

A
DIGEST
OF
CASES REPORTED IN THE
WEEKLY NOTES

ALLAHABAD.

1881-98

BY

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PREFACE.

The necessity of a Digest of the cases reported in the Weekly Notes, Allahabad, comprising eighteen volumes, some seven of which do not contain even head-notes and some others of which are entirely out of print, must have been felt and recognised by every one connected with the profession of Law in these Provinces. The present digest is an attempt to supply this long-felt want and to render the reports themselves useful in the hands of those who have got them as well as to help those who cannot afford to pay for the eighteen volumes of the reports.

The arrangement of the work is simple and easy of reference. Every ruling finds its place under the section of the Act it bears upon. The rest have been grouped together under appropriate headings and sub-headings. In preparing the head-notes care has been taken to state enough of the facts of the cases so as to illustrate and explain the points of law involved and the decision thereon. In fact an attempt has been made to make the work complete in itself.

To facilitate reference:—

- (a) Rulings on the repealed enactments have been embodied with those under the repealing Acts with a note to that effect.
- (b) Catch-words have been added at the beginning of each ruling.
- (c) Decisions dealing with different points have been divided into so many parts and each part put in its appropriate place.
- (d) A table of all the cases given in the *Digest* has been appended, and where a case has been reported in the Indian Law Reports a reference to the volume and page of the reports is also given.

I hope the publication will be found useful both by the Bench and the Bar. At least I have laboured to make it so.

Notwithstanding all the pains I have taken, there will, I fear still be found some mistakes and possibly omissions due to oversight. I hope the readers will look indulgently on them having regard to the extreme difficulty of avoiding mistakes altogether in a work of this description, particularly in its first edition. I may mention however that I have purposely excluded some few cases reported in the Weekly Notes which simply deal with questions of fact and which do not lay down or support any proposition of law. In my humble opinion a digest of those cases could not serve any useful purpose. In conclusion I must express my deep gratitude to my friend Mr. Shaukat Ali for the assistance he has kindly rendered me both in preparing the work and in passing the proofs.

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THE END.

A DIGEST

OF

CASES REPORTED IN THE

WEEKLY NOTES, ALLAHABAD

1881-1898.

ACT XXXII OF 1839 (Interest.)

(1).—s. 1.—The only question to be determined in this suit for the price of goods sold and delivered was whether interest was payable on the bills presented by the plaintiff and which the defendant had failed to pay on presentation. At the head of every bill was printed "Interest will be charged at 12 per cent. per annum on bills not paid on presentation." *Held* that this was a notice in writing as laid down in Act XXXII of 1839 and that interest was properly demandable from the defendant.
FITCH AND CO. v. RAYNOR.

[VII-287]

(2).—When in a suit for sale under ss. 88 and 89 of Act No. IV. of 1882 a Court allows under Act No. XXXII of 1839 interest *post diem*, its decree so far as such *post diem* interest is concerned, is not a decree for sale under s. 88, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees. *Bikramjit Tewari v. Durga Dyal Tewari* (I. L. R., 21 Cal., 274) dissented from.

Article 116 of sch. ii of Act No. XV of 1877 applies to a claim to have interest allowed under Act No. XXXII of 1839 in respect of the non-payment on the due date of the money due under a registered mortgage-deed, if the suit is not brought within six years of the breach of contract. **NARINDRA BHADUR PAL v. KHA-DIM HUSAIN AND OTHERS.**

[XV-128]

ACT XIX OF 1841 (Curators in Cases of Successions.)

s. 4.—In this case petitioner's application

ACT XIX OF 1841—(continued).

under s. 1 of Act XIX of 1841 was rejected in the following words:—"I do not feel satisfied in the terms of s. 4, of Act XIX of 1841, and therefore reject this application." *Held* (in revision) that the Judge should not have thrown out the petitioner's application without first, at least, taking her deposition; and that in cases of this description it is ordinarily desirable that the preliminaries mentioned in s. 4 of the Act should all be satisfied. The order of the Judge is reversed.
JANKI v. GANGA PRASAD AND ANOTHER.

[III-184]

ACT XVIII OF 1850 (Protection of Judicial Officers.)

s. 1.—Under Act XVIII of 1850, where an act done or ordered to be done by a Judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly, or even illegally, or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it.

The word "jurisdiction" is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder v. Halket* (2 Moo. I. A., 293). It means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. A judicial officer who, in the discharge of his judicial duties, issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts

ACT XVIII OF 1850.—(continued).

within and not without the limits of his jurisdiction in this sense.

Where a Magistrate of the first class having sentenced an accused person to three years rigorous imprisonment and Rs. 500 fine under sections 379 and 411 of the Penal Code, and having issued a warrant purporting to act under section 386 of the Code of Criminal Procedure, for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, schedule 5 and section 554 of the Code, and Form D in Chapter V of the Circular Orders of the High Court.—*Held* that he was acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that, under such circumstances, it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850. *TEYEN v. RAM LAL.*

[X-32]

ACT XXI OF 1850 (Non-forfeiture of Right for Loss of Caste.)

s. 1.—Act XXI of 1850 does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of s. 1. protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This applies to a case where a person born a *Muhammadan*, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu-law a share in his father's family. *BIHAGWANT SINGH AND OTHERS v. KALLU.*

[VIII-288]

ACT XXVIII OF 1855 (Repeal of Usury-laws.)

s. 2.—The respondent sued the appellant for Rs. 2,500, principal and interest, due on a bond for Rs. 1,000; and obtained a decree for the amount of her claim. On second appeal it was contended that, regard being had to the rule of Hindu Law that interest on money received at once should not be more than enough to double the debt, the amount of the decree should be reduced to Rs. 2,000. *Held* that this view could not be adopted in face of the very plain language of section 2, Act XXVIII of 1855. No questions of "succession, inheritance, marriage or caste, or religious usage or institution" were involved in the suit, which was based upon a contract pure and simple. All that could be done was to look at the terms of that contract and to see that the decree was passed in accordance with it.—*Luchman Singh v. Pirbhu Lal*, (*Alk.H. C. Rep.*, 1874, p. 358) followed. *MAHARBAN SINGH v. RADHO.*

[I-76]

ACT XXVIII OF 1855 (continued.)

DUNGAR MAL AND OTHERS *v.* SHIB LAL AND ANOTHER

[II-60]

ACT XV OF 1856 (Remarriage of Hindu Widows.)

s. 1.—L sued for possession of certain immoveable property as the widow and heiress of a Hindu, a Gaur Rajput, and governed by the law of the *Mitakshara*, alleging him to have been at the time of his death separate from the other members of his family. The suit was dismissed by the lower appellate Court, on the grounds that the plaintiff at the time when her connection with the deceased began was the widow of one of his consins; that, according to the custom of the caste, the marriage of a widow with a relative of her husband was invalid; and that consequently the plaintiff could not be considered the lawfully married wife of the deceased, and entitled as such to the inheritance of his estate. *Held* that the plaintiff having in the first Court given evidence to show that she was married to the deceased and that her two infant daughters were the offspring of that marriage, and, looking to the provisions of Act. XV of 1856, the presumption was in favour of the legality of such marriage until the contrary was shown, *i. e.*, until the defendants had established that according to the custom of the caste of Gaur Rajputs, the marriage of a cousin with his deceased cousin's widow was prohibited. *LCAHMAN KUAR v. MARDAN SINGH AND OTHERS.*

[VI-43]

(1). - s. 2.—Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to remarry who could not previously have done so, and s. 2 applies to such persons only. *Held* therefore that a widow belonging to the sweeper caste, in which there is not, and in 1856 was not, any obstacle by law or custom against the remarriage of widows, did not by marrying again forfeit her interest in the property left by her first husband; and that the reversioners could not prevent the sale of such interest in execution of a decree for enforcement of hypothecation. *HARSARAN DAS v. NANDI AND ANOTHER.*

[IX-77]

(2). —Act XV of 1856 is an enabling and not a disabling statute. It did not interfere with the rights and status of women who, before its passing, were entitled to marry, but dealt with the case of persons not previously entitled to remarry, and whom it declared to be entitled to remarry, subject to the forfeiture provided for in s. 2. *Held* that a widow belonging to the *Ahir* caste in which the remarriage of widows was, independently of Act XV of 1856, a valid and legitimate proceeding, was not, by reason of her remarriage, deprived of her right to remain in possession of her deceased husband's estate.

ACT XV OF 1858.—(continued).

during her life-time; and that a suit brought during her life-time by the reversioners to the estate of her husband to obtain immediate possession of such estate, could not succeed. *DHARAM DAS v. NAND LAL SINGH AND OTHERS.*

[IX-78]

s. 3.—On the re-marriage of a Hindu widow, if neither she or any other person has been expressly constituted by the will or the testamentary disposition of the deceased husband the guardian of his child, and such child has property of his own sufficient for his support and education whilst a minor, such child should ordinarily be regarded as a child "who has neither father or mother" in the sense of s. 3 of Act XV of 1856, and in such a case a proper male relative of the deceased husband should ordinarily be appointed guardian of such child in preference to his re-married mother. *KHUSHALI v. RANI.*

[II-5]**ACT XXV OF 1857 (Forfeitures).**

s. 8.—*Held* that a Special Commissioner appointed under Act No. XXV of 1857 who had made an order under s. 8 of that Act acquitting a person and directing the release of his property had no power subsequently of his own motion to cancel such order. *JANKI PRASAD v. RAI PARTAP CHAND BAHADUR.*

[XVII-129]**ACT XXXIV OF 1858 (Lunacy, Supreme Courts).**

s. 2.—The High Court has not, under s. 12 of its Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India. *Petition of JAUDHA KUAR.*

[I-172]**ACT XXXV OF 1858 (Lunacy, Mufassal Courts).**

s. 2.—*Jurisdiction of High Court—Native of India.*

See ACT XXXIV OF 1858 s. 2.

ss. 2, 7 & 10 — *Enquiry—legal heir.* A the wife of one X, an alleged lunatic, applied under section 3 of Act XXXV of 1858 to be appointed the manager of his estate and the guardian of his person. The application was resisted by B the mother of X on the following main grounds:—That so far back as the year 1870 she obtained a certificate of guardianship under Act XV of 1858 and that ever since she has acted as the guardian of the person and the property of X. That no kind of misbehaviour on her part was substantiated. That B had no affection for her husband and was not sufficiently experienced to manage the property. That she did not reside with her husband. That under the circumstances there was danger of injury to the interests and life of X if A was appointed as guardian. The District Judge to whom the application was made without taking any evidence as to the mental condition of X or as to

ACT XXXV 1858.—(continued).

the other circumstances of the case, granted the application. *Held* that as there was no medical or other evidence to prove that X was a lunatic, and as the Judge did not enquire into the managing capacities of the contending parties and did not ascertain the truth or otherwise of the allegations made by them and as he ignored the provisions of s. 10 of Act No. XXXV of 1858 which requires that a fit person shall be appointed to be guardian of the person of the lunatic and never the legal heir, his order must be set aside and the case remanded for proper adjudication. *SAHODRA v. MIRIAN.*

[VIII-175]

ss. 10 & 22.—*Wife—Legal heir—Practice.* One M.S., a *Shia* Muhammadan, was formally adjudged a lunatic under the provisions of Act No. XXXV of 1858. At the time of this adjudication M.S. had a wife, Z, who had had one child by him but that child had died previously to M.S. being adjudged a lunatic; it did not however appear that there was any reason precluding the possibility of further issue of the marriage. *Held*, by Mahmood, J., that under the law applicable to the *Shia* sect of Muhammadans Z was, one of the "legal heirs" of M.S. within the meaning of s. 10 of Act No. XXXV of 1858, and as such was excluded by the terms of the proviso to that section from being appointed guardian of the person of her lunatic husband. In cases under the Lunacy Act (Act No. XXXV of 1858) the High Court as a Court of appeal will not take upon itself the duty of deciding who may be the fittest person to appoint as guardian of the person or property of a person adjudged a lunatic thereunder. That duty should rest with the Courts to which it is entrusted by the Act.

Held by Knox, J. that upon the general circumstances of the case the wife was not a fit person to be appointed as guardian of the lunatic: *sed quaere* whether she was within the meaning of s. 10 of Act No. XXXV 1858, "the legal heir" of the lunatic and therefore statutorily disqualified. *FAZL RAB v. KHATUN BIBI AND OTHERS.*

[XII-225]**ACT X OF 1859 (Rent, Bengal).**

s. 6.—*Held* that the sir-land once relinquished by the zamindar ceases to have that character, and cannot prevent the accrual of occupancy-right within the meaning either of s. 6 of Act X of 1859 or of s. 8 of Act XII of 1881. *HAR PAL v. BALGOBIND AND ANOTHER.*

[V-184]**ACT XIII OF 1859 (Fraudulent Breaches of contract by workmen.)**

s. 1.—*Held* that s. 83 of the Code of Criminal Procedure is applicable to warrants issued under Act No. XIII of 1859. *Queen Empress v. Kattayan (I. L. R., 20 Mad., 235) followed.*—*GAURI SHANKAR v. MATA PRASAD.*

[XVII-220]

ACT XIII OF 1859.—(continued.)

ss. 1 & 2.—An employer of workmen residing and carrying on business in the city of Mirzapore, alleging that he had advanced money to certain workmen on the understanding that they would work for him and no one else until they had repaid such money, and that they had broken such contract by leaving his employment, made a complaint against such workmen under Act XIII of 1859, which had been extended to the "station" of Mirzapore by the Local Government. It appeared that such money was advanced by way of loan, and without any reference to the wages of such workmen or the payment for the work performed by them, and that no deduction on account of such advance was ever made from their wages or the payments made to them. *Held* that the contract between the parties was something quite different from any contract contemplated by Act XIII of 1859, and that Act was therefore not applicable. *Held* also that it was doubtful whether that Act applied locally as it was not shown that the city of Mirzapore was comprised within the "station" of Mirzapore. **EMPRESS v. DIRGPAL AND OTHERS.**

[I-50]

s. 2.—*Preamble.*] Offences under s. 2 of Act XIII of 1859 are triable summarily, under s. 260 of the Code of Criminal Procedure. The offence made punishable by s. 2 of Act XIII of 1859 is the wilful and without lawful and reasonable excuse neglecting or refusing to perform the contract entered into by persons whom the Act concerns. Notwithstanding the preamble of the Act, it is not necessary to prove that a breach of contract is fraudulent in order to sustain a conviction under s. 2. *Taradass Bhutta-charjee v. Bhaloo Sheikh* (8 W. R. Cr., 69) dissented from. Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation, or to cut them down. **QUEEN EMPRESS v. INDARJIT.**

[IX-85]

ACT XLV OF 1860 (Penal Code.)

See PENAL CODE.

ACT V. OF 1861 (Police.)

s. 23.—A police constable was given money by the assistant moharir of his thana to purchase rafters and bamboos for repair of the thana. *Held* that the order to purchase rafters &c. was not an order of the kind contemplated by s. 23 of Act V of 1861. **IN THE MATTER OF THE PETITION OF DILDAR KHAN.**

[XI-179]

ss. 8 & 29.—*Police Officer under suspension.*] A police constable was suspended and ordered to remain in the lines during suspension. Despite the order he absented himself therefrom without leave. He was convicted under s. 29 of Act V of 1861. *Held*, s. 29 of Act V of 1861, contemplates that the person to be charged with an

ACT V OF 1861.—(continued.)

offence under it must have been, at the time of his doing the act in respect of which the charge is preferred, a police constable within the meaning of that Act. When a police officer is suspended, he ceases to be a police officer; the conviction was therefore wrong. *The Queen v. Dinonath Gangooly*, (8 B. L. R., App. 58), followed. **EMPRESS v. DURGA.**

VIII-169

(1).—s. 29. *Leave—Overstaying—Withdrawal from duties without permission.*] A police officer obtained leave of absence for one month, a substitute being appointed, and overstayed his leave twenty-nine days. *Held* that such absence without leave did not amount to "withdrawal from the duties of his office without permission", within the meaning of section 29 of Act V. of 1861. **EMPRESS v. SALIG RAM.**

[IV-215]

(2).—*Refusal to turn out for drill.*] *Held* that certain constables who refused to turn out for drill on being ordered to do so by a head constable in charge of the thana were rightly convicted of the offence punishable under sec. 29 of Act No. V. of 1861. **QUEEN EMPRESS v. YAR MUHAMMAD KHAN AND OTHERS.**

[XVI-105]

(3).—*Wilful breach or neglect of duty.*] The accused, a Sub-Inspector of Police, was charged of an offence under s. 29 of Act V of 1861 (Police Act) *i. e.* carelessness in conducting an inquiry. The points made out against him were, that he failed to record the statements of certain parties till late in his inquiry; that he did not search the house of one Bakhti that he did not keep a proper look out to ascertain whence one Bakhti got certain ornaments found in her possession. On these findings he was convicted and sentenced to pay a fine of Rs. 100. *Held* (in revision) that the findings did not constitute any offence punishable by s. 29 of Act V of 1861. It is wilful neglect or violation of duty only which is a criminal offence under the Act. **EMPRESS v. MUHAMMAD HUSAIN.**

[III-42]

(1) s. 34, cl. (2).—*Cruelty to animals.*] This is an application for the revision of an order of the Joint Magistrate convicting the petitioners of an offence under s. 34 of Act V of 1861 (Cruelty to Animals). It was proved that prior to the date of the commission of the offence 6th August, 1886, the attention of one of the petitioners had been called by the District Superintendent of Police to the condition of the two horses abused and that he had been warned with regard to driving them. It was also proved that the state of the horse on the 6th August was that they were bleeding from collar galls, badly galled and bleeding from both shoulders and also suffering from running *barsati* sores. *Held* that not only the using of the horses was a cruel abuse but that the *barsati* sores and

ACT V OF 1861.—(continued).

the matter that was running from them were likely to be productive of damage and risk to the public and would cause annoyance to any ordinarily humane person who saw them being driven. The conviction was therefore proper. **EMPRESS v. RAI BISHEN CHAND AND ANOTHER.**

[VII-67]

(2).—cl. (5).—*Setting up a shop in a road.* One M. set up a shop for the sale of cloth, consisting of a box and an awning, in a certain road, where temporary shops removable at night were ordinarily set up. He did not remove his shop at night, and was convicted under s. 34 of Act V of 1861 for obstructing a public thoroughfare. The Court observed that the construction of a shed for the purpose of selling goods cannot be held to be an offence under cl. 5, s. 34 of Act V of 1861, such a shed not being of the nature of a "cowshed, stable, or the like," to which the law refers. **EMPRESS v. MURLI.**

[I-61]

ACT XVI OF 1861 (Stage-carriages.)

s. 8.—*Held* that running a horse which had not been passed by the police in breach of a rule made by the District Magistrate or permitting a stage carriage to be drawn by coolies was not an offence under s. 8 of Act XVI of 1861. **EMPRESS v. McMULLEN.**

[III-228]

ss. 9 & 10.—Whether or not a horse used in a licensed stage carriage has been overdriven is a question of fact in each case. *Held* that it was *ultra vires* of the Local Government to prescribe by a rule made for enforcing the provisions of Act No. XVI of 1861, as amended by Act No. XVI of 1876, that a person who drives a horse more than two stages of a certain distance within 24 hours shall be considered to have overdriven the horse so as to render himself liable to the penal provisions of the Act. **IN THE MATTER OF THE PETITION OF NIAZ AHMAD.**

[XVII-27]

ACT XX OF 1863 (Religious Endowments.)

s. 3.—The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favor and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they (defendants) had subsequently re-possessioned themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple and professing to sue on behalf of the entire body of the worshippers sued for a declaration that the land was

ACT XX OF 1863.—(continued).

wakf and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of the income. No sanction to the institution of the suit was obtained under s. 539 C. P. C. *Held* by Edge C. J. that Act XX of 1863 did not apply to this case as the temple and the trust, if there was one, came into existence in 1870 and was not in existence at the date of that Act. Per Straight J. If the case does fall within Act XX of 1863 no sanction having been obtained under the Act the suit was not maintainable. **RAGHUBAR DIAL AND OTHERS v. KESHO RAMANUJ DAS.**

[VIII. 276]

s. 8.—*Held* that Act No. XX of 1863 was applicable to an endowment whereby certain shops had been purchased by subscription and dedicated to the support of a mosque, and was also applicable in respect of a person in possession of the endowed property and professing to act as *mutawalli* even though he might not have been lawfully appointed. *Dharam Singh v. Kissen Singh* (I. L. R., 7 Calc., 767) and *Sheo Ratan Kuari v. Ram Pargash* (I. L. R., 18 All., 227) referred to. *Semble* that a suit under s. 14 of Act No. XX of 1863 against the Superintendent of a religious endowment for misfeasance is a suit which for the purpose of payment of court-fees falls within art. 17, cl. (VI), of the second schedule of Act No. VII of 1870. *Delhoos Banoo Begum v. Ashgar Ally Khan* (15 B. L. R., 167) *Sonachala v. Manika* (I. L. R. 8 Mad., 516) and *Omrao Mirza v. Jones* (I. L. R., 10 Calc., 599) referred to. **MUHAMMAD SIRAJUL HAQ AND OTHERS v. IMAM UDDIN.**

[XVI-189]

s. 10.—No appeal lies to the High Court from an order by a District Judge filling a vacancy on a Committee under s. 10 of Act XX of 1863. *Minakshi Naidu v. Subramanya Sastri* (I. L. R., 11 Mad. 26), followed. **FARID-UD-DIN AHMAD AND OTHERS v. MUHAMMAD NASARULLAH KHAN AND OTHERS.**

[IX-7]

ss. 10, & 14.—The managing member of a committee appointed for the management of a religious endowment under Act XX of 1863 paid out of the trust funds a sum of Rs. 132 for the law expenses of himself and another in certain proceedings which resulted in the election of a certain person in place of a deceased member being declared invalid and set aside, and for so doing he obtained the sanction of himself, the person whose election was *subjudice*, and another. He also paid out of the trust-funds another sum part of which was spent in present-

ACT XX OF 1863.—(continued).

ing to the High Court an appeal, which did not lie, against an order passed under s. 20 of the Act, and, acting as managing member, he passed an order sanctioning such payment. *Held* that these acts were obviously *ultra vires* of the managing member, s. 18 of the Act showing that it was for the Court to decide whether costs or any portion of them, might be paid out of the trust fund; and that the managing member had committed malfeasance, breach of trust, and neglect of duty. The decision of the Privy Council in *Meenakshi Naidoo v. Subramaniya Sastri* (L. R., 14 I. A., 160) does not apply to a suit under s. 14 of Act XX of 1863 terminating in a decree. *Farid Uddin v. Wilayat Husain and Another.*

[IX-168]

s. 14.—The Maharaja of B in 1862 assigned certain lands situated in Bengal for the maintenance of a temple at Chauria in the Gorakhpur District, and appointed certain trustees of the endowment. Those trustees dealt with the property in a manner inconsistent with the trust by making alienations thereof as if it were their own private property. In 1893, the representative in title of the original settler sued in the court of the District Judge of Gorakhpur to have certain alienations made by the said trustees set aside and the property restored to its original uses, and for the appointment of a new trustee or new trustees in place of the trustees defendants to the suit. *Held* that such a suit was rightly brought under s. 14 of Act No. XX of 1863, and that it was not essential for the application of that Act that the endowment should ever have been taken under the control of the Board of Revenue. *Ganesh Singh v. Ram Ghulam Singh* (5 B.L.R., App. 55) and *Dhurrum Singh v. Kissen Singh* (I. L. R., 7 Calc., 767) approved. *Raghuvar Dial v. Kesho Ramani Das* (I. L. R., 11 All., 18) *quoad hoc*, over-ruled. *Held* also that there being no special provision in the endowment for the appointment of trustees the right of nomination remained vested in the founder of the endowment and that the right to nominate continued to his heirs *Gossamee Sree Gredharreejee v. Rumanlolljee Gossamee* (I. L. R., 16 I. A., 137, S. C., I. L. R., 17 Calc. 3) referred to. *SHEO RATAN KUNWARI, v. RAM PARGASH AND OTHERS.*

[XVI-37]

(1).—s. 18.—*Suit without leave.* A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf*. He did not allege himself to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause of action that the defendant had, in a former suit between the same parties, filed a written statement in which he denied that the property now in question was *wakf*. *Held* that as no permission had been given to the plaintiff to bring the suit it was not maintainable under Act XX of 1863.—*WAJID ALI SHAH v. DIANAT-ULLAH BEG.*

[V-318]**ACT XX OF 1863.—(continued).**

(2).—*Discretion to grant or withhold leave.* The granting or withholding of leave to sue upon an application made under s. 18 of Act No. XX of 1863 is not a matter simply dependant upon the discretion of the Court. Where therefore a District Judge dismissed an application under s. 18 without determining the question which he was bound to determine under that section, but upon grounds entirely irrelevant to the section, it was held that his order was liable to revision under s. 622 of the Code of Civil Procedure. *WARIS ALI AND OTHERS v. AMIRUDDIN AND OTHERS.*

XVI-200**ACT VI OF 1864 (Whipping.)**

(1).—s. 5.—*Juvenile offender.* *Held* that in the case of juvenile offenders whipping can be awarded in lieu of the other punishment and not in addition to it. *EMPRESS v. KASHI.*

[V-178]

(2).—By the term "Juvenile offender" in section 5, Act VI of 1864 (Whipping Act), is meant an offender under the age of sixteen years. *R. v. Muhammad Ali* (8 Bom. H. C. Cr. C., 9) referred to. *EMPRESS v. DIN ALI.*

[IV-213]

s. 9.—J. R. was convicted on a trial before a Magistrate of theft under s. 379 P. C. and was sentenced to rigorous imprisonment for two years, "and to receive thirty stripes on the day of his release from prison." *Held* that that portion of the Magistrate's order directing J. R. to be whipped on the day his sentence of imprisonment expired was altogether illegal and improper, and must be quashed. *EMPRESS v. JIWA RAM.*

[I-138]**ACT X OF 1865 (Intestate & Testamentary Succession.)**

s. 50.—*Held* that where one of the witnesses to a will held and guided the hand of the testatrix while she was affixing her mark by way of signature to the will, this was not an affixing of the mark of the testatrix by the witness so as to disqualify him from being a witness within the ruling in *Anabai v. Pestonji* (11 Bom. H. C. Rep., 87). *ARTHUR LANE v. HEDAYAT ULLAH KHAN.*

[XV-127]

ss. 76, 91, 106.—A testator directed his trustees and executors to hold his real and personal estate upon trust to sell the real estate either together or in parcels, and either by public auction or private contract, and to call in, sell, and convert into money such part of his personal estate as should not consist of money, and to divide the said moneys, and the ready money which might belong to such estate, amongst the

ACT X OF 1865.—(continued.)

several persons named in the schedule to the will, and to pay the same to them in the shares and proportions therein mentioned, as and when they should respectively attain the age of twenty-one years in the case of males, or, in the case of females, when they should respectively attain that age or marry. He directed that, in the event of any of such persons dying in his life-time, or at any time thereafter "prior to the said division," leaving lawful issue, such issue should be entitled to the share which their deceased parent would have taken. One of the legatees who had attained the age of twenty-one years at the testator's death, died five months after him, before payment of the legacy and left lawful issue. *Held* that the legacy vested in interest in the legatee at the testator's death, but that the legatee having died prior to the division of the estate, it became divested; that the "division" of the testator's estate meant, in this will, the ascertainment of the amounts allottable to the share of each legatee, after the conversion of the estate into money; and that the gift over in favor of the legatee's issue was not void for uncertainty, but took effect. *Johnson v. Crook* (I. L. R., 12 Ch. D., 639); *Collison v. Barber* (L. R., 12 Ch. D., 834); *Bubb v. Padwick* (L. R., 13 Ch. 8., 517); *Choston v. Seago* (L. R. 18 Ch. D., 218); *Spencer v. Duckworth* (L. R., 18 Ch. D., 634) referred to.—BACHMAN v. BACHMAN.

[IV-194]

ss. 190 & 191.—Sale of property of intestate in execution of decree against some of his heirs—Title to sale-proceeds.—Suit for sale-proceeds. S sued some of the heirs to a person governed by the Indian Succession Act, 1865, who died intestate, such heirs being in possession of a part of the estate of the deceased, for a debt due to him by the deceased, and obtained a decree against such persons. In execution of this decree property belonging to the deceased was sold. Before the sale-proceeds were paid to S, R, an heir to the deceased, obtained in the District Court letters of administration to the estate of the deceased, and an order for payment to her of such sale-proceeds. Thereupon S sued R for such sale-proceeds and to have the District Court's order directing payment thereof to her set aside.—*Held* that, with reference to ss. 190 & 191 of Indian Succession Act, 1865, the decree obtained by S against persons who did not legally represent the estate of the deceased, and the proceedings taken against such persons in execution of such decree, gave S no title to the sale-proceeds, which formed part of the estate of the deceased, and the suit was therefore not maintainable. *SUKHNUNDUN AND ANOTHER v. THERESA RENNICK*,

[II-3]

ss. 256 & 257.—Breach of condition—Compensation. An administration bond executed by an administrator in accordance with s. 256 of the Succession Act is not an instrument of the kind referred to in the exception to s. 74 of the Con-

ACT X OF 1865.—(continued.)

tract Act, so as to make the obligor liable, upon breach of the condition thereof, to pay the whole amount mentioned therein; and an assignee of the bond under s. 257 of the Succession Act cannot recover more damage than he proves to have resulted to himself or to those interested in the bond.—*Held* therefore, where neither the assignee of such a bond nor any one else had suffered any damage by reason of the breach of a condition requiring the obligor to file an inventory of the estate within a specified period, that the assignee was not entitled to recover from the obligor any compensation in respect of such breach. *LACHMAN DAS v. CHATER AND ANOTHER*.

[VII-279]

s. 257.—Quare. Whether the Judge of a District Court is competent to call upon a person to whom he grants a certificate under Act XL of 1858 to furnish security; and whether, where he has done so, and security-bonds have been given to him, he can assign them in the manner provided in s. 257 of the Succession Act 1865. *AMARNATH, guardian of LACHMI NARAIN, minor v. THAKUR DAS AND OTHERS*.

[III-12]

ss. 261 & 263.—Held that an appeal from an order of a District Judge granting letters of administration under Act No. X of 1865 was properly brought as a first appeal from an order. *ARTHUR LANE v. HEDAYAT-ULLAH KHAN*.

[XV-127]

s. 263.—The court-fee payable on a memorandum of appeal presented to the High Court under s. 263 of Act X of 1865 from an order of the District Judge granting letters of administration, is Rs. 2, under Act VII of 1870, sch. II, art. 1 (d). Sch. II. Art. 117 is not applicable to such a memorandum of appeal. *LEE v. HARDY*.

[IX-27]**ACT XI OF 1865. (Mufassal Small Cause Courts.)**

(1).—**s. 6.—Suit on bond hypothecating moveable property.** *Held* that a suit upon a bond hypothecating moveable property was not a Small Cause Court suit, consequently a second appeal lay to the High Court. *KALKA PRASAD v. CHANDAN SINGH AND OTHERS*.

[VII-270]

(2).—**Standing timber not moveable property.** *Held* that, for the purposes of the Mufassal Small Cause Court Act, standing timber is not "moveable" property. *Nasir Khan v. Karamat Khan* (I. L. R., 3 All. 168) referred to. *UMED RAM v. DAULAT RAM*.

[III-157]

CHEDA LAL v. MULCHAND, AND MINDAI v. KUNDAN SINGH.

[XI-174]

ACT XI OF 1865.—(continued.)

(3).—s. 6.—*Suit for damages for appropriating fallen tree.* The appellant sued the respondents for a tree or Rs. 20, its value, alleging that the latter had wrongfully taken such tree on its falling down. The defence to the suit raised the question whether such tree belonged to the appellant or the respondents. In second appeal the respondents contended that a second appeal in the case would not lie, as the suit was of the nature cognizable in a Court of Small Causes. *Held* that this contention was a fatal one to the hearing of the appeal, which must be dismissed accordingly. **SKINNER v. DILDAR KHAN AND ANOTHER.**

[I-175]

(4).—*Suit for damages for appropriating branches of trees.* A suit for damages on account of wrongful appropriation of the branches of a tree, is a suit of the nature cognizable by a Court of Small Causes, in which a second appeal is barred by s. 586 of the C. P. C. **ABDUL KARIM AND ANOTHER v. LACHHMAN.**

[VIII-43]

(5).—*Suit to enforce liability arising under an award.* *Held* (in revision) that a suit to enforce a liability arising under an award was not cognizable in a Court of Small Causes. **Guneshee v. Chotay Lall**, (*All. H. C. Rep.* 1871, p. 117) followed. **Durjan Singh v. Sibia**, (*All. H. C. Rep.*, 1875, p. 329) referred to. **MADHO PRASAD v. LALTA PRASAD.**

[I-159]

(6).—*Suit for money paid as penalty under s. 34 of Act X of 1879.* This was a suit to recover from the defendant Rs. 335, the amount of stamp duty and penalty paid by the plaintiffs in respect of an unstamped document executed by the defendant in his favour on which plaintiff had brought a suit. The duty and penalty was paid by the plaintiff under section 34 of Act I of 1879 (Stamp Act). The present suit was based on the provisions of section 41 of the same Act. The suit was decreed by both the Lower Courts. *Held* (over-ruling the objection that the suit was of the nature cognizable by the Small Cause Court being below the value of Rs. 500), that under section 6 of Act XVIII of 1869, the stamp law in force when the document was executed, the executant should have paid the stamp in absence of an agreement to the contrary; consequently the Lower Courts were right in decreeing the claim. **ATMA RAM v. SARDAR KUAR AND ANOTHER.**

[IV-328]

(7).—*Suit under s. 295 C.P.C.* A suit under s. 295, C. P. C., to compel the defendant to refund moneys received by him which should have been paid to the plaintiff, was not cognizable by a Court of Small Causes under Act XI of 1865. **DOST MUHAMMAD v. AJUDHIA PRASAD.**

[X-21]

ACT XI OF 1865.—(continued.)

(8).—*Suit for contribution between judgment-debtors.* The plaintiffs in this suit were compelled to pay the whole amount of a decree passed against them and the defendants in a suit for compensation for the wrongful occupation of certain land; so he brought this suit in the Munsiff's Court for contribution, claiming Rs. 124 odd. *Held* that the suit was in the nature of a Small Cause Court suit, and the Lower Courts had no jurisdiction. **DALJIT SINGH AND OTHERS v. JOKHU AND OTHERS.**

[II-54]

(9).—*Held* that a suit for contribution by two judgment-debtors against a third for sum paid on account of arrears of maintenance payable by them all jointly and severally under a decree of court was maintainable in the court of Small Causes. **KISHEN GOBIND AND OTHERS v. BALGOBIND**

[II-2]

(10).—*Suit for contribution.* A suit by the proprietor of one village who has been compelled to pay the revenue payable by the proprietor of another village for reimbursement is, where the amount of such payment does not exceed Rs. 500, a suit of the nature cognizable in a Mufassal Court of Small Causes.—**Nath Prasad v. Baij Nath**, (*J. L. R.*, 3 *All.* 66) followed.—**QUTUB HUSAIN AND ANOTHER v. ABUL HASAN.**

[I-141]

(11).—*Suit for moveable property attached in execution.* A person, who had claimed moveable property attached in execution of a decree as his own, and whose claim had been investigated and disallowed under sections 278 to 281 of the Code of Civil Procedure, sued, the property being under attachment, the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value. *Held* that the suit could not properly be regarded as a suit "for personal property or for the value of such property," within the meaning of section 6 of Act XI of 1865, but must be regarded as a suit to establish the plaintiff's right, in the sense of section 283 of the Code of Civil Procedure, inasmuch as the plaintiff could not recover the property without clearing out of his way the order of attachment, which he could only do by establishing his right in the sense of section 283, and therefore the suit was not one cognizable in a Court of Small Causes.—**Janakiammal v. Vilhenadion** (5 *Mad.*, *H. C. Rep.*, 191); **Kundeme Naine Booche Naidoo v. Ravoo Lutchmehpaty Naidoo** (8 *Mad.*, *H. C. Rep.*, 36); **Gordhan Pema v. Kasandas Balmukundas** (*J. L. R.*, 3 *Bom.*, 179) **Chhaganlal Nigardas v. Jeshan Rao Dalsukhram** (*J. L. R.*, 4 *Bom.*, 503); **Balkrishna v. Kisanising** (*J. L. R.*, 4 *Bom.*, 505) and **Radha Kishen v. Chotey Lal** (*N.-W. P. H. C. Rep.*, 1871 p. 156) dissented from. **GODHA AND ANOTHER v. NAIKRAM AND ANOTHER.**

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ACT XI OF 1865, s. 6.—(continued).

MAKUNDLAL v. NASIRUDDIN.

[II-93-

(12).—*Suit for money paid by mistake.* Held that a suit for money paid by mistake is one of the nature cognizable in a Court of Small Causes. *CHAMRU v. HARDAT.*

[III-128

(13).—*Implied contract.* Held that a suit to recover a share of money which had been recovered by a co-plaintiff under a decree was a claim for money due on a contract, within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865), and was therefore a suit of the nature cognizable by a Court of Small Causes, in which, under s. 586 of the Civil Procedure Code, no second appeal could lie. *DEBI DAS v. LACHMAN SINGH.*

[V-292

(14).—When one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other joint creditors. Such implied contract falls under the purview of section 6 of the Mufassal Small Cause Courts Act, (XI of 1865). *Lachman Prasad v. Chammital* (I. L. R., 4 All., 6); *Huro Mohun Roy v. Khettro Monee Dossee* (12 W. R., 372); and *Sunkur Lall Pattuck Gyamal v. Ram Kallee Dhamin* (18 W. R., 104) referred to. *SOHAN AND OTHERS v. MATHURA DAS.*

[IV-179

(15).—The plaintiffs purchased land belonging to the defendant at an execution sale at which it was notified that arrears of revenue were due in respect of the land. The plaintiffs paid such arrears, and also the arrears which had accrued in the period between the sale and the date the plaintiffs obtained possession. They then sued the defendant in the Munsif's Court to recover the amount they had paid. Held that, with reference to the principle laid down in *Nath Prasad v. Baij Nath* (I. L. R., 3, All., 66,) the suit should have been instituted in the Court of Small Causes. *ALI MAZHAR v. GOPI NATH AND ANOTHER.*

[I-167

(16).—C, a mortgagee, the mortgage having been foreclosed, sued D, the mortgagor, for possession of the mortgaged property and obtained a decree for possession thereof. He subsequently agreed with D to surrender the mortgaged property to him, if he deposited the mortgage-money in Court by a specified day. D borrowed the money for this purpose by means of a conditional sale of the property to L, and deposited it in Court. The deposit was made after the specified day and consequently C took possession of the property. The money deposited by D remained in deposit, and while there C caused it to be attached in

ACT XI OF 1865, s. 6.—(continued).

execution of a money-decree he held against D, and it was paid to him. L thereupon sued C in the Munsif's Court to recover such money, which amounted to Rs. 350. Held that the suit must be regarded as one for money had and received by the defendant for the use of the plaintiff, and was therefore one cognizable in a Court of Small Causes. *LACHMAN PRASAD v. CHAMMI LAL AND ANOTHER.*

[I-96

(17).—*Suit for money had and received for plaintiff's use.* A suit was brought by some of the co-sharers in a patti of a mahal in which land had been taken for public purposes under the Land Acquisition Act, against the other co-sharers in the patti for the proportion due to them out of a sum of money which had been awarded as compensation for acquisition of the land, and which the defendants had received. Held that the suit was one for money had and received for the plaintiff's use, and was therefore cognizable by a Court of Small Causes. *Sohan v. Mathura Das* (I. L. R., 6 All., 449) followed. *UMRAI AND OTHERS v. RAM LAL AND OTHERS.*

[V-65

(18).—The transferee of a mortgage of a share of an undivided estate sued the lambardar of the estate for the profits of such share for a certain year, the amount claimed being Rs. 500. Held, regarding such suit as one for money had and received to the plaintiff's use, that it was one of the nature cognizable in a Court of Small Causes. *MOHAMEDI BEGAM v. ABBAS ALI.*

[III-115

(19).—*Suit for specific performance.* Held that a suit for specific performance of a contract to execute a bond for money found due to the plaintiff from the defendant was not a suit cognizable in a Court of Small Causes. *NARESH SINGH v. JAIPAL SINGH AND ANOTHER.*

[III-147

(20).—*Suit raising question of title.* I A and G H, sold certain immovable property for Rs. 190. G H who had received the whole consideration money refused to give any part thereof to I A. Therefore I A brought this suit against G H for Rs. 52 odd alleging that he was by inheritance a co-sharer in such property to the extent of $\frac{1}{3}$. The defence was that the plaintiff's share by inheritance in such property entitled him only to Rs. 2-6-8. The Lower Courts dismissed the suit. The plaintiff thereupon applied to the High Court under s. 622 of Act X of 1877 to set aside the decrees on the ground that the suit being cognizable in the Court of Small Causes, the Courts below had exercised a jurisdiction not vested in them. Held that the plaintiff himself based his claim on his right of inheritance, directly and not in-

ACT XI OF 1865, s. 6.—(continued).

cidentally, raising a question of title such as could not properly be disposed of by a Court of Small Causes. The application must be disallowed. **MUHAMMAD ISHARAT ALI v. GHULAM HUSAIN AND OTHERS.**

[I-162]

(21).—This was a suit instituted in a Court of Small Causes in which the plaintiff claimed from the defendant, Rs. 40, the value of certain trees which the latter had cut down and removed. The claim was based on the plaintiff's right to the cultivation of the land on which such trees stood. The defendant set up as a defence that the cultivation of such land had belonged to him and the plaintiff had wrongfully planted such trees on such land. *Held* that the suit involved a question of title and was not cognizable by a Court of Small Causes. **DHUMAN v. SHANKAR.**

[II-27]

(22).—The only prayer in the plaint in this case was to recover Rs. 50 as damages for the wrongful taking of the fruit of some trees. *Held* that the suit was of the nature cognizable by the Court of Small Causes and the fact that a question as to the right to the grove had been raised on behalf of the defence did not alter the nature of the suit.—*Hedaatoolah v. Shaikh Karloo* (7 W. R., 73) and *Ram Dyal Gangooly v. Huro Soonduree Dossia* (10 W. R., 272) followed. **SUBARAN SINGH v. RAMPARBAT SINGH.**

[II-158]

(23).—*Suit for money on a sulchnama.* *Held* that a suit to recover Rs. 397-3-4 from the defendant based on a *sulchnama* which made the obligors responsible to the obligee under certain circumstances was a suit of the nature cognizable by the Court of Small Causes and in which no second appeal lay. **NAIMUL HAQ AND OTHERS v. ABDUL LATIF AND OTHERS.**

[I-5]

(24).—*Suit for arrears of maintenance contracted.*—In this case the plaintiff sued her husband to recover Rs. 24 arrears of maintenance which he had by an agreement in writing contracted to pay. *Held* that it was a suit to recover money due under a contract (a Small Cause Court suit) to which s. 6 of the M. S. C. Court Act and s. 586 of the C. P. C. applied and consequently no appeal lay to the High Court. **HARDEO DAS v. PARBATI.**

[VII-94]

(25).—*Hundi.*—This was a suit brought by the plaintiff-appellant upon a hundi which was drawn by B and S D in favor of M. L., for the acceptance of a firm called P M and N D. The suit was brought was in reality for the recovery of a sum of Rs. 449, principal and interest, which the plaintiff was constrained pay to the

ACT XI OF 1865, s. 6.—(continued).

last endorsees in consequence of the hundi not having been accepted and having been dishonoured. In consequence of the hundi having been lost the plaintiff also prayed that the defendant should be directed to obtain a duplicate of the hundi and make it over to him. *Held* that in the first place the plaintiff was not competent to ask for this last relief and in the next place the fact that he included such a prayer in his plaint cannot change the nature of the suit. The suit was one of the nature cognizable in a Court of Small Causes in which no second appeal would lie, (s. 586, C. P. C. and s. 6 of Act IX of 1865.) **BANKEY LAL v. MOHAN AND OTHERS.**

[VI-73]

(26).—*Suit for damages for assault.*—This was an action for the recovery of Rs. 200 as damages by the plaintiffs for his bodily injury resulting from his having been assaulted by the defendants and the consequent loss of reputation and hurt of feelings and also hospital expenses and expenses incurred in prosecuting the defendant in the Criminal Courts. *Held* that as part of the claim related to alleged actual pecuniary damages resulting from an alleged personal injury the whole suit was of Small Cause Court nature and consequently no second appeal would lie. **JIWA RAM SINGH v. BHOLA AND ANOTHER.**

[VII-268]

UDIT v. RANJIT KUAR.

[II-185]

(27).—*Suit for arrears of malikana.* A sold certain properties to B, and B agreed to pay as a part of the consideration a certain sum yearly in cash, a portion of profits, and to give possession of 10 bighas of land. This was a suit by A to recover arrears for two years of the cash payment and for Rs. 60 for rents wrongfully realised. *Held* that the suit was of a Small Cause Court nature and no second appeal lay, (s. 586 of the Civil Procedure Code.) **HAyat ALI v. DAWAN RAM AND OTHERS.**

[VI-293]

(28).—*Held* that a suit for arrears of *malikana* payable under the terms of *Wajibulars* to the plaintiff in respect of certain land held by the defendant was not a suit of the nature of the Court of Small Causes. **BIHAWAN SINGH v. CHATTAR KUAR.**

[II-114]

CHURAMAN v. BALLI.

[VII-121]

(29).—*Claim based partly on contract and partly on customary right.* This was an action for the recovery of Rs. 4 upon the ground of a certain agreement between the parties and the general right of *parohit*. The plaint was stamped with a 6 annas adhesive stamp. *Held* that the suit was of a Small Cause Court nature and there-

ACT XI OF 1865, s. 6.—(continued).

fore a second appeal did not lie. *SHEODIHAL PANDE v. MAHESH PANDE.*

[VII-228]

(30).—*Suit for value of mangoes founded on agreement contained in Wajib-ul-arz.* This suit is to recover the value of half the mangoes produced on certain land of which plaintiff is the zamindar and defendants are the occupiers. The claim is founded on an agreement contained in the *Wajib-ul-arz*. Thus it is a suit for money under a contract and being under Rs. 500 no second appeal lies to this Court. *BISHUN AND ANOTHER v. NAIPAL.*

[V-299]

(31).—*Suit to enforce lien.* A suit was brought in a Small Cause Court to recover a sum of money from the defendants personally, and by enforcement of hypothecation of certain cattle by their attachment and sale. The cattle were in the hands of other persons, who had purchased them at an auction-sale in execution of a decree against the original defendants, and who were added as defendants under s. 32 of the Civil Procedure Code. *Held* that the suit was not cognizable by a Small Cause Court, inasmuch as it did not fall under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property, or for the value of such property," within the meaning of s. 6 of the Mufassal Small Cause Courts Act (XI of 1865) *Ram Gopal Shah v. Ram Gopal Shah* (6 W. R., 136) and *Godhav. Naik Ram* (1 L. R., 7 All. 152) referred to. *SURAJPAL SINGH AND OTHERS v. JAIRAM GIR.*

[V-289]

(32).—*Suit for damages by way of mesne profits.* Plaintiff sued the defendant who had wrongfully taken possession of her share of certain estate for possession and obtained a decree. Under the decree the defendant should have surrendered some sir lands, a part of the estate to the plaintiff, but instead of doing so he continued to cultivate the same. She thereupon brought the present suit for Rs. 99-12 the value of the produce which she would have made if allowed to cultivate the land. The suit was instituted in the Court of Small Causes. *Held* overruling the decision of the Small Cause Court that the suit was cognizable by the Small Cause Court. *KATWARI BIBI v. SUBAL KHAN.*

[I-109]

(33).—*Suit for rent against a distrainer.* B who held a decree for money against G, cultivator, brought to sale in execution of his decree the produce of certain land occupied by G, and such produce was purchased by S. The land-holder, to whom G owed rent for land sued G and S for the amount of the rent, on the ground that under s. 56 of the N.-W. P. Rent Act the produce of the land was hypothecated for the rent. *Held* that the defendants could only be held responsible *ex delicto*, and the suit was therefore one for

ACT XI OF 1865, s. 6.—(concluded).

damages, and, the amount claimed being under Rs. 500, one cognizable in a Court of Small Causes. *SHIBBA v. HULASI.*

[III-114]

(34).—*Damages—Malicious prosecution.* The plaintiff sued the defendant for damages for a malicious prosecution claiming Rs. 200 in respect of the mental annoyance caused him by such prosecution and Rs. 25 expended by him in his defence. *Held* that the suit was one cognizable in a Court of Small Causes, *Ganga Narain v. Gudadhur Chowdhry* (13 W. R., 434), and *Bhojo Soondur v. Eshan Chunder* (15 W. R., 179) followed. *HANUMAN v. DEBI SINGH.*

[I-52]

(35) s. 21.—An application by a decree-holder for money paid into Court by the judgment-debtor is a "process for enforcing the decree," within the meaning of s. 21 of Act XI of 1865. *AMOLAK RAM AND OTHERS v. THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY.*

[VIII-59]

ACT III OF 1867 (Public Gambling.)

(1). ss. 5 & 6.—*Non-compliance with the provisions of s. 5—Evidence.* *Held* that where the provisions of s. 5 of Act III of 1867 had not been complied the simple fact that some money in a small earthen pan and some cowries were found in the house of the accused was not sufficient evidence under s. 6 of the same Act of the fact that the house was a common gaming house. *EMPRESS v. SHAKAR CHAND AND OTHERS.*

[II-132]

(2). ———— *Credible information—Informal warrant—Evidence.* The police made a report to a Magistrate which merely stated that it was heard that a great deal of gambling was going on, and that this was the cause of numerous offences. Upon this report the Magistrate issued a warrant directing the search of a certain house, which the police report did not state was used as a common gaming house, and the owner of which was only accused of gambling. The house was searched, the accused was found with many other persons seated round a board, and dice also were found there. The accused was convicted under s. 4 of Act III of 1867 (Public Gambling Act), of having been found gaming, or present for the purpose of gaming, in a public gaming house. *Held* that the Magistrate should not have granted the warrant upon the information received by him in such general terms, that there was nothing to show that the house was a common gaming house as defined in s. 1 of the Act, and that the conviction must be set aside. *QUEEN EMPRESS v. YUSUF HUSAIN.*

[IX-162]

ACT III OF 1867, ss. 5 & 6.—(continued).

(3).—[A house belonging to *R. B.* was searched under a warrant issued by the District Superintendent of Police, and purporting to be under the provisions of s. 5 of Act III of 1867, and instruments of gaming were found therein. *R. B.* was accordingly prosecuted and convicted under s. 3 of the said Act. The warrant did not state that credible information had been received that the house in question was used as a "common gaming house," but merely that it was one in which "gambling frequently took place"; and no further evidence appeared on the record to show that credible information had been received that the house was a "common gaming house." *Held* that the warrant was informal; and the instruments of gaming found as above described were not found in pursuance of a search conducted in accordance with the provisions of s. 5 of Act III of 1867; and, consequently, their finding could not be taken as evidence that the house was a common gaming house. *QUEEN-EMPRESS v. RAM BHAROSE*

[X-226]

(4).—During the *Diwali* festival, at which time gambling is customary amongst the Hindus, the house of one *J. M.* was searched by the Police on a warrant purporting to have been issued under s. 5 of Act III of 1867, and instruments of gaming were found therein. The warrant did not show that the officer issuing it (the District Superintendent of Police) had reason to believe that the house in respect of which it was framed was a common gaming house, and there was nothing on the record to show that such belief was entertained "upon credible information." *J. M.* and others, who were in the house at the time of the search were charged with and convicted of offences under Act III of 1867. *Held* that the convictions and sentences obtained and imposed under the circumstances above set forth could not be sustained. *QUEEN-EMPRESS v. CHIRANJI AND OTHERS.*

[XI-111]

(5).—*Search warrant—irregularity in issuing—Covered by s. 537, Cr. P. C.* This was a case reported to the High Court for orders by the Sessions Judge. It appeared that a first class Magistrate issued a warrant authorizing a Sub-Inspector of Police to enter and search the shop of accused on the ground that he had given credible information that it was being used as a common gaming house, whereas under Notification No. 201A, dated the 25th April, 1867, (issued by the Lieutenant Governor) the warrant should have been issued to an Inspector. *Held* that the irregularity would be covered by s. 537 of the Code of Criminal Procedure. *EMPRESS v. MUSA AND OTHERS.*

[IV-59]

ACT III OF 1867, ss. 5 & 6.—(continued).

(6).—*Warrant to Sub-Inspector—Informal—Evidence.* *Held* that the issue of a search-warrant to a Sub-Inspector instead of an Inspector (as provided by the Government Notification) was an irregularity which rendered s. 6 of the Gambling Act inapplicable to the case. But the irregularity did not render the things found (instrument of gambling, etc.) inadmissible if they were otherwise relevant and admissible in evidence. In other words the irregularity made the particular provisions of the Gambling Act inoperative but did not touch other laws. Consequently if the offence was proved by other evidence there was nothing to prevent a conviction. *Held* further, (1.) That the irregularity would be covered by s. 537 of the Code of Criminal Procedure, (2.) That on a pure question of weight of evidence the High Court did not enter in revision, except for very exceptional reasons. (In the above case which was a charge under s. 3 of Act III of 1867, certain instruments of gambling *i. e.*, cowries *etc.*, were sought to be proved in evidence against the prisoner under ss. 5 and 6 of the Act.) *EMPRESS v. HARDEO DAS.*

[IV-286]

(7).—*Search warrant—Irregularity cured by s. 537.* *Held* (per Mahmood, J.) that the mere fact that a warrant issued under the Gambling Act was defectively worded and was rather a warrant of arrest than a search-warrant had not the effect either (1) of making the particular provisions of ss. 5 and 6 of the Act inapplicable, or (2) of vitiating the trial. The irregularity would be covered by s. 537 of the Code of Criminal Procedure.

DUTHOIT, J., however concurred with dictum (2) but not with dictum (1). *EMPRESS v. MAN-SINGH AND OTHERS.*

[IV-291]

(1).—s. 6—*Cowries, instrument of gambling.* *Held* that cowries are not "instruments of gambling" within the meaning of s. 6 of Act No. III of 1867. *QUEEN-EMPRESS v. BHAWANI AND OTHERS.*

[XV-139]

(2).—*Held* that the mere finding of cowries in a house searched in pursuance of a warrant issued under Act No. III of 1867 would not raise the presumption that the house was used as a common gaming house; but evidence that cowries were used in that house as instruments whereby to carry on gaming would bring the house within s. 6 of the Act. (*Queen Empress v. Bhawani, W. N. 1895, p. 139*) referred to. *QUEEN EMPRESS v. BALA MISRA AND OTHERS.*

[XVII-117]

(1).—s. 13.—*Public place.* Certain persons were convicted of gambling in a "public place" under s. 13 of Act III of 1867. The place where

ACT III OF 1867, s. 13.—(continued)

such persons had been gambling was the *chabutra* of the shop of one of them, which was a part of his own premises. The case was referred to the High Court by the Sessions Judge. The Court held that the place where such persons had been gambling was not a "public place," within the meaning of s. 13 of Act III of 1867, and quashed such conviction. *EMPRESS v. RATAN AND OTHERS.*

[I-8]

EMPRESS v. KALÁNDAR KHAN AND OTHERS

[VII-75]

(2).—Held that a *verandah* attached to a room of a private house, looking on an alley, is not a "public place" within the meaning of s. 13 of Act III of 1867. (See as to the *chabutra* of a shop *Empress v. Ratan, W. N.*, 1881, p. 8) *EMPRESS v. BHAGWAN AND OTHERS.*

[I-17]

(3).—Held that the *chabutra* of a temple to which all classes of the public who were not of the lowest castes had access was a "public place" within the meaning of s. 13 of Act No. III of 1867. *QUEEN EMPRESS v. CHOTE LAL AND OTHERS.*

XV-127

(1).—s. 15.—Sentence. Held that a Magistrate is not competent under ss. 3 and 15 of Act No. III of 1867 to pass any sentence in excess of Rs. 400 or six months' imprisonment, and that a prisoner cannot be sentenced under those sections to a fine of Rs. 600 or to imprisonment for one year until he had been convicted at one trial of two or more offences. The sentence of one year's imprisonment under s. 15 of the Act passed in this case was illegal and must be reduced to six months' rigorous imprisonment. *EMPRESS v. CHUNNI.*

[I-111]

(2).—G was convicted of the offence of being found in a gaming house, and was sentenced, under ss. 4 and 15 of Act III of 1867, to rigorous imprisonment for six months. He had been seven times previously convicted under that Act. Held that the sentence was illegal. The utmost punishment allowed by the law upon the conviction had been a fine of Rs. 200 or rigorous imprisonment for 2 months. *Empress v. Chunni, (W. N.*, 1881, p. 111) referred to. *EMPRESS v. GANPAT.*

[I-129]

ACT XXV OF 1867 (Printing & Newspapers Act).

ss. 1, 3, 12.—"Publisher"—"Printed legibly on it the name of the printer and the place of printing." In this case the applicant for revision caused to be printed copies of certain books, which previously had been printed at the Government Press, Allahabad, and offered them for sale, and sold some of them. Some of these books did not contain the name of the printer and the place of printing, or the name of the publisher and the place of publication.

ACT XXV OF 1867, ss. 1, 3, 12.—(continued).

Other books had printed upon them the words, "Government Press, Allahabad." Held that in respect of those books which did not contain the name of the printer or publisher the prisoner was properly convicted of an offence under s. 12 of Act XXV of 1867. A man who causes a book to be printed and offers it to the public for sale is a publisher within the meaning of ss. 3 and 12 of Act XXV of 1867. Section 3 applies to every volume of the book. Held also that in respect of the books which contained the words, "Government Press, Allahabad," the prisoner was guilty of an offence under s. 12 of Act XXV of 1867 because by doing so he published a book which did not contain "printed legibly on it the name of the printer and the place of printing" and the name of the publisher, that is to say the *true* name of the printer and the publisher. *EMPRESS v. JOTI PRASAD.*

[VII-95]

s. 16.—Held that non-compliance with s. 16 of Act No. XXV of 1867 is not a criminal offence, although, as a penalty or forfeiture may be imposed under it, it is necessary for a Magistrate acting under the section to follow some recognized procedure and to ascertain by evidence or admission whether or not the complaint has been made out. *Quære* whether any appeal lies from an order under s. 16 of Act XXV of 1867. *QUEEN EMPRESS v. AMBA PRASAD.*

[XVII-25]

ACT IV OF 1869 (Divorce)

ss. 3 (2) & 55.—A decree dismissing a suit for dissolution of marriage made by the Judicial Commissioner of Oudh exercising the powers of a District Judge under Act XIII of 1879 and the Divorce Act, 1869, is appealable to the High Court for the N.-W. P. At the hearing of an appeal from a decree dismissing a suit by a wife for dissolution of marriage, on the ground of her husband's incestuous adultery with her sister *M* and cruelty, the appellant produced certain letters written by the respondent and *M* to each other which showed that a criminal intimacy existed between them. These letters were not written until after the appellant had filed the appeal. Held that such letters were admissible and should be admitted, and that, having been brought to the Court's notice by the appellant's counsel, the Court was bound in the interest of justice to require their production in order to enable it to decide the appeal on its real merits. *MORGAN v. MORGAN.*

[II-86]

Per Contr F. H. Percy v. J. Percy.

[XVI-110]

ss. 3 (2), 8, 9, 13, 17 & 55.—The High Court of Judicature for the N.-W. P. has no jurisdiction to entertain an appeal from the decree of a District Judge in Oudh dismissing a suit for dissolution of marriage. *Morgan v. Morgan (J. L. R., 4 All., 306)* overruled. *F. H. PERCY v. J. PERCY.*

[XVI-110]

ACT IV OF 1869.—(continued).

s. 3 (5).—In 1882 a decree for dissolution of marriage between *E M* and *S M* was passed by the High Court on the wife's petition, and the husband was ordered to pay alimony for the wife and certain minor children of the marriage. On the 26th of August, 1895, a petition was presented to the Court on behalf of *E M* stating that *S M* had married again on the 3rd of August, 1895, that one of the children in respect of whom alimony was payable had come of age on the 16th of April, 1895, and that another of such children had married in April 1893, and it was prayed that certain sums which had been paid into Court as alimony in respect of the three persons above referred to might be refunded. *Held* that *E M* was not entitled to any refund of alimony except as to sums, if any, paid into Court after the date of the filing of petition for refund and relating to a period subsequent to that date. In the matter of the petition of *E. Morgan*.

[XVI-52]

(1). s. 14.—This was a suit under Act IV of 1869, (Divorce Act), instituted in a District Court by a husband for the dissolution of his marriage on the ground of his wife's adultery. The District Judge found that it was the harsh and cruel treatment of the plaintiff's mother-in-law, to which the plaintiff was a party, that drove her from her home and that it was only at the last when she had returned two or three times to her husband, and had again been turned out, that, in despair, and to ward off absolute want and starvation, she took up with the defendant. He also found that at the time of the institution of the suit plaintiff was living in adultery with another woman. *Held* that under the circumstances plaintiff was debarred from obtaining the relief claimed. *STEPHEN v. STEPHEN AND BIRBAL*.

[III-73]

(2).—*Unreasonable delay in presenting petition.* This was a suit for dissolution of a marriage on the ground of the adultery of the respondent with the co-respondent. There was the respondent's evidence that she had committed adultery with the co-respondent in 1883 and 1886. As to the adultery in 1886, she, in the course of her examination, produced certain letters which she swore she had received from the co-respondent. Some of these letters show that he had impertuned her to visit him in 1886, and the letters raised a violent presumption that adultery was committed on the occasion of that visit. The petitioner in his evidence proved that the co-respondent was in Court at the time of the trial. The co-respondent was not called to contradict any of the evidence given by the respondent at the trial. *Held* that the petitioner was entitled to have the decree made absolute in respect of the adultery in 1886. *HENCHY v. HENCHY AND ANOTHER*.

[VII-272]

ACT IV OF 1869, s. 14.—(continued).

(3).—A husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, merely because she had run him into debt. He did not write to her, or go to see her, or make her an allowance proportionate to his income, after he had done so. *Held*, upon a petition by the husband for dissolution of his marriage on the ground of his wife's adultery, such adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought. *HOLLOWAY v. HOLLOWAY & CAMPBELL*.

[II-177]

s. 17—*Compromise.* In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. Petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute. On the 2nd June, the case came before the Court, when an order was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one *vakil*, and he prayed the Court not to make the decree *nisi* absolute. *Held*, by Edge, C. J., and Brodhurst, J., that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh. Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect.

Held by Mahmood, J., that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise or mutual agreement between the parties: *Held*, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the practice of the English Divorce Act in such a matter might well be followed and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done. *Lewis v. Lewis* (30 L. J., P. and M., 199) referred to. *CULLEY v. CULLEY AND OTHERS*.

[VIII-249]

s. 22.—*Cruelty.* A false charge by a husband against his wife of adultery, although such charge is made wilfully, maliciously, and with-

ACT IV OF 1869, s. 22.—(continued).

out reasonable or probable cause, is not an act amounting at law to cruelty, so as to entitle the wife to a judicial separation. **AUGUSTIN v. AUGUSTIN.**

[II-82]

(1) s. 51.—The co-respondent in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery was summoned by the petitioner in such suit as a witness. The Court did not explain to him, before he was sworn, that it was not compulsory upon, but optional with, him to give evidence or not. He did not object to be sworn, and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him that he was bound to do so, and he accordingly answered such question, answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. *Held*, under such circumstances, that the co-respondent had not "offered" to give evidence, within the meaning of s. 51 of the Indian Divorce Act, 1869, and therefore his evidence was not admissible. **DEBRETTON v. DEBRETTON AND HOLME.**

[II-41]

(2)—This was a suit for dissolution of a marriage on the ground of the adultery of the respondent with the co-respondent. There was the respondent's evidence that she had committed adultery with the co-respondent in 1883 and in 1886. As to the adultery in 1886 she, in the course of her examination produced certain letters which she swore she had received from the co-respondent. Some of these letters show that he had importuned her to visit him in 1886 and the letters raised a violent presumption that adultery was committed on the occasion of that visit. The petitioner, in his evidence, proved that co-respondent was in Court at the time of the trial. The co-respondent was not called to contradict any of the evidence given by the respondent at the trial. *Held* that the petitioner was entitled to have the decree made absolute in respect of the adultery in 1886. **HENCHY v. HENCHY AND ANOTHER.**

[VII-272]

s. 55.—The High Court of Judicature for the N.-W. P. has no jurisdiction to entertain an appeal from the decree of a District Judge in Oudh dismissing a suit for dissolution of marriage. *Morgan v. Morgan* (I. L. R., 4 All., 306) overruled. **F. H. PERCY v. J. PERCY.**

[XVI-110]

ACT VII OF 1870 (Court Fees).

1.—*Miscellaneous—Memorandum of appeal.* Where one of several appellants takes a ground

ACT VII OF 1870 Miscellaneous—(continued).

of appeal which goes to the root of the respondent's case, and which if successful would deprive the respondent of his decree as a whole and not merely of his interest in it *quoad* the particular appellant, that the appellate Court is justified in refusing to hear such appellant on such ground as aforesaid unless he pays a court-fee sufficient to cover the whole relief obtainable on such ground of appeal. **BUJHAWAN RAI AND OTHERS v. MAKUND RAI.**

[XII-248]

(2).—One *B L* sued *B D* and others for damages on account of the alleged wrongful cutting and removing of certain trees by the defendants. The plaintiff before hearing obtained an injunction against the defendants restraining them from removing certain trees which they had already cut. On the hearing of the suit the court being of opinion that such injunction had been unnecessarily obtained by the plaintiff ordered him, under s. 497 of the Code of Civil Procedure, to pay damages. The plaintiff appealed both against the main decree and as to the award of damages, but paid only the same court-fee which he had paid on his plaint. The memorandum of appeal was reported by the Munsarim of the appellate Court to be duly stamped but at the hearing the Court dismissed the appeal *in toto* on the ground of insufficiency of court-fee. On these facts it was *held* that the plaintiff-appellant, ought to be allowed an opportunity of amending his memorandum of appeal either by relinquishing his claim to relief against the award of damages or by making good the deficiency in the court-fee. **MISR BEHARI LAL v. BHUGWAN DAS AND OTHERS.**

[XIII-220]

s. 5.—Where an appellant whose memorandum of appeal had been declared by the taxing officer of the Court to be insufficiently stamped applied for relief under s. 3 of Act No. VI of 1892, and it was found that the report of the taxing officer was erroneous and that the correct stamp had as a matter of fact been put on the memorandum of appeal. *Held*, that the appellant was entitled to the relief sought notwithstanding the provisions of s. 5 of Act No. VII of 1870. **BADRI PRASAD v. KUNDAN LAL.**

[XIII-45]

s. 6.—*See* **JAINTI PRASAD v. BAICHU SINGH AND OTHERS.** S. 28. No. (3)

[XIII-29]

(1) s. 7, cl. (1). *A* sued to recover the amount due on two mortgage bonds of Rs. 2,759-14 annas from the mortgagors personally and by sale of the mortgaged property in the possession of *B* who had purchased it in an auction-sale and obtained a decree. *B* appealed from this decree valuing the relief sought by him at Rs. 70, the amount for which he had purchased the property and paying court-fees accordingly. *Held* that the relief ought to have been valued according to

ACT VII OF 1870, s. 7, cl. (1).—(*continued.*)
the value of the interest of *B* in the property.
DURGA CHARAN SANYAL v. JAMSHETJI.

[II-97]

SHEORAJ AND OTHERS v. DALJIT SINGH.

[IV-151]

(2).—**s. 7, cl. i & ii.**—This was a reference to the Court by the Registrar on a question of the court-fees payable on the memorandum of appeal in this case. The Registrar observed as follows :—

“In this first appeal the claim is.—

(i). To recover arrears of annuity, Rs. 137-8.
(ii). That the defendants may be called on to furnish security for the payment of Rs. 27-8 per mensem in future, or that they be directed to invest the sum of Rs. 8,250, which will yield an annuity of Rs. 330 (*i. e.*, Rs. 27-8 × Rs. 12) as interest thereon to be paid to the plaintiff.

In the lower court the plaintiff was charged.

	Rs.	a.	p.
(i). On Rs. 137-8 under s. 7 (i) ...	10	8	0
(ii). On Rs. 8,250 <i>advalorem</i> , but under what section is not apparent ...	406	0	0

This calculation seems to be clearly wrong. The second part of the prayer is clearly chargeable under s. 7 (ii) on ten times the annuity which equals Rs. 3,300, the fee being Rs. 190. The memorandum of appeal in this court has been stamped as follows :—

	Rs.	a.	p.
(i). On Rs. 137-8 ...	10	8	0
(ii). On the second part of the prayer ...	10	0	0

This is equally wrong.” *Held* that the fees chargeable was as indicated by the Registrar, Rs. 10 for the first prayer and Rs. 190 for the second, total Rs. 200-8. But as the total amount paid by the appellant in the first Court and in the High Court amounts to Rs. 437 and that due from him for both the courts is only Rs. 401 the appeal may be admitted. *GURYA BAI v. HAR KUAR BAI.*

[VI-228]

(3).—**s. 7, cl. iv (c).**—Certain co-sharers of a village sued to have a lease of certain land, the joint undivided property of the co-sharers, which the other co-sharers had granted, set aside and to have the buildings erected on such land by the lessees demolished, on the ground that such lease had been granted without their consent, without which it could not lawfully be granted. They valued the relief sought at Rs. 100. The value of the buildings of which they sought demolition was Rs. 3,000. *B.* sued *N.* claiming *inter alia* possession of certain land, and to have certain buildings erected thereon by the defendant demolished. *Held*, with reference to the abovementioned suits, that in estimating their value for the purposes of the Court Fees Act, 1870, or of the Bengal Civil

ACT VII OF 1870, s. 7, cl. iv (c).—(*continued.*)

Courts Act, 1871, the value of the buildings which might have to be demolished should not be taken into account. *Held* by Straight, Brod-hurst, and Tyrrell, JJ., with reference to the first suit that it was one for a declaratory decree in which consequential relief was prayed, and fell under s. 7, Art IV, cl. 4, Court Fees Act, 1870, and, such relief being valued at Rs. 100, had been properly instituted in the Munsif's Court. *BINDESHRI AND ANOTHER v. NANDU.*

[II-44]

(4).—*C's* father hypothecated to *D* certain land. *A* purchased the bond and sued *C* for the enforcement of the lien, (*C's* father having died) and obtained a decree. *C* then mortgaged to *B* half of the land and afterwards sold it to *A*. *A* now sues *B* for the cancellation of the mortgage-deed to *B*. *Held* that the suit was in the nature of a simple declaratory suit under s. 39, Specific Relief Act and did not fall under s. 7 para 4 cl. (c) Court Fees Act. **STAMP REFERENCE.**

[III-55]

(5).—This was a suit for the following relief,—“That the property detailed below be declared to belong to the joint family and that it be declared established that the plaintiff holds possession of the said property in partnership with the defendants.” The plaint was written on a 10 rupee stamped paper. *Held* that the plaint was properly valued as for a suit for a declaratory decree. *SIVA RAM v. NARAIN-DAS.*

[IV-11]

(6).—The allegations made in the plaint in this case were :—That defendants 9 to 11, members of a joint Hindu family, had recklessly and extravagantly and without any legal or family necessity encumbered the ancestral property with unlawful debts, had executed bonds in favor of the other defendants whereupon decrees had been obtained behind the back of the plaintiffs, members of the family, and the ancestral properties advertized for sale. They prayed for the following reliefs :—That a declaratory decree in respect of the plaintiff's own shares in the family property may be passed in plaintiff's favor protecting the property in question which bears a jama of Rs. 147-6-7 ten times whereof is Rs. 1,474-1-10 and the market value of which is Rs. 25,000, from the auction-sale, and from all liability for the unlawful debts and staying the sale fixed, and should any lawful debts be found payable by the plaintiff's share a proper order may be made for its payment. *Held* that the suit was one for a declaratory decree in which consequential relief is asked and that the court-fee must be paid *advalorem*. *LACHMI NARAIN AND OTHERS v. GAURI SHANKER AND OTHERS.*

[VI-54]

ACT VII OF 1870, s. 7, cl. iv (c).—(continued)

(7).—One *H G* the head of a Hindu family executed mortgage deeds in 1873 and 1872, in favor of *S P*. *S P* obtained a decree on these bonds against *H G*, and in execution thereof attached and put up to sale the property hypotheated, a 5 annas 4 pies share in certain villages. Plaintiffs, the other members of the family of which *H G* was the head, objected, claiming to be in possession of $\frac{2}{3}$ of the share attached. Their objection was disallowed, hence this suit. The reliefs prayed for were:—

"(i). For a decree establishing their right to a $\frac{2}{3}$ share of the property and declaring that such share shall be exempted from mortgage lien.

"(ii). For a decree setting aside (a) the proceedings taken for attachment and sale of the property as belonging altogether to *H G*, and (b) the order in the miscellaneous department." Held that the prayer "that such share shall be exempted from mortgage lien" amounted to a substantial consequential relief and therefore the fee chargeable was that provided for by s. 7, cl. iv. (c) of Act vii of 1870 and not that provided for mere declaratory suits. *Gulzari Mal v. Jodain Rai* (I. L. R., 2 All., 720) followed. The deficiency not having been made good within the time allowed the appeal was rejected. *MAKHAN LAL AND ANOTHER v. SURJU PRASAD AND ANOTHER*.

[V-48]

(8).—The plaintiffs specified in their plaint as the reliefs sought by them:—(i) That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendants No. 4. dated 4th December, 1883, against the defendant No. 1. (ii) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the amount of the decree and the value of the property at Rs. 6,000. (iii) That any other relief, which the Court may think the plaintiffs entitled to, may also be granted. Held, that the suit should be deemed a suit for one declaratory decree only, without consequential relief, and that a court-fee of Rs. 10 was sufficient. *GOVIND NATH TIWARI v. GAJRAJMATI TAWAYAN AND OTHERS*.

[XI-139]

(9).—Held, that the court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the C. P. Code, praying (a) for a declaration of right to certain property, and (b) that the said property might be released from attachment in execution of a decree, was Rs. 10 in respect of each of the reliefs prayed. *DILDAR FATIMA v. NARAIN DAS AND ANOTHER*.

[IX-131]

(10).—The plaintiffs alleged in their plaint as follows:—Certain property having been attached in execution of a decree their

ACT VII OF 1870, s. 7, cl. iv (c).—(continued)

mother, the wife of the judgment-debtor, objected to the attachment on the ground that the property had previously come into her possession under a transfer by sale in lieu of her dower debt. The plaintiffs' mother died pending the determination of the objection, having devised her property to the plaintiffs. They succeeded to the same, and certain other property which also had been transferred to their mother in lieu of her dower debt, having been also attached in execution of the same decree, the plaintiffs objected to the attachment. The Court executing the decree passed orders disallowing both objections. Upon these allegations the plaintiffs claimed to set aside both orders. They paid, with reference to cl. 1., Art. 17, sch. ii of the Court Fees Act, 1870, a court-fee of Rs. 20 on their plaint, but the Court of first instance held that this was not sufficient, and that the court-fee should be calculated on the amount of the decree in execution of which the property had been attached. Held that, looking at the nature of the relief sought, cl. i, Art. 17, sch. ii of the Court Fees Act, 1870, was applicable, and that a ten rupee stamp in respect of each order sought to be set aside was payable. *Dayachand Nemchand v. Hemchand, Dharam Chand* (I. L. R., 4 Bom : 515); and *Gulzari Mul v. Jodain Rai*, (I. L. R., 2 All., 63), followed *FATIMA BEGAM AND OTHERS v. SUKH RAM*.

[IV-113]

MAHARAJ KUARI v. MAHARAJAH RADHA PRASAD SINGH.

[IV-175]

(11).—Where a claimant whose objection under s. 278 of the Code of Civil Procedure has been disallowed brings a suit and makes the judgment-creditor who was trying to execute the decree, the sole defendant to the suit, a claim for a declaration that the property under attachment was the plaintiff's property and not liable to attachment in execution of the decree of the defendant is a claim for only one declaration, and for such purposes and in such a suit it is immaterial whether the claim is that the property is the plaintiff's and not liable to attachment, or that the property is the plaintiff's and as against the defendant's right to attach and that the order of attachment should be cancelled. But where the person objecting under s. 278 of the Code brings his suit and makes not only the execution creditor in the attachment proceedings but also the judgment-debtor in those proceedings parties to the suit, and asks for a declaration of the plaintiff's title to the property under attachment as against the judgment-debtor, and also asks for a declaration in denial of the judgment-creditor's right to bring that property to sale in execution of the judgment-creditor's decree, there are two substantial declarations asked for. *MOTI SINGH AND ANOTHER v. KAUNSILLA AND OTHERS*.

[XIV-109]

ACT VII OF 1870, s. 7, cl. iv(c).—(continued)

(12).——. A suit for Rs. 9,122 was brought by enforcement of lien. The lower Court decreed the claim for Rs. 5,231, but annexed a condition that one of the properties be first proceeded with and in case of non-satisfaction the other. The plaintiff appealed for the balance and got the condition cancelled. *Held* that he must pay *advalorem* fee for the balance and Rs. 10 for the other relief. **UJAGAR LAL AND OTHERS v. MAHAN KUAR AND OTHERS.**

[VI-312]

(13).——. A suit for a declaratory decree by obtaining the cancelment of a *mukhtarnama* purporting to have been executed in favor of the defendant, is of the nature contemplated by s. 39 of the Specific Relief Act (1 of 1877) and falls within Art. 17 (iii) of sch. ii of the Court Fees Act, and a court-fee of Rs. 10 upon the plaint or memorandum of appeal in such suit is therefore sufficient. *Karam Khan v. Daryai Singh* (J. L. R., 5 All., 331) referred to. **HIRA LAL v. WALI BHAGAT AND OTHERS.**

[IX-124]

(14).—s. 7, cl. v.—A suit to eject a tenant at fixed rates is a suit for the possession of land within the meaning of paragraph 5, s. 7 of the Court Fees Act, 1870, and the valuation of such suit for the purposes of court-fees and of jurisdiction is the value of the subject matter of the suit, that is to say of the tenant right, not of the land itself nor of merely one year's rent. **RAM RAJ TEWARI v. GIRNANDAN BHAGAT AND OTHERS.**

[XII-240]

(15).—s. 7, cl. v. (b) & (d).—*Definite share of an estate.* *Held* that the court-fee chargeable on plaint in a suit for a declaration of right to and possession of "definite shares of 15 estates paying an annual revenue to Government such shares being recorded in the Collector's register as separately assessed with such revenue and such revenue being settled but not permanently was one computed according to 5 times the revenue payable in respect of the share and not one computed according to the estimated value of the shares. **ISHRIDIAL v. KISHEN DAS.**

[I-5]

(16).—s. 7, cl. v. (d).—*Definite share—Market value—Pre-emption suit.* *Held* that in a suit for pre-emption in respect of separate plots of land which did not constitute any definite fraction of a distinct revenue paying area and were not themselves separately assessed to revenue, the court-fee should be paid on the market value of the land in suit and not, as is the case where the suit is for a definite fractional share, on five times the Government revenue. **BAIJA v. MIR AND ANOTHER.**

[XIV-174]

(17).—s. 7, cl. vi. Where, in a suit to enforce a right of pre-emption, a decree was passed against

ACT VII OF 1870, s. 7, cl. vi.—(continued).

the vendees defendants and they appealed from the same on the grounds that they were entitled to receive from the plaintiffs pre-emptors a sum larger than that found by the Court of first instance to have been the purchase money, and also that the plaintiffs had estopped themselves from asserting the right by refusing the purchase.

Held that the nature of the suit was not changed in appeal, and that on the contrary, the subject matter of the dispute between the parties was the right of pre-emption, the value of which for the purposes of court-fee was to be determined in manner directed by section 7, clause (vi) of the Court Fees Act VII of 1870. *Ram Lakhan Rai v. Bandan Rai* (Legal Remembrancer, H. C. Series, 162) distinguished.

Where an appeal is preferred in a suit for pre-emption on the ground that the right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the value of the subject matter in dispute, for the purposes of the Court Fees Act must be determined as in terms provided in art. (vi) of section 7 of the Act.

Where the question in appeal relates solely to the amount to be paid by the pre-emptor, the court-fee should be calculated *advalorem* on the difference between the amounts alleged as the sale price on the one side and the other. **HAFIZ AHMED AND OTHERS v. SOBHA RAM AND ANOTHER.**

[IV-179]

(18).—See No. 12.

(19).—s. 7 cl. ix.—*Redemption account—Appeal.* Where the plaintiff in a suit for redemption appeals, and the relief sought in appeal is that an account may be taken and he may be allowed to redeem on payment of such sum as may be found due after account taken; the court-fee payable on the memorandum of appeal must be computed according to the principal money expressed to be secured by the instrument of mortgage. **MAHARAJA PIRBHU NARAIN SINGH v. SITA RAM AND OTHERS.**

[X-231]

(20).——*Mortgage.* A deed of mortgage was executed by P and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one-third of the mortgaged property against the mortgagees, who had purchased the shares of P and T the other mortgagors. *Held* by the Full Bench with reference to s. 7, art. ix of the Court Fees Act (VII of 1870) that the defendant mortgagees having bought up the equity of redemption of two of the mortgagors, and *pro tanto* extinguished their mortgage-debt and so by their own act empowered the plaintiff to sue for redemption of one-third of the property, the principal money now secured as between them and the plaintiff must now be regarded as one-third of the original mortgage amount, namely, Rs. 1,333-5-4, more particularly as fiscal enactments, should

ACT VII OF 1870, s. 7 cl. ix. (c).—(continued)

as far as possible, be construed in favour of the subject. *Balkrishna Dhondo v. Nagrekar*, (I. L. R., 6 Bom., 324) referred to.

It is a rule of construction that while in cases of taxation everything must be strictly construed in favour of the subject, in questions of jurisdiction the presumption is in favour of giving jurisdiction to the highest Court. *AMANAT BEGAM AND ANOTHER v. BHAJAN LAL AND OTHERS*.

[VI-146]

s. 10, cl. (2).—*Held* that it is competent to a Court which has made an order under s. 10, cl. (2) of Act No. VII of 1870 for the payment of an additional court-fee to enlarge either before or after its expiration, the time limited for the payment of such additional fee. *Badri Narain v. Mussummat Sheo Koer* (I. L. R., 17 I. A. 1) and *Bhagwandus Bogla v. Haji Abu Ahmed* (I. L. R., 16 Bom. 263) referred to. *CHUNNI LAL AND ANOTHER v. AJUDHIA PRASAD AND OTHERS*.

[XVII-40]

ss. 10 & 12.—The powers conferred by s. 12 of Act VII of 1870 read with clause (11) of s. 10 are intended to be exercised before the disposal of the case and not after it has been decided finally so far as the Court is concerned. *MAHA-DAI v. RAM KISHEN DAS AND OTHERS*.

[V-140]

(1). s. 12.—The Court of first instance, being of opinion that the plaintiff bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal, the lower appellate Court held that the court-fee was sufficient, and remanded the case for trial on the merits. *Held* that the first Court's disposal of the suit must be treated so being under s. 54 of the Code of Civil Procedure and was therefore appealable as a decree, and that such appeal as not prohibited by s. 12 of the Court Fees Act. *Ajoodhya Pershad v. Gunga Pershad* (I. L. R., 6 Cal., 249) and *Annamalai Chetty v. Chetty* (I. L. R., 4 Mad., 204) referred to. *MUHAMMAD SADIQ AND OTHERS v. MUHAMMAD JAN AND OTHERS*.

[VIII-286]

HIRA LAL v. WALI BHUGAT AND OTHERS.

[IX-124]

SHEORAJ AND OTHERS v. DALJIT SINGH.

[IV-151]

(2).—*Petition of objection under s. 561, C. P. C.*] Section 12 of the Court Fees Act, 1870, does not apply to a petition of objection under s. 561 of the Code of Civil Procedure. Where such a petition of objection relating only to the costs awarded against the respondent had been filed under s. 561 of the Code of Civil Procedure, as that section stood before the passing

ACT VII OF 1870, s. 12.—(continued).

of Act No. VII of 1888, on an 8 anna stamp and where an objection taken by the Munsarim to the stamp the additional stamp as assessed by him was deposited before the hearing of the appeal but after the date fixed for hearing. *Held* that the petition of objection was not barred by limitation. There is apparently no provision made by the Court Fees Act, 1870, for the case of a petition of objection filed by a respondent under s. 561 of the Code of Civil Procedure where such objection relates solely to costs and the appellant has appealed against the whole of the decree. *HASAN BANO v. NIZAM UD-DIN AND OTHERS*.

[XIII-55]

(3).—The decision of the Court on the question of the court-fee payable on a plaint or memorandum of appeal which is to be "final as between the parties to the suit," must be a decision made between the parties on the record and after they had an opportunity of being heard, and not a mere decision based upon the report of a Munsarim before the plaint or memorandum of appeal is filed and therefore before any parties are before the Court. Hence where a Court of first instance held on the report of the Munsarim that a plaint presented to it had been insufficiently stamped, but subsequently the alleged deficiency in the court-fee, having been made good, and the parties being before the Court, decided that the court-fee originally paid was sufficient; it was *held* that the latter decision was the decision which was final as between the parties within the meaning of s. 12 of the Court Fees Act, 1870. *AMJAD ALI AND OTHERS v. MUHAMMAD ISRAIL AND OTHERS*.

[XVII-157]

(4).—In this suit plaintiff valued his relief at Rs. 1,015, but the Court of first instance, on enquiry found the value of the land in suit to be Rs. 6,090 and on plaintiff's failing to make up the deficiency within a time fixed by the Court, dismissed the suit. The plaintiff appealed and the lower appellate Court held, that the order of the first Court was not appealable under s. 12, cl. 1 of the Court Fees Act. The plaintiff thereupon appealed to the High Court valuing his relief at Rs. 245, being the difference between Rs. 325 the court fees on Rs. 6,090 and Rs. 80 the court fees on Rs. 1,015. *Held* that the relief was correctly valued. *DURGA PRASAD v. RAGHUBAR DIAL*.

[II-244]

(1) s. 17.—*Suit for possession of immoveable property and mesne profits.*] A suit upon one and the same cause of action for possession of immoveable property and for mesne profits or damages for the wrongful retention of such property is not a suit embracing two or more distinct subjects within the meaning of s. 17 of

ACT VII OF 1870, s. 17.—(continued).

Act No. VII of 1870. *Chamaili Rani v. Ram Dai* (I. L. R., 1 All., 552) *Mul Chand v. Shib Charan Lal* (I. L. R., 2 All., 676) *Chedi Lal v. Kiruth Chand* (I. L. R., 2 All., 682) and *Kishori Lal v. Sharat Chandra* (I. L. R., 8 Cal., 593) discussed. REFERENCE UNDER S. 5 OF ACT NO. VII OF 1870, MAY, 14.

[XIV-124]

(2)———. *Suit for profits for several years.* In an appeal in a suit for recovery of profits under s. 93 (b) of the N.-W. P. Rent Act, in respect of several years, the proper court fee leviable on the memorandum of appeal is one calculated on the aggregate amount of the profits claimed, and not one calculated separately on the amount of profits claimed for each year. *MUHAMMAD MALIK KHAN v. NIRHI BIBI AND OTHERS.*

[V-218]

(3)———. *Suit on hundis.* Held that three hundis executed by the same person in favor of three different persons (who constitute a firm) payable on the same date, constitute three different causes of action and the memorandum of appeal in a case brought upon these hundis is chargeable with the aggregate amount of the fees to which the memorandum of appeal in suits embracing separately each of such subjects would be liable under the Court Fees Act. *PARSHORAM LAL AND ANOTHER v. LACHMAN DAS.*

[VII-42]

(1). s. 28 — *Per Mahmood J.* that the powers conferred by s. 28 of the Court Fees Act cannot be exercised by an order passed after the decision of the case to which the question of the payment of court fees relates and, even assuming that they can be so exercised such an order, though it may be subject to such rules as to appeal or revision as the law may provide, cannot be given effect by making insertions in an antecedent decree. *Per Oldfield, J.*, that the Court had power to make the order it did inasmuch as the collection of court-fees was no part of a Judge's function in the trial of a suit which could be said to have ceased with its determination; and the provisions of the Court Fees Act fixed no time within which the presiding Judge could exercise his power of ordering documents to be stamped, and seemed, on the other hand, to contemplate the exercise of that power at any time subsequent to the receipt, filing or use of a document, and to make the validity of the document and the proceedings relative thereto dependent on the document being properly stamped. *MAHA DAI v. RAM KISHEN DAS AND OTHERS.*

[V-140]

(2)———. On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped, and the

ACT VII OF 1870, s. 28.—(continued).

Munsarim endorsed on it "stamp insufficient." On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889, the deficiency pointed out by the Munsarim was made good and on the 26th May, the Judge admitted the application, on the applicant paying the court-fee payable on an application presented on or after 90 days from the date of the decree. Held that s. 6 and the first paragraph of s. 28 of the Court Fees Act (VII of 1870) were applicable; that there was no mistake or inadvertence within the meaning of the second paragraph of s. 28. *UMRAO v. THE CAWNPORE MUNICIPAL BOARD.*

[IX-197]

(3)———. An appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of the Limitation Act (XV of 1877), unless it is accompanied by the copies required by the Code. A memorandum of appeal is a document included in the first and second schedules to the Court Fees Act (VII of 1870), and is a document within the meaning of ss. 4, 25, 28 and 30 of the Act, and therefore cannot be filed or recorded in or received by the High Court unless and until the proper court-fee in respect of it is paid, and is of no validity unless and until it is properly stamped. Consequently, if it is not, when tendered, properly stamped, it is not at that time a memorandum of appeal within the meaning of s. 541 of the Code, and the appeal cannot be regarded as having been at that time presented within the meaning of s. 4 of the Limitation Act, or as valid for any other purpose, except in the event specified in s. 28 of the Court Fees Act. Where a memorandum of appeal which, when tendered was insufficiently stamped, has subsequently been sufficiently stamped, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation, unless it has been done by order made under the second paragraph of s. 28 of the Court Fees Act. In the case of a High Court, such an order can be made only by a Judge and by him only in cases of "mistake or inadvertence". These words mean mistake or inadvertence on the part of the Court or its officers, and not on the part of the appellant or his advisers. The expression "head of the office" in s. 28 does not refer to the head of the office of a Court, or at all events to the head of the office of a High Court, acting not as such but as a taxing officer; but it refers to the head of a public office such as the Boards of Revenue. Ss. 9, 10 and 11 of the Court Fees Act are not in conflict with s. 28; nor are ss. 9, 10, 11 and 28 read together, in conflict with s. 54 of the Civil Procedure Code. Cases within s. 10 or s. 11 of the Act would arise only where, through mistake or inadvertence of the Court, a plaint which subsequently was discovered to be insufficiently stamped, had been received, filed, or used in the Court; and clauses (a) and (b) of s. 54 of the Code are similarly related to s. 28 of the

ACT VII OF 1870, s. 28.—(continued).

Act, and were not intended to cut down or limit its provisions. The "dismissal" of a suit under s. 10 or s. 11 of the Act has the same effect as that provided by s. 56 of the Code in the case of "rejection" of a plaint under s. 54. Clauses (a) and (b) of s. 54, which are declared by s. 638, to be inapplicable to the Original and Civil Jurisdiction of the High Court, are also inapplicable to its Appellate Jurisdiction, notwithstanding the provisions of s. 582. The word "final" in s. 5 of the Court Fees Act has the same meaning as in s. 12, though it is applied to a different subject. The cases in which it has been held that, notwithstanding the use of this word in s. 12, an appeal lies from a decision as the category in which the relief sought by a plaintiff or appellant falls, do not mean that decisions which the section declares to be "final" are nevertheless appealable, but that the question of category is not a "question relating to valuation" and therefore is not declared by the section to be final. In both s. 5 and s. 12 "final" is used in its ordinary legal sense of unappealable. A decision under s. 5 of the Act is not open to appeal, revision, or review, and is final for all purposes, and no means has been provided or suggested by the Legislature for questioning it. The officer mentioned in s. 5 of the Court Fees Act is not bound to advise parties as to the stamp required under the Act, or to give them notice that they have not sufficiently stamped documents which the Act requires to be stamped before presentation. A practice which is in contravention of the law, even if it is the practice of a High Court, cannot justify a Court in construing an Act of the Legislature in a manner contrary to its plain wording. Nor can the principles of construction to be applied to an Act, be influenced by extraneous considerations such as questions of hardship. A plaint contained a prayer for a declaration (i) that certain property was the joint property of the plaintiff, and (ii), that it was not liable to attachment and sale in execution of a decree held by one of the defendants against another; and, as a foundation for the latter relief, alleged collusion, fictitious transactions and want of title. The decree in the suit, passed on the 14th September, 1887, granted both the declarations prayed for. The defendants appealed to the High Court against the whole decree, and stamped their memorandum of appeal with a stamp of Rs. 10 only. On the 9th November, 1887, it was tendered to a Judge for admission, and it then bore a report dated the 7th November by the officer appointed under s. 5 of the Court Fees Act, "report will be made on receipt of record". The Judge made an order, "admit, subject to stamp report," and the memorandum was then received by the office, and the appeal was entered on the register. On the 27th September, 1888, the office reported that there was a deficiency in the stamp of Rs. 615; on the 9th November the taxing officer ordered that the deficiency should be made good; and on the 8th December, 1888, it was made good. At the hearing of the ap-

ACT VII OF 1870, s. 28.—(continued).

peal a preliminary objection was taken that the appeal had never been validly presented within time, or admitted, and that it could not be heard. *Held*:—That, there was before the Court no valid appeal as to the merits of which the Court could give a decision. *Held* also that the stamp of Rs. 10 was insufficient, inasmuch as two distinct declarations were asked for and obtained, and were by the appeal sought to be set aside; and it was not the province of the taxing officer or of the Judge or Court on a question of the sufficiency of a stamp or fee to consider whether a plaintiff or an appellant was asking for more declarations or reliefs than were required for his protection. **BALKARAN RAI AND OTHERS v. GOBIND NATH TIWARI AND ANOTHER.**

[X-39]

JAINTI PRASAD v. BACHU SINGH AND OTHERS.

XIII-28

(4).—*Dismissal under ss. 10 & 12 after judgment.**See ss. 10 & 12.*

(5).—The plaintiff filed his plaint on the last day of limitation on an insufficient stamp, and, being required by the Court to make good the deficiency within a certain time did not do so until two days after the expiration of that period. The Court however accepted the plaint and issued notice to be defendant but made an order to the effect that it would be open to the defendant to object to the admissibility of the plaint. The defendant did object, and the plaint was in consequence rejected. *Held* that even if the Court had power to extend the period of limitation the order admitting the plaint subject to the defendant's objections showed no intention of extending the time for payment of the residue of the court-fee; neither could it be taken as an order under s. 28 of the Court Fees Act. The plaint was properly rejected. *Held*, also that the plaintiff not having made an application to be allowed to amend his plaint could not be permitted to prosecute his suit in respect of so much of his claim as was covered by the amount originally paid as court-fee. **DHARAM NARAIN LAL v. JAGMOHAN PANDE.**

[XI-166]

s. 34 (3).—The sale of court-fee stamp without a licence is not an offence. **EMPRESS v. JALLU.**

[II-23]

Sch. i, art. 5.—For the purpose of ascertaining the court-fee to be paid under sch. i, art. 5 of Act VII of 1870 upon an application to review an appellate decree, the fee to be considered is the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint nor, where the decree sought to be reviewed was passed on appeal under s. 10 of

ACT VII OF 1870, Sch. i. art. 5.—(contd).

the Letters Patent from an appellate judgment of a Division Bench,—the fee which was leviable on the memorandum of the appeal before such Bench. *HUSAINI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR AND OTHERS.*

[IX-27]

Sch. ii, art. 1 (d).—The court-fee payable on a memorandum of appeal presented to the High Court under s. 263 of the Succession Act from an order of the District Judge granting letters of administration, is Rs. 2 under Act VII of 1870 (Court Fees Act), sch. ii, art. 1 (d). Sch. ii, art. 17 is not applicable to such a memorandum of appeal. *LEE v. HARDY.*

[IX-27]

Sch. ii, art. 6.—*Held* that where a bond is given under the orders of Court as security by one party for the costs of another, it is subject to two duties, (i) an *advalorem* stamp under sch. i, art. 13 (b), of Act I of 1879, (ii) a court-fee of 8 annas under sch. ii, art. 6 of Act VII of 1870 *KULWANTA v. MAHABIR PRASAD AND ANOTHER.*

[VIII-281]

(1).—**Sch. ii, art. 11.**—*Advalorem stamp.* An appeal from the decision of a dispute under s. 322 (b) of the Code of Civil Procedure falls directly within the exception of art. 11 of sch. ii of the Court Fees Act (VII of 1870), and the memorandum of appeal should therefore be presented as for a decree in a suit, upon an *advalorem* stamp. *Sr. nivasa Ayyangar v. Peria Tambi Nayakar* (I. L. R., 4 Mad., 420) dissented from. *AHMAD KHAN v. MADHO DAS.*

[V-99]

(2).—**Sch. ii, art. 11 (b).**—An order under s. 214 of Act No. VI of 1882 Indian Companies Act is not a decree or an order having the force of a decree and consequently an appeal from such an order to the High Court is properly stamped with reference to Act No. VII of 1870, sch. ii, art. 11 (b), with a court-fee stamp of Rs. 2. REFERENCE UNDER Act VII of 1870.

[XV-56]

(1).—**Sch. ii, art. 17 (1).**—

See CASES UNDER S. 7, NOS. 7, 8, 9, 10, 11 AND SCH. ii, ART. 1 (d).

(2).—**Sch. ii, art. 17 (3).**—

See CASES UNDER S. 7, NOS. 3, 4, 5, 6 AND 13 AND THE CASE UNDER SCH. ii, ART. 1 (d).

(3).—**Sch. ii, art. 17, cl. (vi).**—A prayer in a plaint purporting to be a plaint under s. 539 of the Code of Civil Procedure, that the plaintiffs themselves may be appointed trustees is not a prayer for possession requiring to be stamped at the value of the trust property, but is a prayer for a relief falling within art. 17, cl. (vi) of the second schedule to Act No. VII of 1870. *Sonachala v. Manika* (I. L. R., 8 Mad., 516);

ACT VII OF 1870, Sch. ii, Art. 17, Cl. (VI).—(continued).

Delroos Banoo Begum v. Ashgar Ally Khan (15 B. L. R., 167) and *Omrao Mirza v. Jones* (I. L. R., 10 Calc., 599) referred to and distinguished. *THAKURI AND OTHERS v. BRAMHA NARAIN AND OTHERS.*

[XVI-187]

(4).—*Semble.* That a suit under s. 14 of Act No. XX of 1863, against the Superintendent of a religious endowment for misfeasance is a suit which for the purposes of payment of court fees falls within art. 17, cl. (vi.) of the second schedule of Act No. VII of 1870. *Delroos Banoo Begum v. Ashgar Ally Khan* (15 B. L. R., 167), *Sonachala v. Manika* (I. L. R., 8 Mad., 516) and *Omrao Mirza v. Jones* (I. L. R., 10 Calc., 599) referred to. *MUHAMMAD SIRAJ-UL-HAQ AND OTHERS v. IMAM-UD-DIN*

[XVI-189]

ACT VIII OF 1870 (Female Infanticide)

s. 2.—Rules made by Local Government. Although Rule VI of the Rules framed by the Government of the N.-W. P. under Act VIII of 1870 (Infanticide Act), s. 2 declares it to be the duty of the village chaukidar to report, on the occasion of his periodical visit to the police station, not only the occurrence among proclaimed families in the village, of births, of the deaths of infants and of the removal of pregnant woman to other villages but also "other deaths removal and arrivals," this last duty is not cast upon him by the provisions of the Infanticide Act itself: for Rule VI is not on this point consistent with the Act. *Held*, therefore, that a chaukidar who had omitted to report the departure of a woman of a proclaimed family from her home was not guilty of an offence under the Infanticide Act. *Held* also that the heads of proclaimed families are not bound by any of the Rules framed under the Infanticide Act to give information to the chaukidar regarding the departure of the women of their families. *EMPRESS v. BHUPAL.*

[IV-133]

ACT XXVI OF 1870 (Prisons.)

s. 47.—One *HA*, a prisoner in the Gorakhpore jail, was employed in some brick fields outside the jail. While so employed he endeavoured to escape, but after he had got some little distance was re-captured. Subsequently, after a form of trial of a very summary nature, *HA* was sentenced for this offence by the Inspector General of prisons to receive thirty stripes, apparently under s. 47 of the Prisons Act, 1870. *Held* that under the above circumstances the offence committed was that punishable under s. 224 of the Indian Penal Code, and was not punishable under s. 47 of Act No. XXVI of 1870, nor, if the Inspector General of prisons was acting in his magisterial capacity, was the offence triable summarily under s. 260 of the Code of Criminal Procedure, if indeed, the offence was committed within the limits of the Inspect-

ACT XXVI OF 1870, s. 47.—(continued).

tor General's jurisdiction as a Magistrate. In any event, if the offence was triable by the Inspector General as a Magistrate it should have been duly tried according to the procedure laid down in the Code of Criminal Procedure for the trial of warrant cases. **QUEEN-EMPRESS v. HASAN ALI, HAZRAT ALI AND MUHAMDI**

[XIV-176]

ACT XXIII OF 1871 (Pensions.)

ss. 3 & 4.—The plaintiff in this case came in Court on the allegation that one *U B*, out of Rs. 45,000, which she used to draw from the Government treasury as a *rakam sair* (surplus) for excise (*abkari*) compensation, made a gift in the name of the tomb of an ancestor of the plaintiff, of an annuity of Rs. 300. That the plaintiff has continued to receive his share of the annuity from the successors of *U B*. That the Government is also one of the successors of *U B*. The plaintiff is therefore entitled to recover the amount claimed from the Government. *Held* that on a careful consideration of the plaint the money allowance settled by the Government upon *U B* was to all intents and purposes a sort of allowance paid in money as a compensation to the holder of some privilege or right and that therefore the terms of s. 3 and prohibition of s. 4 of the Pensions Act were applicable. **HAMID ALI SHAH AND ANOTHER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.**

[VII-225]

ss. 4 & 6.—The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions or grants of money or land-revenue must be strictly construed. *Held* that a suit by the assignees of land-revenue, whose rights were admitted by Government to recover arrears from persons admittedly liable to pay revenue to some body but who disputed the plaintiff's right thereto came within s. 9 of the Pensions Act, and was not barred by ss. 4 and 6 by reason of no certificate having been obtained as therein provided. **NAGAR MAL AND OTHERS v. ALI AHMAD AND OTHERS.**

[VIII-72]

s. 7.—A pension of the nature described in Act XXIII of 1871, s. 7 (2), was drawn by a Muhammadan, in whose name alone it was recorded in the Government Registers, for himself and the other members of his family, who, up to the time of his death, received their shares from him. Shortly before he died, he executed a deed of gift in favour of his wife, which purported to assign to her the whole pension. *Held* that under s. 7 of the Act the pension or any interest in it was rapable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid. **HAFIZA BIBI v. SAHIB-UN-NISSA BIBI. SAHIB-UN-NISSA BIBI v. HAFIZA BIBI.**

[VII-22]

ACT XXVI OF 1870.—(continued).

s. 9.—*See* Act XXIII of 1871, ss. 4 & 6.

ss. 11 & 12.—*Held* that an annual pension granted by the Government to the recipient and his heirs, by way of compensation for the resumption of an *allamgha jagir* belonging to the recipient, did not fall under the class of pensions specially made inalienable by Act XXIII of 1871. **DAMODAR DAS v. KHWAJA MIR MUHAMMAD.**

[I-147]

(1). **s. 12.**—*A* who was in receipt of a *zihakhie* pension from Government, assigned by deed a portion thereof to his wife, in lieu of dower. After his death, disputes arose between the wife and the heirs of *A* in regard to a portion of the amount thus settled on her; and she instituted a suit, on a certificate granted her by the Collector under s. 6 of Act XXIII of 1871, in which she prayed for a declaration of her proprietary right in respect of the said sum, and of her power to transfer the same. *Held* that inasmuch as, with reference to s. 12 of Act XXIII of 1871, *A* could not legally assign any portion of his pension to the plaintiff, the deed executed by him in her favor was null and void; and that, inasmuch as it was upon the basis of that instrument that she now came into Court, her suit must fail, since, she was seeking to obtain a declaration of right rested upon a deed which was contrary to law. **IMTIAZ BEGAM AND OTHERS v. LIAKAT-UN-NISSA BEGAM.**

[IV-209]

(2).—Assignment of pension before passing of Act.] *Held* that s. 12 of Act XXIII of 1871, had no retrospective operation, so as to invalidate assignments made before the passing of that Act. **IMTIAZ BEGAM AND OTHERS v. LIAKAT-UN-NISSA BEGAM.**

[V-267]

ACT I OF 1872 (Evidence.)

ss. 8 & 9.—Conduct. In a trial upon a charge of murder it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her that she was unable at the time to speak but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge to prove the questions put to the deceased and the signs made by her in answer to such questions.

(*Per Petheram, C. J.*) that the signs could not be proved as "conduct" within the meaning of s. 8 of Act I of 1872, inasmuch as taken alone and without reference to the questions leading to them there was nothing to connect them with the cause of death and so to make them relevant; while the questions could not be proved either under explanation 2 of s. 8 or under s. 9, inasmuch as the condition precedent to their

ACT I OF 1872, ss. 8 & 9.—(continued).

admissibility under either of these provisions was the relevancy of the conduct which they were alleged to effect or of the facts which they were intended to explain. The conduct made relevant by s. 8 is conduct which is directly and immediately influenced by a fact in issue or relevant fact and it does not include actions resulting from some intermediate course such as questions or suggestions by other persons.

(*Per* Mahmood, J.). That the word conduct as used in s. 8 does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact; that the signs made by the deceased were the conduct of "a person an offence against whom was the subject of any proceeding" and were relevant as such under s. 8; and that the questions put to her were admissible in evidence either under explanation 2 of the same section or under s. 9 by way of an explanation of the meaning of the sign. **EMPRESS v. ABDULLAH.**

[V-78]

(1). s. 9.—*Rubkar showing relation.*] The question in issue in a suit being whether one Gauri Shanker was son of Balwant Singh or of one Moajjam Singh, belonging to a totally different family from that of Balwant Singh, an attested copy of a *rubkar* in some proceedings long anterior to the suit was tendered in evidence, in which *rubkar* Gauri Shanker was described, as the son of Balwant Singh. *Held* that the *rubkar* was admissible in evidence under the provisions of s. 9 of Act I of 1872. **RADHAN SINGH AND OTHERS v. KUARJI DICHIHT AND ANOTHER.**

[XV-236]

(2). ————*Fact disclosing offence other than that under inquiry.*] At a criminal trial evidence otherwise admissible is not rendered inadmissible by the fact that it discloses the commission of an offence other than that in respect of which the trial is being held. *Reg v. Briggs* (2 M. and R., 199) referred to. **QUEEN EMPRESS v. MULUA AND OTHERS.**

[XII-95]

s. 11, cl. (2).—One R had been employed to make gold and silver armlets and similar ornaments and had been given patterns for that purpose. On being required to give the ornaments given to him as pattern it appeared that he had made away with them. An armlet and two bracelets were found in the possession of one L. N. to whom they had been pawned by S. Several other ornaments were found in the possession of S, but he was charged of an offence under s. 411 only in respect of the armlet found with L. N. The defence was that the accused had received it from R to raise money on and he had pledged it to L. N. So the only question was as to guilty knowledge. The Magistrate though he confined the charge to the gold armlet took evidence about the other articles

ACT I OF 1872, s. 11 Cl. (2) —(continued).

under s. 11, cl. (2) Evidence Act and convicted the accused of the offence charged. *Held* that this was an erroneous application of s. 11, cl. (2) of the Evidence Act. The fact that the accused had other dealings with R of a similar nature in respect of the complainant's property entrusted to R can be no indication that the particular dealing which is the subject of the conviction was criminal when those other dealings have not been themselves shown to have been of a criminal character. And as it was on this evidence chiefly that the conviction was based it must be set aside and the accused released. **EMPRESS v. SITAL.**

[V-27]

s. 13 (b).—*Custom.*] In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied, is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. *Gujju Lal v. Fateh Lal* (J. L. R., 6 Cal., 171) distinguished. *Koodootoolah v. Mohinee Mohun Shaha* (5 Rev. case and Cr. Rep., 290), *Shenchurn v. Gudur* (N.-W. P., II. C. Rep., 1858, p. 138), and *Lachman Rai v. Akhal Khan* (J. L. R., 1 All., 440) referred to. **GURDAYAL MAL v. JHANDU MAL.**

[VIII-242]

s. 16.—*Course of business.*] Upon the settlement of the list of the contributions to the assets of a company in course of liquidation under the Indian Companies Act, one of the persons named in the list denied that he had agreed to become a member of the Company or was liable as a contributory. The District Court admitted as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector, for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record; but at the hearing of the appeal, it was alleged by the official liquidator and denied by the objector, that such notice had in fact been given. There was no evidence as to the posting of the original letter, or of the address which it bore; but the press-copy was contained in the press-copy letter-book of the Company, and was proved in the hand-writing of a deceased secretary of the Company, whose duty it was to despatch letters after they had been copied in the letter-book. The objector denied having received the letter or any notice of allotment. *Held* that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter was inadmissible in evidence; and that there was no proof of the communication of any notice of allotment. The evidence adduced by the official liquidator to show that the defendant was a member of the Company and so liable as a contributory consisted of the register of members, a letter written by

ACT I OF 1872, s. 16.—(continued).

the objector, a reply thereto written by a managing director of the Company, and the oral testimony of the director himself. The objector adduced no evidence at all. *Held* that the official liquidator might, if he had chosen to do so, have put the register in evidence, and waited before giving any further evidence, until the objector had given some to displace the *prima-facie* evidence afforded by the register, or to impugn the character of the register; but his case must be looked at as a whole, and having taken the line which he did, he must take the consequences of his other evidence contradicting or impugning the *prima-facie* evidence of the register, and, notwithstanding that the objector gave no evidence, the register was not conclusive. **RAM DAS CHAKARBATI v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY, LIMITED, CAWNPORE,**

[VII-34]

(1).—**s. 24.—Confession, caused by threat, &c.—Person in authority.**] The matter before a *panchayat* was whether *M* and *K* had murdered *B*, and thereby disqualified themselves from further intercourse with the rest of their brotherhood. *M* and *K* made certain statements before the *panchayat* which it was afterwards sought to prove against them on their trial for the murder of *B* as confession corroborating the evidence of an approver. The witnesses called to prove these "confessions" did not state specifically what was said by *M* and *K* before the *panchayat*. One witness, a member of the *panchayat*, said:—" *M* confessed and *K* acquiesced". Another witness, also a member of the *panchayat*, said: "*M* and *K* were taxed with taking *B*'s life, upon which both admitted having murdered him." The same witness also said:—"The admissions were not taken down." It appeared that it was not till at the sixth meeting of the *panchayat*, and when *M* and *K* were threatened with excommunication from caste for life, that they made such statements. *Held* that, if the statements attributed to *M* and *K* had been actually made, and assented to and this fact had been duly proved, the provisions of s. 24 of Act I of 1872, could not be pleaded against their admissibility on the ground that such statements had been caused by such threats, for the members of the *panchayat* were not in authority over *M* and *K* within the meaning of that section, nor was there any threat made having reference to any charge against them. The statements, however, could not be accepted as sufficient in themselves to corroborate the evidence of the approver, or to support the conviction of *M* and *K* for the murder of *B*. The statements were in general terms and represented only the impression conveyed by what might have been said to the mind of the witnesses. It was always essential that the Court should know as nearly as possible what were the words used by the supposed confessors and what were the questions or matters in regard to which they were said. It might have been that the words ascribed to *M* and *K* taken

ACT I OF 1872, s. 24.—(continued).

with the questions put and the exact subject-matter of the enquiry did not amount to a confession of the guilt believed by the hearers to have been confessed. **EMPRESS v. MOHAN AND ANOTHER.**

[I-84]

(2).—**s. 24.—Confession—Mere inculpatory admission.**]

See s. 25, No. (1).

(1).—**s. 25.—Confession—Mere inculpatory admission.**] The word "confession" as used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt. **EMPRESS v. JAGRUP AND OTHERS.**

[V-131]

(2).—**—Made before commencement of enquiry.**] The question raised in this appeal was whether the confession hereinafter set out was admissible in evidence against the appellant. The confession was made to the committing Magistrate, in Court, three weeks before the commencement of the enquiry and any evidence had been taken. The confession was in these terms:—"My statement is this"—(After the statement the confession proceeded as follows)—"Have you made this statement voluntarily, without having been threatened, intimated, or taught by any one? *Answer.*—I have made the statement voluntarily. No one threatened me, or intimidated me, or taught me. I am in my proper senses. I have nothing else to say; nor was I punished before." The memorandum required by s. 164 Cr. P. C. was attached to the confession. *Held* that the confession was not excluded by s. 25 of Act I of 1872 and that s. 26 and the latter part of s. 29 of the same Act appear to point to a confession such as this being taken cognizance of. **EMPRESS v. BALJIT.**

[III-238]

(3).—**—To police.**] *Held* that a confession to a police officer could not be used in evidence against the accused. **EMPRESS v. THAKUR DAS.**

[III-188]

(1).—**s. 26.—Confession—Mere inculpatory admission.**]

See s. 25, No. (1).

(2).—**—Made before commencement of enquiry.**]

See s. 25, No. (2).

(1).—**s. 27.—Confession—Mere inculpatory admission.**]

See s. 25, No. (1).

(2).—**—To police—Fact discovered in consequence of information.**] *P*, accused of the murder of a girl, gave to a police officer a knife, saying it was the weapon with which he had committed the murder. He also said that he had

ACT I OF 1872, s. 27.—(continued).

thrown down the girl's anklets at the scene of the murder and would point them out. On the following day he accompanied the police officer to the place where the girl's body had been found, and pointed out the anklets. *Held* that such statements, being confessions made to a police officer, whereby no fact was discovered, could not be proved against *P.* (Observations on the use of confessions made to police officers.) *Reg v. Jora Hasj* (11 *Bom. H. C. Rep.*, 242) and *Empress v. Rama Birapa* (1. L. R., 3. *Bom.*, 12) referred to. **EMPRESS v. PANCHAM.**

[II-21]

(3).—The accused was convicted of an offence under s. 412, Penal Code. The evidence for prosecution consisted of certain confessions made to the police and the circumstance that the accused found some stolen cloth for the police while in police custody. *Held* that the confession was inadmissible under s. 25 (Evidence Act) and the circumstance mentioned did not justify his conviction under the section. **EMPRESS v. NANHE BEG AND OTHERS.**

[III-126]

(4).—The accused in this case was convicted of an offence under s. 411, Penal Code. The conviction was based on the following circumstances, *viz.*, that part of the stolen property was discovered underneath the "chulha" of the prisoner's house, and that the prisoner had stated to the police that he had buried a part of the stolen property, some woollen cloth, near some ice-pits; and accompanied by the police had pointed out the spot where he had done so, and the property had been discovered buried in an earthen vessel. On appeal the Sessions Judge affirmed the conviction, relying only on the statements of the prisoner to the police and the discovery of the woollen cloth. *Held* that neither the statements nor the pointing out by the prisoner of the spot where the woollen cloth was found could be proved against the accused for the following reasons:—
(i). Because it was a statement made to a police officer within s. 25 and because s. 25 is not governed by the provisions contained in s. 27.
(ii). Because the cloth was not discovered in consequence of any "information" given by the accused but by his own act (his going with the police and pointing out the spot). S. 27 contemplates information only. **EMPRESS v. KUARPALA.**

[II-225]

(5).—*B* and *R*, accused of offences under s. 414 of the Penal Code, gave information to the police which led to the discovery of the stolen property. This information was to the effect that the accused had stolen a cow and calf, and sold them to a particular person at a particular place. *Held* by the Full Bench (Mahmood, J. dissenting) that s. 27 of the Indian Evidence Act is a proviso not only to s. 26, but also to s. 25; and

ACT I OF 1872, s. 27.—(continued).

that, therefore, so much of the information given by the accused to the police officer, whether amounting to a confession or not, as related distinctly to the facts thereby discovered, might be proved. *Empress v. Kuarpala* (11. N., 1882, p. 225) dissented from.

Per Mahmood, J. that s. 27 of the Indian Evidence Act is not a proviso to s. 25, but only to s. 26; and that, therefore, the statements in question were wholly inadmissible in evidence.

Empress v. Pancham (1. L. R., 4 *All.*, 198) referred to by Straight, Offg. C. J. and Mahmood J.

Per Straight, Offg. C. J., that where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding.

Observations by Straight Offg. C. J., as to the mode in which the testimony of witnesses should be recorded in cases where two persons are being tried.

Observations by Straight, Offg. C. J., and Duthoit, J. upon the nature of confessions by accused persons in India, and the circumstances in which such confessions are made. **EMPRESS v. BABU LAL AND ANOTHER.**

[IV-220]

s. 28.—Confession—Mere inculpatory admission.]

See s. 25, No. (1).

(1). **s. 29.—Confession—False on a material point—Admissibility.]** *Held* that a confession does not become inadmissible in evidence simply because there is in it a false statement on a material point. **EMPRESS v. MOHAMMAN SINGH**

[II-148]

(2).—*Made before commencement of enquiry.]*

See s. 25, No. (2).

(3).—*Confession—Mere inculpatory admission.]*

See s. 25, No. (1).

(1). **s. 30.—Confession—Mere inculpatory admission]**

See s. 25, No. (1).

(2).—*Joint trial.]* *Held* that a confession made by one *S.* in 1870, while he was on his trial for murder, implicating the present accused who is on his trial for being a *thug* was not admissible in evidence. **EMPRESS v. JITA SINGH.**

[I-164]

(3).—*B, C and K were committed for trial before the Court of Session charged with dacoity; B being also charged with receiving property stolen in the commission of such dacoity. K had made a confession*

ACT I OF 1872, s. 30.—(continued).

before the committing Magistrate implicating the other accused as well as himself. This confession he subsequently retracted before the committing Magistrate. *C* also made a statement before that officer, which he subsequently retracted, such statement consisting of vague accusations of *B*. He, however, admitted no offence or share in an offence; he admitted nothing more than that he knew that the dacoity was to take place, and that he was a passive spectator of it. He denied even subsequent abetment by sharing in the booty to the smallest degree. The case came on for trial on the 28th February, and when charged, *K* pleaded guilty. His trial was, however, suspended immediately after his plea was taken, and he was set aside, as he appeared to be insane. The Court of Session proceeded with, and completed the trial of the other two accused. On the 7th March, the Court of Session, finding that *K* was not insane, proceeded with and concluded his trial. The Court of Session in trying *B* and *C* did not make and record an examination of them after the witnesses for the prosecution had been examined and before the accused were called on for their defence. *Held* that the confession of *K* could not be used against the other accused, for he was not jointly tried with them. His plea of guilty had not the effect of making his admissions relevant against them. It would indeed, have had a contrary effect if his trial had proceeded with theirs on the principle laid down in *Reg v. Kulu Patial*, (11 Bom. H.C. Rep., 146.) *C*'s statements could not, under the circumstances, be treated as confessions. The Sessions Judge should have examined the accused persons, whether defended or undefended, before they were called on for their defence. The terms of s. 250 of Act X of 1872 being in this respect mandatory. Of course, in the event of non-responson on the part of an accused the fact would be recorded, and the Court would proceed with the trial. **EMPRESS v. BAIJU AND ANOTHER.**

[I-99]

(4). ———— In order that the confession referred to in s. 30 of the Indian Evidence Act may be admissible it must be proved and the person or persons against whom it is sought to use it must be on their joint trial along with the person proved to have made it, but it is not necessary that such confession shall have been made in the course of the joint trial, or even in the presence of the persons against whom it is sought to use it. *Empress v. Lakshman Bala* (I. L. R., 6 Bom., 124) referred to. **QUEEN EMPRESS v. KALLUA.**

[XIV-11]

(5). ———— Where two out of several persons on their trial in a Court of Session on a joint charge pleaded guilty and made certain statements to the Court it was *held* that such statements could not be taken into consideration as evidence against the other accused persons, inasmuch as after pleading guilty the persons making those statements were no longer

ACT I OF 1872, s. 30.—(continued).

on the trial. **• QUEEN-EMPRESS v. PIRBHU AND OTHERS.**

[XV-111]

(6).—*Self incriminating.* In this case four persons were jointly tried before the Court of Session for murder. All the accused made statements before the Magistrate disavowing all complicity or share in the murder and directly fixing the guilt of the crime on their co accused. The Sessions Judge observing that the evidence of the witnesses examined for the prosecution, taken by itself, would be totally insufficient to establish the charge, and that under s. 30 of Act I of 1872 the statements of the accused were "admissible in evidence against their accomplices" convicted three of the accused. *Held* that the statements were not admissible in evidence under s. 30 as they did not amount to confessions. *The Queen v. Mohesh Biswas* (10 B. L. R., 453, 455) *The Empress v. Ganraj* (I. L. R., 2 All. 444.) *Noor Bux Khan v. The Empress* (I. L. R., 6 Calc., 279) followed. **EMPRESS v. KALWA.**

[I-135]

(7). ———— *Held* that a "confession" within the meaning of s. 30 of Act I of 1872, is a full and unqualified admission of the guilt of the person making it and of a character to justify his conviction upon it. The statements, therefore, of a person being jointly tried with another person for the same offence can not be taken into consideration against such other person, under that section, unless such statements are of the nature indicated above. *Empress v. Ganraj* (I. L. R., 2 All., 444) followed. *In re* PETITION OF KAPUR SINGH.

I-20

EMPRESS v. KADIR BAKSH AND OTHERS.

V-303

(8). ———— *Corroboration.* *Held* that statements made by persons who are being jointly tried with the accused can not at all events be put higher than the evidence of an accomplice. For my part, I doubt if they can be put so higher. They therefore stand as much in need of corroboration as those of the latter. *Held* further that it is not sufficient for a witness's story to be corroborated as to the details of the crime, but it must be corroborated in particulars directly connecting the accused person with the commission of the crime itself. **EMPRESS v. PIRIA AND OTHERS.**

[V-320]

(9). ———— *Held* that the confession of an accused person though "evidence" against another who is being jointly tried with him, is not conclusive evidence or evidence of weight and must be used with the nicest caution and discrimination as the principle is novel and not wholly unattended with danger. (It is not evidence under the English law.) **EMPRESS v. SUNDRA.**

[IV-38]

ACT I OF 1872. — (continued),

(1). — s. 31. — Although an admission contained in a deed of sale or made before the Registrar, that the consideration has been received by the vendor is *prima-facie* evidence against the person making it, it raises only a rebuttable presumption, the weight of which varies with the special circumstances of each case. *SHEO RATAN v. ABDUL KARIM AND ANOTHER.*

[IX-142]

(2). — Recital in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *MANOHAR SINGH v. SUMVITA KUAR.*

[XV-93]

(1). s. 32. — In a trial upon a charge of murder, it appeared that the deceased shortly before her death was questioned by various persons as to the circumstances in which the injuries had been inflicted on her that she was at that time unable to speak, but was conscious and able to make sign. Evidence was offered by the prosecution and admitted by the Sessions Judge to prove the questions put to the deceased and the signs made by her in answer to such questions. *Held* by the Full Bench (Mahmood, J. dissenting) that the questions and the signs taken together might properly be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act and were therefore admissible in evidence under that section.

Per Straight, J., that the statements by the witness as to their impressions of what the signs meant were inadmissible, and should be eliminated; but that assuming that the questions put to the deceased were responded to by her in such a manner as to leave no doubt in the mind of the Court as to her meaning, it was not straining the construction to hold that the circumstances were covered by s. 32.

Per Mahmood, J., that the expression "verbal statements" in s. 32 should be confined to statements made by means of a word and words, and that the signs made by the deceased, not being verbal statement in this sense, were not admissible in evidence under that section. *EMPRESS v. ABDULLAH.*

[V-78]

(2) s. 32 (5). — *Held* that sub-section 5 of s. 32 (Evidence Act) does not relate to statements made by interested parties in denial in the course of litigation of pedigrees set up by the opposite parties. *NARAINI KUAR v. CHANDI DIN AND ANOTHER.*

[VII-118]

(1). — s. 33. — *Evidence given in a former judicial proceeding.* *Held*, following *Empress v. Mulu*, (I. L. R., 2 All., 646,) that admitting evidence given in a former judicial proceeding under s. 33 Evidence Act, without explaining the

ACT I OF 1872, s. 33. — (continued).

reasons for so doing was an irregularity which should not be repeated. *EMPRESS v. FATEH ALI.*

[I-38]

(2). — In an inquiry before a committing Magistrate one of the accused persons absconded as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that one of the accused had absconded, and the evidence was recorded against the prisoners then under trial only. In a subsequent trial of the accused who had absconded held that the depositions given in the former trial either before the Magistrate or the Sessions Judge were not admissible in evidence under s. 33 of Act I of 1872, that the former were admissible under s. 512 Cr. P. C. *EMPRESS v. ISHRI SINGH.*

[VI-257]

(3). — *Held* that evidence given by witnesses since deceased on occasions when neither the accused was present and had an opportunity to cross examine nor was it proved to the satisfaction of the Court that the accused was absconding and that there was no immediate prospect of arresting him, could not be used against a person subsequently put on his trial for participation in the offence in respect of which such witnesses had given evidence. *Queen Empress v. Ishri Singh* (I. L. R., 8 All. 672) and *Queen Empress v. Makhni*, (W. N., 1890, p. 100), referred to. *QUEEN EMPRESS v. SAKIB SINGH.*

[XVI-182]

(4). — At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination-in-chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans who were opposed to the Hindus in the same riot. These copies were read out to the witnesses who were then cross-examined by the prisoners, without any objection by them as to the procedure. *Held* that although the procedure was irregular, the irregularity was cured by s. 537, Cr. P. C. and s. 167 of Act I of 1872. *EMPRESS v. NAND RAM AND OTHERS.*

[VII-143]

(5). — One of the pleas raised in this appeal from a conviction under s. 411, P. C. was that the examination of the complainant and his wife by commission was unjust and prejudicial to the accused. Their evidence, as a matter of fact, was taken by commission in the course of the preliminary enquiry. The Judge admitted it in evidence under s. 33 of Act I of 1872, and he

ACT I OF 1872, s. 33.—(continued)

issued a supplementary commission for the examination of complainant. The grounds on which he admitted the evidence taken at the preliminary enquiry are stated to be that the presence of the witnesses could not be obtained without an amount of expense which, under the circumstances of the case, he considered unreasonable, also the inconvenience to the witnesses, and the fact that their evidence does not concern the accused personally. *Held* that inconvenience to witnesses was no ground allowed under s. 33, Act I of 1872, and the evidence of the witnesses was of the utmost moment; and as regards the ground of expense that the amount, Rs. 500, was not unreasonable under the circumstances of the case considering that the entire case rested on the evidence of those witnesses. **EMPRESS v. BURKE.**

[IV-55]

(1).—s. 34.—[*Entries in account books.*] *Held* that under s. 34 of Act I of 1872, entries in books of account regularly kept in the course of business are not alone, without any external evidence corroborating the same, sufficient evidence to charge any person with liability. **GHASITA AND ANOTHER v. RANCHORE AND OTHERS.**

[I-65]

(2).—In a suit to recover money due upon a running account the plaintiff produced his account books, which were found to be books regularly kept in the course of business, in support of his claim. One of the plaintiffs gave evidence as to the entries in the account books, but in such a manner that it was not clear whether he spoke from his personal knowledge of the transactions entered in the books, the entries in which were largely in his own handwriting, or simply as one describing the state of affairs that was shown by the books. He was cross-examined, but no questions were asked him to show that he was not speaking as to his personal knowledge. *Held* that the evidence given as above should be interpreted in the manner most favorable to the plaintiff and might be accepted in support of the entries in the plaintiffs' account books, which by themselves would not have been sufficient to charge the defendants with liability. **DWARKA DAS AND ANOTHER v. SANT BAKSH AND OTHERS.**

[XV-235]

s. 35.—A certificate of guardianship is not evidence of minority when the question of minority is in issue. *Satish Chunder Mukhopadhyaya v. Mohendra Lal Pathak* (I. L. R., 17 Cal., 849) followed. **GUNJRE KUAR v. ABLAKH PANDE.**

[XVI-158]

s. 40.—One S died in 1865. On the 2nd August, 1866, M mother of S K, alleging that she was the lawfully married wife of S, sued for her share in S's estate. She made defendants to the

ACT I OF 1872, s. 40.—(continued).

suit her own son S K, B another widow of S, C his daughter and A his nephew who claimed to have been adopted by S. She admitted the right of all the defendants except A. The defendants with the exception of S K denied the marriage of plaintiff with S. In this suit the court held it proved that M was lawfully married to S, and S K was his legitimate son and that A was not the adopted son of S and gave M a decree. Subsequently C died and A got his name entered in the revenue papers in her stead. Thereupon S K brought the present suit against A in which he alleged that as C's half brother, he, and not A, was her heir. A set up as a defence, *inter alia*, to this suit that M was not S's wife, nor was S K his son. *Held* that under s. 40 of Act I of 1872, the previous judgment was relevant as showing *res judicata*. *Gujju Lall v. Fattah Lall* (I. L. R., 6 Cal., 171) referred to. **SHADAL KHAN v. AMIN-UL-LAH KHAN.**

[I-137]

s. 43.—*Held* that in a suit for pre-emption where the defence set up by the defendants mortgagors was that the defendants mortgagees themselves were co-sharers in the village and therefore the mortgage to them gave no right of pre-emption to the plaintiff, a judgment obtained in a previous litigation between the present plaintiff on the one hand and the defendants mortgagees on the other, declaring the present defendants to be co-sharers in the village was a piece of evidence in his favor the effect of which could only be annulled by rebutting evidence, showing either that the judgment had been set aside or had otherwise become inefficacious. **AMMAN BIBI AND OTHERS v. MURARI DAS.**

[VIII-212]

s. 50.—The appellant in this case was convicted of adultery with P the wife of D. The evidence as to the marriage of P and D was as follows:—P herself said: "I am the lawful wife of D *kachi*. Don't know when I was married. I live with my husband the last three or four years." D said: "P is my wife, I was married to her eight years ago. She was never married before. She has lived with me for four years; no children yet." *Held* that having regard to the distinct provisions of s. 50 of Act I of 1872, the evidence was altogether insufficient for a conviction. **EMPRESS v. KALLU.**

[III-1]

s. 54 (expl. 1).—In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named), "in a similar manner." This latter

ACT I OF 1872, s. 54 (Expl. 1).—(continued).

accusation was contained in a postscript. The complaint filed by the complainant in the Court of the Committing Magistrate, and the charge-sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case, the defendant pleaded not guilty, and also relied on the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice towards the complainant. *Held*, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first as relating to the question what was the reputation which the defendant was said to have injured, and secondly because it must be gathered from the document complained of as a whole whether it showed a malicious intention or not. **LAIMAN v. HEARSEY.**

[V-272]

s. 60.—*Held* that the deposition of a Police Inspector that one T (since dead) in the capacity of an approver had in 1870 made statements implicating the present accused was not admissible in evidence against the accused. **EMPRESS v. JITA SINGH.**

[I-164]

s. 63 (c).—The plaintiff in this case sought in support of his case to put in a copy, on plain paper purporting to have been transcribed from a certified copy of a decree which the defendants admitted was once in their possession and subsequently destroyed by fire. *Held*, with reference to the provisions of s. 63, Act I of 1872, that, there being no evidence proving that the copy produced by the plaintiff had been compared with the original decree, the copy was not admissible in evidence inasmuch as it could not be regarded either as primary or as secondary evidence of the contents of the original decree. **RAM PRASAD AND OTHERS v. RAGHUNANDAN PRASAD.**

[V-160]

(1) —s. 65.—*Certified copy no proof of the genuineness of the original.* In a suit for declaration of title to immovable property, the plaintiff tendered in evidence what purported to be a certified copy of a petition signed by the defendant in certain revenue proceedings. The defendant denied the genuineness of the document, and execution of the original was not proved. *Held* that s. 79 of the Evidence Act (I of 1872) would not authorize the presumption that the original document was executed by the defendant; that s. 65 carried the case no further, as it was still necessary to prove execution of the original and that it was in fact what, judging from the copy, it purported to be; and that the

ACT I OF 1872, s. 65.—(continued).

document was not admissible in evidence. **REHLO v. JAI DEVI.**

[IX-190]

(2).—s. 65 (b).—Plaintiff in this case sued upon the copy of a bond for Rs. 1,200, on the ground that the original was in the possession of the defendants, who refused to give it up. Defendants, admitted the execution of the bond but pleaded that it was with the plaintiffs who did not produce it because the obligor had made certain payments which were endorsed on its back. The Court of first instance gave the plaintiff a decree. The lower appellate Court dismissed the plaintiff's claim, *in toto*, on the ground that he must either produce the original or prove that it was lost and the plaintiff has done neither. *Held* that as the defendants had admitted the execution of the bond there was no obligation on the plaintiff to produce the original. The lower appellate Court was therefore wrong in dismissing the suit. **KARORI MAL v. GHU-LAM AKHBAR AND ANOTHER.**

[IV-78]

CHUNNI KUAR v. UDAI RAM.

[III-221]

(3).—In this suit for the cancellation of a lease for the breach of its conditions, the plaintiff produced a copy of the lease as evidence of its existence and of its conditions. The original of the lease was in the possession of the defendant, who did not deny its existence nor raise any objection to the admission of the copy as evidence of its existence, or of the conditions of the lease. The original Court dismissed the suit on its merits but the lower appellate Court dismissed the appeal on the ground that the original of the lease had not been produced. *Held* that, as the defendant had the original in his possession and had not objected to the terms of it, nor to the admission of the copy, s. 65 (b) of Act I of 1872 applied and the case must be determined by the lower appellate Court on the merits. **ATA HUSAIN v. JAMNA DAS.**

[I-9]

(1).—s. 66.—*Notice to produce.* A press copy letter, addressed to the defendant, was tendered in evidence by the plaintiff for the purpose of proving the contents of the letter. No notice was given to the defendant to produce the original letter. *Held* that the press copy letter was inadmissible in evidence. **RAM DAS CHAKRABATI v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY LIMITED, CANNORE.**

[VII-34]

(2).—s. 66 (2).—In this suit for the redemption of a mortgage it was admitted by the defendants that the sum due under the mortgage-deed was Rs. 112 but it was pleaded that a further sum of Rs. 288 was due from the mortgagors and that until it was paid redemption could not be claimed. The mort-

ACT I OF 1872, 66 (2).—(continued).

gage bond was not produced, nor was the defendant called upon to produce it. The lower appellate Court held that at least the plaintiffs should have called upon the defendants to produce the mortgage-bond and that in default of its production, defendant's evidence as to the amount payable before redemption, should be preferred to that of the plaintiffs. *Held* that from the nature of the case the defendants must have known that it lay on them to produce their documents. The defence under the circumstances should be rejected and the appeal decreed. **SHEO SAHAI AND OTHERS v. SIDH GOPAL AND OTHERS.**

[I-92]

(3).—The decree appealed against, which was a decree for the redemption of a usufructuary mortgage, was impugned in second appeal on the ground that though there was a mortgage-deed actually written out the Court has based its findings upon secondary evidence consisting of witnesses and that such admission was in contravention of s. 65 of Act I of 1872, read with s. 66 of the same enactment. *Held* that as this was a case to which cl. (a) of s. 65 of Act I of 1872 and cl. (2) of s. 66 of the same Act applied, secondary evidence was clearly admissible. **SAHAI v. SHEODARSHAN.**

[VIII-147]

s. 68.—Scribe—Attesting witness. *Held* that the scribe of a mortgage-deed who had signed his name on the deed, and who at the same time was in a position to give evidence as to the execution of the deed, might be considered as an attesting witness within the meaning of s. 59 of Act No. IV of 1882, although there were also other witnesses to the same deed who had signed specifically as attesting witnesses. **MUHAMMAD ALI v. JAFAR KHAN.**

[XVII-146]

s. 74.—Statements duly recorded—Admissibility. In this case the accused were charged with a dacoity committed at Chawripura, a village on the borders of Gwalior. Certain of them having gone over into Gwalior territory were arrested and brought before the Magistrate of Bhind in Gwalior. That officer recorded their statements attesting each statement in the following words:—

"I believe that this confession was made without threat or coercion, and it was made in my presence and to my hearing. The person making it, having heard it read out to him, stated it as correct. It contains a full and true account of the statement made by him."

Each statement also bore the mark (by way of signature) of the person by whom it purported to have been made. Subsequently these same accused were handed over to the British authorities and were tried by the Sessions Judge of Mainpuri who rejected the confessions above referred to as inadmissible in evidence. The accused having appealed to the High Court

ACT I OF 1872 s. 74.—(continued).

it was held that each of the confessions recorded in the manner above described was admissible in evidence, certainly under s. 80 of the Evidence Act, and probably under s. 74 of that Act, as against the person by whom it was made. **QUEEN EMPRESS v. SUNDER SINGH AND OTHERS.**

[X-199]

s. 76.—Held by the Full Bench that in no case is an accused person entitled as of right to a copy of any statement recorded by a police officer in the special diary prepared under the authority of s. 172, Cr. P. C. **QUEEN EMPRESS v. MANNU.**

[XVII-174]

s. 79.—Certified copy no proof of genuineness of the original.

See s. 65, No. 1.

(1).—s. 80.—Statements duly accorded—Admissibility.

See s. 74.

(2).—Attestation of deposition.—Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory. S. 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a Committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in the evidence at the trial before the Court of Session under s. 500 Cr. P. C. **Empress v. Riding (I. L. R., 9 All., 720)** referred to. **QUEEN EMPRESS v. POHP SINGH AND ANOTHER.**

[VIII-11]

(1).—s. 91.—H lent Rs. 85 to *D* on a pledge of moveable property. *D* repaid *H* Rs. 40; and at the time of the repayment acknowledged orally that the balance of the debt, Rs. 45, was still due by him. It was agreed between the parties at the same time that *D* should give *H* a promissory note for such balance, and that such property should be returned to him. Accordingly *D* gave *H* a promissory note for Rs. 45, and the property was returned to him. *H* subsequently sued *D* on such oral acknowledgment for Rs. 45, ignoring the promissory note, which being insufficiently stamped was not admissible in evidence. *Held* that the existence of the promissory note did not debar *H* from resorting to his original consideration nor exclude evidence of the oral acknowledgment of the debt. **HIRA LAL v. DATADIN.**

[I-144]

ACT I OF 1872, s. 91.—(continued).

(2).—The plaintiff in execution of his decree arrested one of the retainers of the Maharajah of Betia. On that the Maharajah requested the plaintiff to discharge his servant from arrest offering to pay the amount of the debt. The Maharajah executed a promissory note in favor of the plaintiff and the plaintiff released the servant, but the promissory note was not stamped. This suit was brought by the plaintiff to recover the amount of the decree against the representative of the Maharajah, on the contract. The Court below dismissed the suit holding that the action could not be maintained without the note being put in evidence and the plaintiff was prohibited by the Stamp Act from putting it in evidence. *Held* that the suit could be maintained apart from the note. The note was only a collateral security for the fulfilment of the promise made by the Maharajah. **GOBARDHAN DAS v. THE MAHARAJAH OF BETIA.**

[VII-49]

(3).—This is an action to recover money secured by mortgage. The defendants pleaded part payment, and tendered in evidence an unregistered receipt for Rs. 280, which shows that Rs. 280 was paid by them on account of the mortgage-debt. They also gave oral evidence to prove that the sum of Rs. 280 had been paid on account of the mortgage-debt. *Held* that if the receipt required registration oral evidence was admissible to prove the payment acknowledged by the receipt. **NABI BAKISH v. MEWA RAM AND ANOTHER.**

[VII-188]

(4).—Accounts were stated between B and D and a balance of Rs. 800 was found to be due from D to B. D gave B an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. B also made a note to the same effect in his account book. The instrument however was not properly stamped. B sued D for an instalment basing his claim on the note made in his account book at the time. *Held* that the agreement could not be proved by the note made in the account book but could only be proved by the promissory note. **BANARSI DAS v. BHIKARI DAS.**

[I-47]

(5).—An occupancy tenant relinquished his holding, and signed a memorandum of the relinquishment in a book kept by the landholder showing transactions between him and the tenant. The memorandum was not stamped or registered. *Held* that the relinquishment was not required by s. 91 of the Evidence Act to be in writing, but might be made verbally or in writing or by action, and so might be proved *alimunde* even if the memorandum were inadmissible in evidence, as to which the Court expressed no opinion. S. 95 (b) of the N.-W. P. Rent Act does not apply where the person claim-

ACT I OF 1872, s. 92.—(continued).

ing the lease is not a tenant in possession. **RAI SINGH v. VANSITTART.**

[IX-3]

(1). s. 92.—“*Between the parties to any such instrument.*”] The words in s. 92 of the Evidence Act (I of 1872) “between the parties to any such instrument” refer to the persons who on the one side and the other came together to make the contract or disposition of property, and would not apply to questions raised between the parties on the one side only, of a deed, regarding their relations to each other under the contract. The words do not preclude one of two persons in whose favour a deed of sale purported to be executed, from proving by oral evidence in a suit by the one against the other, that the defendant was not a real but a nominal party only to the purchase, and that the plaintiff was solely entitled to the property to which it related. A conveyed certain houses and premises to plaintiff and defendant jointly by a sale-deed. Plaintiff sued defendant for ejectment from the premises, alleging that he alone was the real purchaser, and that defendant was only nominally associated with him in the deed. *Held* that s. 92 of the Evidence Act will not preclude plaintiff from showing by oral evidence that he alone was the real purchaser, notwithstanding that the defendant was described in the sale-deed as one of the two purchasers. **MUL CHAND AND ANOTHER v. MADHO RAM.**

[VIII-127]

(2).—Contemporaneous agreement.—“*Possession in lieu of interest.*”] In this case there was a mortgage by which a fixed rate of interest was agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into the possession of the house in satisfaction of the interest. He was let into possession. *Held* that this was not a case under s. 92 Evidence Act, i. e., the oral agreement was not one which contradicted, varied, added to, or subtracted from the terms of the written agreement. It is merely a provision as to how the interest should be paid, i. e., by the occupation of the house. **BINDRABAN v. UMRAO SINGH AND ANOTHER.**

[VII-61]

RAM BAKSH v. DURJAN AND OTHERS.

[VII-65]

(3).—“*Contradicting etc, its, terms.—Jamog of interest.*”] Subsequent to the execution and registration of a bond, a *jamog* was made orally between the creditor and the debtor by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself, and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal

ACT I OF 1872, s. 92—(continued).

and interest agreed to be paid under the bond, alleging that he had never received any rents under the *jamog*. *Held* that whether or not the plaintiff could maintain a suit on the *jamog* against the tenants for the rent assigned to him in the Revenue Court, he could do so in the Civil Court, and the fact that the *jamog* was not in writing did not affect the question. *Ganga Prasad v. Chandrawati* (I. L. R., 7 All., 256) referred to. *Held* also that the *jamog* was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force, within s. 92, proviso (4), of the Evidence Act. *AUTU SINGH v. AJUDHIA SAHU*.

[VII-27]

(4).—s. 92 proviso. (1).—*Evidence to show that certain words had been omitted by mistake.* In this suit for money on a bond the only question was what was the rate of interest agreed upon between the parties. In the bond the rate of interest was entered as "one rupee a month." The plaintiff alleged the words "per cent." had been omitted by mistake. The defendant on the other hand contended that there had been no mistake, and that the rate of interest agreed was one rupee a month on the principal advanced. *Held* that evidence was admissible to show that the omission was accidental or intentional. *BISHESHAR SINGH v. BHAGWAN SINGH*.

[V-41]

(5). ———— *Non-payment of consideration—condition precedent.* A sued B for money lent on an instrument which recited that the borrower had taken the money and brought it into his own use. B called witnesses to prove that he had not received the money and that he had executed the instrument upon the understanding that it should not be binding on him unless a certain condition precedent was performed by A. *Held* that the evidence was not inadmissible under s. 92, Evidence Act. *KISHEN SAHAI v. CHANDI PRASAD, AND OTHERS*.

[II-93]

(6). ———— *Non-payment of consideration* The plaintiff stated that he sold a bond to the defendant for Rs. 1,575, that he was paid Rs. 1,200, that Rs. 375 were not paid and he sued for the same. The sale-deed recited that the consideration had been received in full; the detail of the item in dispute stood thus:—"Rs. 375 on account of money taken previously for private expenses." The plaintiff alleged that this sum was agreed to be paid after the money of the bond sold had been realized. *Held* that oral evidence was admissible to prove the allegation, proviso 1 to section 92, Evidence Act being applicable to the case. *SHADAT KHAN v. DULAGIR*.

[VI-58]

(7). ———— Section 92 of the Indian Evidence Act, 1872, will not debar a party to a contract in writing from show-

ACT I OF 1872, s. 92, proviso(1).—(continued).

ing, notwithstanding the recitals in the deed, that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner. *Hukum Chand v. Hira Lal* (I. L. R., 3 Bom., 159), *Lala Himmat Sahai Singh v. Llewellyn* (I. L. R., 11 Calc., 485), *Ram Bakhsh v. Durjan* (I. L. R., 9 All., 392) referred to. *INDARJIT v. LAL-CHAND AND ANOTHER*.

[XVI-16]

(8).—s. 92, proviso (2).—S L obtained, from the Court of the Subordinate Judge, a decree for Rs. 12,747-15 against B B, but his claim to interest on that sum was dismissed. He appealed to the High Court from the part of the decree disallowing interest. Before this appeal was decided, B B, in order to pay off the debts she owed to S L, amounting to Rs. 40,000, executed and registered a sale-deed in favor of S L by which she conveyed to him a part of her estate. One of the items of consideration set out in that deed was the decretal debt of Rs. 12,747-15, subsequently S L's appeal in the High Court was decided in his favor. The amount payable by B B under this decree was in July, 1884, a sum of Rs. 5,493-3-6. S L put this decree into execution. B B objected on the ground that the claim had been settled and extinguished by the sale-deed. Her objection was disallowed. Thereupon she brought the present suit for Rs. 5,493-3-6 as damages for breach of contract and fraud, on the allegation that as a part of the contract of sale, S L had agreed to withdraw his appeal from the file of the High Court. There was no mention in the sale-deed of any future or unascertained liabilities and not a word regarding the appeal pending in the High Court. *Held* that the plaintiff's claim besides being open to the objection that the oral agreement alleged could not be proved under s. 92 of Act I of 1872 had not been proved. The suit must therefore be dismissed. *SHAM LAL v. BANNI BEGAM*.

[VI-40]

(9). ———— *Mortgage—Sale.* The plaintiff and the defendants executed upon the same day two documents. One purported to be a deed of absolute sale of a certain estate by the plaintiff to the defendants. The other was an agreement by which the defendants covenanted, upon payment of a certain sum by a specified date, to reconvey the property sold by the first mentioned deed. *Held* that evidence was admissible *dehors* the documents to show that the intention of the parties was not to effect an out and out sale with merely a right of repurchase under certain conditions left on the vendor, but to constitute a mortgage by conditional sale or *bai-bil-wafa*. *BALKISHAN DAS AND OTHERS v. W. F. LEGGE*.

[XVII-109]

(10). ———— *proviso (4).*—Prior to the due date of a registered hypothecation bond securing

ACT I OF 1872, s. 92, proviso (4).—(continued).

Rs. 750 with interest, the obligor, the obligee, and a creditor of the latter, made an oral arrangement whereby Rs. 600 due by the obligee to his creditor was appropriated towards the discharge of the bond debt. In a suit by the obligor to recover the whole amount secured by the bond by enforcement of lien,—*held* that there was nothing in s. 92, proviso (4) of the Evidence Act (I of 1872) or in any provision of law to debar the obligor from proving by oral testimony that he satisfied and discharged the bond in whole or in part before due date. **THAKUR RAI v. GULZARI RAM AND OTHERS.**

[X-193]

(1).—s. 94.—*Evidence to show that certain words had been omitted by mistake.*

Sec s. 92, No. 4.

(2).—*Fasti year.—Evidence to show that agricultural year was meant.* Where in a mortgage-deed it was stipulated that the mortgage should not be redeemed "from 1287 Fasli, to 1298 Fasli for twelve years." *Held* that evidence was improperly admitted to show that the "Fasli year" alluded to was not the Fasli year as commonly understood, but the agricultural year. **SHEOBARAN SINGH AND ANOTHER v. BISHESHAR DAYAL SINGH AND OTHERS.**

[XII-236]

(3).—*Trust.* In 1868 one B executed an instrument which, after reciting that marriages had been arranged between his two daughters and the two sons of one B P, proceeded in manner following:—"I give" (certain land) "to B P the father of my sons-in-law as dower for the maintenance of my daughters: the said B P after the celebration of the marriages shall enter into possession of the said" (land) "as proprietor, and pay the Government revenue....I have therefore executed this document as a deed of dower." In 1880, after the death of B P, one of his sons sued his brothers, including the two who had married the two daughters of B, for the recovery of his share by inheritance alleging that the instrument was a deed of gift, and the land had passed thereunder to his father absolutely. *Held* that from the terms of the instrument it was apparent that B P was merely trustee for his daughters-in-law and that no evidence was admissible as to conduct subsequent to the execution of the deed by the parties to it for the purpose of explaining the meaning of that document. **CHANDRA DAI AND ANOTHER v. SEWADAT PANDEY.**

[II-54.]

(1). ss. 101-103.—*Onus.* In this case the plaintiffs, came into Court on the allegation that seventy years back they held the land in dispute as usufructuary mortgages, that ten years afterwards their possession became proprietary, that they have been wrongfully ousted, therefore the claim. The plaintiff did not produce the mortgage-deed. On the other hand the defend-

ACT I OF 1872, ss. 101-103.—(continued).

ants admitted the origin of the plaintiff's title as mortgages but denied the other allegations. *Held* that the admission did not shift the burden of proof on the defendants and that as the plaintiffs had not proved their case the suit must be dismissed. **HANUMAN AND ANOTHER v. RAM CHARITTA AND ANOTHER.**

[VII-51]

(2).—*Muhammadian brother and sister—Adverse possession.* *Held* that in a suit by a Muhammadan lady against her brother for possession of a share in a landed estate to which she had a good title of inheritance under the Muhammadan Law it was for the defendant to show that his possession was, for twelve years prior to the institution of the suit, adverse to his sister and not for the lady to show that she was in possession within twelve years next before the institution of the suit. **IZZATUNNISSA v. MUHAMMAD TAQI.**

[I-90]

(3).—*Suit for possession—Plea of adverse possession for over 12 years.* Where a suit for the recovery of the possession of immovable property is resisted by a plea of adverse possession for more than twelve years the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance, to give satisfactory *prima facie* evidence of his possession within twelve years of the suit. **Mohima Chunder Mozoomdar v. Mohesh Chunder Neogh (J. L. R., 16 Cal., 473) and Parmanand Misra v. Sahib Ali (J. L. R., 11 All., 438)** referred to **JAFAR HUSAIN AND ANOTHER v. MASHUQ ALI.**

[XII-55]

(4).—*Onus on the plaintiff—False defence—Burden shifted.* A brought this suit, for the value of a currency note alleged to have been stolen from him, against B and C the former of whom was alleged to have changed it with the latter. The suit against C was dismissed on the finding that he was a *bona fide* purchaser for value and without notice. Defendant B denied all knowledge of the note and he gave evidence to prove an *alibi*. The Judge disbelieving this evidence gave judgment against him. *Held* that though the burden of proof was on the plaintiff and he did not prove his case, defendant's giving evidence which proved to be false raised a violent presumption against him and thus proved the plaintiff's case. **MURLI DHAR v. CHHAJMAL.**

[VII-299]

(5).—*Suit on copy of a bond—Plea of payment.* The plaintiff in a suit on a bond for money accounted for not producing it by alleging that the defendant had stolen it. The defendant admitted the execution of the bond, but alleged that he had paid it. *Held* that the defendant was bound to begin and prove payment either by the production of the bond or

ACT I OF 1872, ss. 101-103—(continued).

other evidence or by both. *CHUNNI KUAR v. UDAI RAM.*

[III-221]

KARORI MAL v. GHULAM AKHBAR.

[IV-78]

(6).—*Suit on bond—Plea of limitation.* Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. If, when the plaintiff has proved his case, the facts show that the cause of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, he will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favor. The obligee of a bond, by which the obligor covenanted to pay the sum of Rs. 3,800 by annual instalments of Rs. 200, and in which it was also agreed that payments of the instalments should be endorsed on the bond, brought a suit against the obligor alleging default in payment, and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment. The bond showed on its face endorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year, that therefore the debt became due at an earlier date than that stated by the plaintiff, and that the claim was barred by limitation. *Held* that inasmuch as the defendant adduced no evidence to show that the latter instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed. *RADHA PRASAD SINGH v. BHAJAN RAI AND OTHERS.*

[V-202]

(7).—*Genuineness of document.* This was a suit for the cancellation of an instrument purporting to have been executed by the plaintiff in favor of the defendant. Plaintiff alleged it to be a forgery. Of the five attesting witnesses three were dead. The remaining two (who were examined by the defendants) denied their having witnessed the document. The Lower Court upon certain inferences of its own (*e. g.*, that the signature of one of the witnesses was proved to be in his handwriting, &c.) dismissed the suit. *Held* that as the burden of proving the genuineness of the document was solely on the defendant and as the witnesses put by him in the box completely broke down the suit should have been decreed, defendants were bound by the statement of their own witnesses. *HARDIAL v. RAM DAS AND ANOTHER.*

[IV-19]

(8).—*Fraud.* One *S*, brought a suit upon a bond against the husbands of *F* and

ACT I OF 1872, ss. 101-103—(continued).

appellant No. 2 on the 16th June, 1887. *S* obtained a decree in execution whereof he brought to sale certain property which he had caused to be attached before judgment, *i. e.*, on the 13th July, 1887, and purchased it himself. Subsequently he sold the property to *A*. *A*, upon endeavouring to obtain possession of the property was resisted by *F* and appellant No. 2 who claimed the property under a deed of transfer purporting to have been executed by their respective husbands in lieu of their dower on the 16th June, 1887. *A* thereupon brought the present suit against the appellants to set aside this deed of transfer, on the ground that it was fraudulent and collusive. The Lower Appellate Court, without any evidence of fraud decreed the plaintiff's claim holding that the deed was not real and genuine. *Held* that it lay on the plaintiff to prove fraud and as there was no evidence of fraud, the Court should not have inferred fraud from the mere execution of the deed. *FARIDUNNISSA AND ANOTHER v. ALADAD KHAN.*

[I-77]

(9).—*B* obtained a decree against one *S* and caused certain property belonging to *S* to be sold on the 20th September, 1879, and purchased it himself. In the meantime *S* had mortgaged the same property to *A* on the 31st July, 1878, who obtained a decree for the sale of the property and sought it to be put up for sale. *B* thereupon brought this suit against *S* and *A* to have it declared that the property was not liable to be sold on the allegation that the bond and decree of *A* were collusive. *Held* that the burden of proving fraud lay on the plaintiff *B*. *BISHEN SAHU v. ANMOLE PANDEY AND ANOTHER.*

[II-10]

(10).—*Held* that the ruling in *Sheodin v. Ganesh Lal*, (*N.-W. P.*, *S. D. A. Rep.*, 1859 p. 73) did not apply to a case where the endorsement of payments in satisfaction of the bond, and not the terms of the bond itself, were found to have been fraudulently altered by the obligee. In the present case the execution of the bond was admitted by the obligor and the only question in issue was as to the amount that had been paid in satisfaction of the bond. *KALLU MAL v. KALLU.*

[I-119]

(11).—This was a suit, under a sale-deed, for an orchard of grafted mangoes bearing in the village-papers No. 261 and comprising 6 bighas $4\frac{1}{2}$ biswas. The defendant vendor alleged that the deed conveyed an orchard of old country mangoes numbered 262 and known as *sonarwala*. In the deed, as originally drawn, the number, *jama* and area of the orchard sold were those of the orchard of grafted-mangoes; but the orchard was described as an old orchard of country mangoes. It appeared that the follow-

ACT I OF 1872, ss. 101-103.—(continued).

ing additions had been made to the deed:—In the margin of the body there was an addition describing the orchard sold as "near the sonarwala orchard" and in the second column of the detail at the foot of the deed the word "*paivandi*" had been inserted; and in the fifth column, the words "known as near the sonarwala" had been added. The copy of the deed in the registration office also contained these additions. The defendants alleged that these additions had been fraudulently inserted in collusion with the registration clerk. The Lower Appellate Court dismissed the suit on the ground that if the deed had been registered in its present state, it had been improperly registered; and if it was not in its present state when registered the additions were clearly fraudulent. *Held* that the Lower Appellate Court had not disposed of the case in a satisfactory manner. Improper registration by a Registrar could not afford any presumption of fraud against the parties to a deed, nor could fraud be imputed from the mere fact of a deed containing additions before some conclusions had been arrived at as to the circumstances under which they were made. The burden of proving fraud lay on the defendants. The case must be remanded for a finding on the issue when and by whom and under what circumstances the additions were made. *GIRDHAR LAL AND ANOTHER v. JAUNATUN-NISSA AND ANOTHER.*

[II-7]

(12).—Suit under s. 283 C. P. C.]

In proceedings under s. 278 of the Code of Civil Procedure, the objector pleaded that the property sought to be attached was his by virtue of a certain registered sale-deed. This objection was disallowed on the finding that the deed relied upon was fictitious. The objector then brought a separate suit to have the property declared not liable to be taken in execution; but he did not file the sale-deed in question or account for its non-production. *Held* that under the circumstances of the case it was in this instance for the plaintiff to prove that the deed he relied on was not fraudulent and collusive, as had been found in the previous proceedings. *Gobind Atma v. Sanjai (I. L. R., 12 Bom., 270)* referred to, *RAM NATH v. BINDRABAN.*

[VI-106]

(13).—One

L B the holder of a decree on a hypothecation-bond sought to execute his decree by bringing to sale certain immoveable property of his judgment-debtor. Thereupon one *R D* filed an objection based mainly on his (*R D*'s) possession of the property in question. The objector being on inquiry found to be in possession his objection was allowed, and *L B* brought a suit to establish his right to execute his decree against the property. The Court of first instance and the lower appellate Court found that the ancestors of the judgment-debtor and of *R D*'s mother were members of a joint Hindu

ACT I OF 1872, ss. 101-103.—(continued).

family and that they about one hundred years ago had partitioned the property held jointly by them. *Held* that in respect of that portion of the property which the defendant had not shown to have belonged to the ancestor through whom he claimed, it was for the plaintiff to show that his judgment-debtor had been in possession for some period within 12 years preceding the suit. *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi (I. L. R., 16 Cal., 473)* referred to. *RAM DIAL v. LAL BAHADUR.*

[XIII-60]

(14).—The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the court is bound in law to find in his favor and the mere happening of the accident is not sufficient proof of negligence. *S* hired a horse from *W*, and while it was in his custody it died from rupture of the diaphragm which was proved to have been caused by over-exertion on a full stomach. In a suit by *W* against *S* to recover the value of the horse, the defendant gave evidence to the effect that the horse became restive and plunged about, that he might then have touched it with his riding cane, that it shortly afterwards again became excited, bolted for two miles, and at last fell down and died. This evidence was not contradicted on any point, nor was any other evidence offered as to how the horse came to run away. There was evidence that the horse was a quiet one, that, for some time previously it had done hardly any work, that it was fed immediately before it was let out for hire, and that rupture of the diaphragm was a likely result of the horse running away while its stomach was distended with food. The Court of first instance held that the defendant was bound to prove that he had taken such care of the horse as a man of ordinary prudence would under similar circumstances have taken of his own property, that he must have used his whip freely, or done something else which caused the horse to bolt, and that in so doing he had acted without reasonable care, and had thus caused the animal's death. The court accordingly decreed the claim. *Held* by Edge, C. J., that if the burden of proof was originally upon the defendant, it was shifted by the explanation which he gave and which was neither contradicted nor *prima facie* improbable. *SHIELDS v. WILKINSON.*

[VII-44]

(15).—Suit for redemption—Burden of proving that the mortgage subsists.] In a suit

ACT I OF 1872, ss. 101-103.—(continued.)

for redemption of mortgage, where a plaintiff alleges that he is entitled to possession by reason of the determination of a mortgage, it is for him to prove (unless it is admitted) that he had, at the commencement of the suit, a subsisting title to the possession of the property, *i. e.*, a title not barred by limitation; and, with reference to s. 50(d) of the C. P. Code he should allege in his plaint facts showing that such right exists. A plaintiff in such suit is not entitled to succeed merely because the defendant fails to prove the case he sets up, unless the defendant's pleadings show that, on failure to prove a particular defence, the plaintiff must be entitled. *Parmanand Misr v. Sahib Ali* (W. N., 1889 p. 155) followed. *ZINGARI SINGH AND OTHERS v. BHAGWAN SINGH AND OTHERS.*

[IX-187]

(18). ———— If a plaintiff desires to obtain a decree for possession from a person who obtained possession under him or his predecessor as mortgagee the plaintiff must prove that he is entitled to redeem the mortgage, or that the mortgage has determined by payment of the whole mortgage debt or by the happening of some other event which would determine the right of the mortgagee to hold possession as against his mortgagor. *LAL MAKUND SINGH AND OTHERS v. JAGESHAR SINGH.*

[XIV-167]

(17). ———— *Twelve year's adverse possession—Question of title—Mortgage.* There is a clear distinction as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve year's adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve year's adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property. *Philips v. Philips* (L. R., 4 Q. B. D., 127), *Dawkins v. Lord Penrhyn* (L. R., 4 App. Cas., 58), *Radha Gobind Roy Sahab v. Inglis* (7 Calc. L. R., 364), *Rao Karan Singh v. Rajah Baker Ali Khan* (L. R., 9, I. A., 99), *Rajah Kishan Dutt Panday v. Narendar Bahadur Singh* (L. R., 3 I. A., 85), *Ram Chandra Apaji v. Balaji Basupal* (I. L.

ACT I OF 1872, ss. 101-103.—(continued.)

R., 9 Bom., 137) and other cases referred to. *PARMANAND MISR v. SAHIB ALI AND OTHERS.*

[IX-155]

(18). ———— *Suit for redemption—Execution admitted—Consideration in dispute—Recital in mortgage-deed.* Certain properties were mortgaged to *M A* and then to *M S* and *H A* and were then again sold to *M A. M A* brought this suit to redeem the mortgage to *M S* and *H A*. In this suit the amount of the mortgage money which the defendant had advanced was in dispute. *Held* that the burden of proving such of the items as were acknowledged by the mortgagor by his execution of the mortgage-deed to have been received was *prima facie* on the plaintiffs but the fact that the other two items had not been paid at the time of the execution of the mortgage-deed or until long afterwards, threw the burden in respect of these two items on the defendants. *MUHAMMAD ALLAH-YAR KHAN AND ANOTHER v. MUHAMMAD SAMI-UD-DIN KHAN AND OTHERS.*

[VII-245]

(19). ———— *Suit by mortgagee on his mortgage against a person other than the mortgagor—Recital in mortgage deed.* Where in a suit by a mortgagee on his mortgage the defendant put the plaintiff to proof of the title under which he claimed:—It was *held* that the mere production of the deed of mortgage which had been thus questioned and the fact that the deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under s. 59 of Act No. III, 1877, were not sufficient to shift the burden of proof on to the defendant. Recitals in an instrument may be conclusive and are always evidence against the parties who make them, but they are not evidence against third parties. *Brajeshware Peshakar v. Budhanudda* (J. L. R., 6 Calc., 268) referred to. *MANOHAR SINGH v. SUMIRTA KUAR.*

[XV-93]

(20). ———— *Suit for possession of land sold—Execution admitted but consideration denied—Suit brought eight years after sale.* In a suit for possession of land alleged to have been purchased under a registered deed of sale, the defendant-vendor admitted the execution and registration of the deed, but denied receipt of consideration. The deed was dated in January, 1876, and the suit was instituted in 1884. It was found that the vendor had been in possession during the whole of that period. The plaintiff produced no evidence in proof of the payment of consideration. *Held* that although under ordinary circumstances the party to a deed duly executed and registered who alleges non-payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of eight years, combined with the continuous possession of the vendor, favoured the allegation of the latter that

ACT I OF 1872, ss. 101-103.—(continued.)

possession had been withheld because of the non-payment of consideration, and raised such a counter presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. *Held*, therefore, that in the absence of such evidence, and of evidence to explain the fact of the plaintiff being out of possession, the suit failed. **ACHOBANDIL KUARI v. MAHABIR PRASAD.**

[VI-242]

(21).—The defendants in a suit on a bond admitted the execution of the bond, but denied that they had received, as the bond recited they had at the time of its execution, the consideration for it. The Court of first instance instead of calling on the defendants to establish the fact that they had not received the consideration for the bond, as it ought to have done under the circumstances, irregularly allowed the plaintiff to produce witnesses to prove that the consideration for the bond had been paid at the time of its execution. The evidence of these witnesses proved that the consideration of the bond had not been paid at the time of execution, and that, if it had been paid at all, it had been paid at some subsequent time. The plaintiff did not give any further evidence to establish such payment, and the Court of first instance, without calling on the defendants to establish their defence, dismissed the suit. The lower appellate Court held that the defendant should have been required to begin under the circumstances, and reversed the decree of the Court of first instance, and gave the plaintiff a decree. *Held* that, although the plaintiff ought not to have begun, yet as he had done so, and his witnesses had proved that the consideration for the bond had not been paid as admitted in the bond, a new case was opened up, in which the *onus* was shifted back to the plaintiff to establish that he had, not at the time alleged in the bond, but at some subsequent time, paid to the defendants the consideration for the bond. Also that it was doubtful, having regard to the provisions of s. 578 of Act X of 1877, whether it was competent for the lower appellate Court to reverse the decision of the Court of first instance; but even if it were, the lower appellate Court should not have ignored what had taken place, but should have dealt with the case in appeal in the shape it came before it. **MAKAND AND OTHERS v. BAHORI LAL.**

[I-86]

(22).—*Auction sale—Sir.* The defence to this suit for possession of certain plots of land on the ground that the plaintiff had purchased them at an auction sale was, that the lands were *sir* holding of the defendant and he became exproprietary tenant of them. *Held* that the burden of proving that the lands were at the time of the execution sale, defendant's *sir* land lay on him. **HARI DAS AND ANOTHER v. GHANSHAM NARAIN.**

[IV-77]**ACT I OF 1872, ss. 101-103.—(continued.)**

(23).—*Rent—Payable in kind or in coin.* The appellant, a zemindar, sued the respondent, his tenant, for the value of his share of the produce of certain land, by way of rent, alleging that the rent was paid in kind. The respondent alleged that the rent of the land in question was payable in coin, admitting, however that it had formerly been paid in kind. *Held* that the burden of proving the change alleged by the respondent lay on him. **GRISH CHANDER v. GANPAT NARAIN.**

[II-113]

(1). s. 106. *Onus—Suit by recorded co-sharer against lambardar.* In a suit under section 93 (b) of the N.-W. P. Rent Act (XII of 1881), by a recorded co-sharer against a *lambardar* for his recorded share of the profits of a *mahal* in which the plaintiff seeks to make the defendant liable under s. 209 not only for the profits which the latter has actually collected but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. No general rule can be laid down as to the quantum of evidence which the plaintiff in such a case must give in order to shift the burden of proof on to the defendant. The mere production by the plaintiff of the *jamabandi* or rent-roll is not sufficient to cast upon the defendant the necessity of proving that there was no negligence or misconduct in him. Section 106 of the Evidence Act (I of 1872) does not apply to such a case. So *held* by the Full Bench, Mahmood, J. dissenting.

Held by Mahmood, J., *contra*, that the production of the *jamabandi* by the plaintiff in a case where he claims his share of the profits according to the *jamabandi* and the *lambardar*-defendant pleads that the actual collections fell short of the *jamabandi*, established a *prima facie* presumption in favor of the plaintiff so as to throw upon the defendant, with reference to s. 106 of the Evidence Act, the necessity of proving circumstances which rendered it impossible for him to collect the profits according to the *jamabandi*. **MUHAMMAD INAYAT HUSAIN v. MUHAMMAD KARAMAT ULLAH.**

[X-131]

(2).—*Quantum of evidence.* When the quantum of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence. *Raja Kishen Dutt Ram Panday v. Narendar Bahadoor Singh* (L. R., 3 I. A. 85) and *Parmanand Misr v. Sahib Ali* (I. L. R., 11 All. 438) referred to. **JANKI PRASAD v. RAI PARTAP CHAND BAHADUR.**

[XVII-129]

(3).—*Suit for pre-emption.—Purchase money.* In a suit to enforce the right of pre-emption in which the plaintiff impugns the correctness of the price stated in the instrument of

ACT I OF 1872, s. 106.—(continued.)

sale, although the burden of proof *prima facie* is on him to show that the property has in fact been sold below the stated price, yet very slight evidence is ordinarily sufficient to establish his case, and when such case is established, it rests upon the defendants, the vendor and vendee, to prove by cogent evidence, that the stated price is the correct one. *Raja Kissen Dutt Ram Panday v. Narender Bahadur Singh*, (L. R. 3, I. A. 85) followed, *Sheikh Mahomed Nurul Hasan v. Sheikh Hyder Baksh* (W. R., Jan. July, 1864, p. 304) and *Sheikh Golam Ayhya v. Joy Mungal Singh*, 15 W. R., 435) referred to. BHAGWAN SINGH AND OTHERS *v.* MAHABIR SINGH AND OTHERS.

[II-213]

(1).—ss. 107 & 108.—*Missing person.*] The rule contained in s. 108 of the Evidence Act governs the case of a Muhammadan who has been missing for more than seven years, when the question of his death arises in cases to which, under the provisions of s. 24 of Act VI of 1871 (Bengal Civil Courts Act) the Muhammadan Law is applicable. *Held* that the rule of Muhammadan Law that a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth is, according to the most authoritative texts of the Muhammadan Law itself, a rule of evidence, and not of "succession, inheritance, marriage, or caste, or any religious usage or institution," within the meaning of s. 24 of Act VI of 1871. MAZHAR ALI AND OTHERS *v.* BUDH SINGH AND ANOTHER.

[IV-333]

(2). ————— Ss. 107 and 108 of Act I of 1872, taken together, do not lay down any rule as to the exact time of the death of a missing person. Whenever the question as to the exact time of death arises, it must be dealt with according to the evidence and circumstances of each case, when the death is alleged to have occurred at any time not affected by the presumption of law as to the seven years. Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow the second came into sole possession of the property and so continued till her death in 1882. At that time *S* was still living and *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884 a purchaser from *S* claimed possession of the whole estate and was resisted by *D* on the ground that the estate had on the death of the second widow devolved on his father and *S* jointly and *S* was not competent to alienate it. *Held* that the question whether the defendant's father was living at the time of the second widow's death in 1882 was a question of evidence governed by ss. 107 and 108, Act I of 1872; that under the circumstances the defendant's father must be held to have died prior to the time referred to. *Mazhar Ali v. Budh Singh* (I. L. R., 6 All., 297); *Guru*

ACT I OF 1872, ss. 107-108.—(continued.)

Das Roy v. Moti Lal Roy (6 Bom., I. L. R. Ap. 16) *Janmajay Mozundar v. Keshab Lal Ghose* (2 B. L. R. A. C. 134); and *Parmeshwar Rai v. Bisheshwar Singh* (I. L. R., 1 All., 53) referred to. DHARUP NATH *v.* GOBIND SARAN. GOBIND SARAN *v.* DHARUP NATH.

[VI-239]

(1). s. 110.—*Long and continuous possession.*] It is usually for the plaintiff who seeks ejectment to prove his title. But where he proves himself to have peaceably enjoyed possession for a considerable time, the person who has recently dispossessed him has to meet the presumption of law that the plaintiff's possession indicates his ownership. In a suit for possession of immoveable property and other reliefs, it was proved that the plaintiff and his predecessors in title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant. The defendant alleged, but failed to prove, that the plaintiff had paid him rent as tenant-at-will of the premises. The lower appellate Court, upon the finding that the plaintiff's possession was that of a licensee modified the first Court's decree, which had allowed the claim in full. *Held*, with reference to s. 110 of the Evidence Act, that although in the first instance the burden of proving his title was on the plaintiff, it was shifted by his proving long undisturbed possession; that the defendant's failure to prove the alleged payment of rent went far to prove that the plaintiff's possession was adverse; and that the Court below, in acting upon the theory that such possession was that of a licensee, had wrongly set up for the defendant a defence which he had not set up for himself. LACHHO AND ANOTHER *v.* HAR SAHAL.

[VIII-33]

(2). ————— *Mortgage — Ownership — Possession.*] A usufructually mortgaged a moiety of a village to *B* who sub-mortgaged it to *C*. *C* who had purchased the other half thus acquired possession of the whole village. This suit was brought by a representative of *A* for possession of a share of the mortgaged moiety of the village (apparently on the allegation that the mortgage-money had been paid up from the usufruct). *C* set up as a defence that he had been in possession for forty years as a proprietor, having purchased the rights of *A* and *B*. *Held* that notwithstanding the general presumption of the law to the contrary in this case it having been clearly proved that *C* had been in possession of the entire village for forty years without interference and that two settlements were made with him, a very strong presumption of proprietorship arose in favor of *C*, which being un rebutted the plaintiff's suit must fail. GULABI KUAR *v.* PIR BAKHSI.

[I-69]

(3). ————— *Mortgage — Redemption.*] On the 18th July, 1829, one *J S* mortgaged by condi-

ACT I OF 1872, s. 110.—(continued.)

tional sale to one *M B* half of *Manza* Amor, and the whole of *Manza* Sachawli, for a loan of Rs. 4,500. The mortgage had not been foreclosed at the time of the present suit. On the 25th July, 1839, the son of the original mortgagee assigned by way of sale either his right as mortgagee or the mortgaged property itself, (the nature of the transaction being a matter in dispute in the present suit), to one *F A*. Similarly, on the 25th May, 1846, *F A* assigned by way of sale either his right as mortgagee in Amor or that village itself to one *R* and certain other persons. In 1872-1874 certain of the heirs of *J S* endeavoured, by application to the Revenue authorities, to obtain a recognition of their title. They were unsuccessful and were referred for their remedy to the Civil Court. On the 1st July, 1879, the heirs and representatives of *J S* brought the present suit against the heirs and assignees of *F A* for possession of the mortgaged property and for mesne profits, on the allegation that the mortgage loan with interest had been satisfied from the usufruct. The lower appellate Court dismissed the suit as barred by the terms of art. 134, sch. (ii) of Act XV of 1877. In second appeal it was contended on behalf of the appellants (plaintiffs) that the suit was not so barred, as neither in the transaction of 1839 or of 1846 was the property sold, but the mortgagee's right only. On behalf of the respondent, it was contended, *inter alia*, that the suit was so barred, as it was the property which was conveyed; that the burden of proving that it was not the property which was so conveyed was (s. 110 of Act I of 1872) on the appellants, and they had failed to satisfy it; and that with reference to the proceedings of 1873 before the Revenue authorities the suit was barred by the terms of art. 45, sch. (ii) of Act XV of 1877. The Court observed that it was admitted that art. 134, sch. (ii) of Act XV of 1877 refers to full "*dominium*" only, and not to a sale of the rights of a mortgagee. The omission of the words *bona-fide* which appeared in the corresponding article (No. 134) of sch. (ii) of Act IX of 1871 had no significance. The words were probably omitted because, with reference to the provision of s. 18 of the Act, they would have been superfluous. The suit was not barred by the terms of art. 45, sch. ii of Act XV of 1877. All that the settlement officer decided was that the claim of the petitioners was not cognizable in his department. *Kristo Dass Kundoo v. Ramkant Roy Chowdhry*, (I.L.R., 6 Cal., 142.) With reference to art. 134, sch. (ii) of Act XV of 1877, the burden of proving the nature of the transfers of 1839 and 1846 (whether, that is, they were transfers of the complete "*dominium*" or of the mortgagee's rights only) lay on the respondents. They were in possession and claimed to hold as owners, but the *onus* was thrown back on them by the fact that the documents which were the original basis of their title (the deeds, namely, of conditional sale of 1829) had been produced by the appellants, and were not open to question,

ACT I OF 1872, s. 110.—(continued.)

and by the fact that foreclosure of the mortgage was not pretended. The suit was by the heirs and representatives of a proved mortgagor to recover possession of immoveable property; it was brought well within the limitation provided by art. 148, sch. (ii) of Act XV of 1877; and it was for the respondents therefore to show that the appellants were put out of Court by the operation of another article of the schedule or otherwise. *KAMTA PRASAD AND OTHERS v. BAKAR ALI AND OTHERS*.

[I-122]

(1). s. 111.—*Fiduciary relation—Pardah ladies.* A suit was brought upon a bond purporting to have been executed on behalf of two Muhammadan *Pardahnashin* ladies by their husbands, and to charge their immoveable property. The bond was compulsorily registrable, and it was presented for registration by a person who professed to be authorised by a power-of-attorney in that behalf. The only proof given by the plaintiff that this power-of-attorney was executed by the ladies, or with their knowledge and consent, was the evidence of a witness who deposed that he was not personally acquainted with them nor did he know their voices, that he went to their residence, that there were two women behind a *pardah* whom the executors of the bond said were their respective wives, and that these women acknowledged they had made the power-of-attorney. There was nothing to show that the ladies had ever benefited in any way from the money advanced under the bond. *Held* that even if the ladies behind the *pardah* were in fact the two defendants, this evidence would not be enough to bind them, and that it was for the plaintiff, who sought to bring their property to sale on the strength of a transaction with them, to show that they were free agents in the matter, and, having a clear knowledge of what they were doing, accorded their consent to it. *Buzloor-Ruhcem v. Shamsunnissa Begum* (11 Moo. I. A., 551), *Ashgar Ali v. Debroos Banoo Begum* (I. L. R., 3 Cal., 524) and *Sudisht Lal v. Sheoharal Koer* (I. R. 8 Ind. Ap., 39) referred to. *BEHARI LAL v. HABIBA BIBI AND OTHERS*.

[VI-91]

MARIAM BIBI v. SAKINA AND OTHERS.

[XI-213]

(2). — *Guru and chela—Gift.* In a suit under section 39 of the Specific Relief Act (I of 1877) for cancellation of a deed of gift executed by the plaintiff in favor of the defendant, the plaintiff was a *Chattri* by caste, well advanced in years, and the defendant was his *guru* or spiritual adviser, a Brahmin held in high consideration in the locality where he resided. The gift comprised the whole of the plaintiff's property, and the only reason for its execution was the plaintiff's desire to secure benefits to his soul in the next world, and his having heard the defendant recite the holy book or *Bhagwal*.

ACT I OF 1872, s. 111.—(continued.)

Almost immediately after the execution of the deed the plaintiff repudiated it and sued for its cancellation on the ground of fraud. *Held* that having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift, the absurdity of the reason alleged for it and the principle recognized by s. 111 of the Evidence Act (I of 1872), the burden rested upon the defendant to show that the transaction was made without undue influence and in good faith; and, in the absence of such proof, the plaintiff was entitled to obtain cancellation of the deed. *Sital Prasad v. Parbhu Lal* (I. E. R., 10 All., 535) referred to. *MANNU SINGH v. UMA DAT PANDE AND OTHERS*.

[X-56]

(3). — This was a suit to set aside a deed of gift executed by the plaintiff and a Hindu widow aged ninety-two years in favor of her spiritual adviser without any consideration. *Held* that the burden of proving the perfect *bona fide* of the transaction was on the defendant. *MURARI v. RADHA BIBI*.

[IV-184]

(4). — *Held* that where a fiduciary or quasi-fiduciary relation had existed Courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it. *SITAL PRASAD v. PARBHU LAL*.

[VIII-221]

(1). — s. 114—*Presumption—Highway*.] There is a presumption that a highway or waste land adjoining thereto belongs to the owners of the soil of the adjoining land. *NIHAL CHAND v. AZMAT ALI KHAN*.

[V-56]

(2). — *Acknowledgment—Wajib-ul-arz*.] The question in this case was whether an acknowledgment in writing of the title of one Ganga Din and one Budhai to certain shares and their right of redemption was signed for one Thakur Das, who claimed under the mortgagee, by his authority. The acknowledgment was contained in a document in a settlement record styled "*Tajrik Thok Patti*." This document purported to have been drawn up and attested in the presence of the Settlement Officer on the 11th June, 1842. Opposite to the name of Thakur Das, *lambardar*, in respect of a two anna share, it was recorded in the column of remarks that Thakur Das stated that one-third belonged to Ganga Din and one-third to Budhai, both of whom had long ago mortgaged their shares to his father, that his father and he had been in possession, and that their shares would be restored on payment of the mortgage-money. At the end of the document there were a number of signatures including that of Thakur Das, *lambardar*, all of which were in the same handwriting and did not pretend to be autographs. Another document in the settlement record

ACT I OF 1872, s. 114.—(continued.)

bearing the signature of Thakur Das showed that he was illiterate, as it was recorded in that document that his name was written by Ram Charan, *patwar*. *Held* that, under the circumstances it might be fairly presumed that the statement contained in the "*Tajrik Thok Patti*" was signed for Thakur Das by his authority. *DUNNI AND OTHERS v. BASTI*.

[I-40]

(3). — *Illustration (a) Theft*.] *Held* that the presumption mentioned in s. 114 of Act I of 1872, illustration (a) is not confined to theft but applies to all crimes. *EMPRESS v. AJUDHIA*.

[II-224]

(4). — *Recent possession—Presumption*.] The prisoner had been convicted of theft. This conviction was based on the fact that he had been found in possession of the stolen property, a cooking utensil. The property had been stolen fourteen months previously to its being found in the prisoner's possession. The Court observed that the long interval between the theft and the discovery of the utensil was sufficient to dissipate the ordinary presumption against the prisoner (s. 114 of Act I of 1872). *EMPRESS v. KESHUB DAT*.

[I-155]

EMPRESS v. DALLUA.

[VII-281]

(5). — *C* was found in possession of property stolen in a dwelling-house immediately after the theft. There was no direct evidence against him. He was convicted under s. 379, P. C. of simple theft, such conviction being based upon presumption arising from his possession of the property. The Court observed that, if the presumption of recent possession was to hold good in the present case, and it was to be inferred that the accused was the thief, then the presumption was equally strong that he stole the property in the dwelling-house. The conviction therefore should have been under s. 380 P. C. *EMPRESS v. CHANDAN*.

[II-143]

(6). — (b). — *A* sued his tenant *B* for the value of his share of the produce of certain land by way of rent, alleging that the rent was paid in kind. *B* alleged that it was payable in coin admitting however that it had formerly been paid in kind. *Held* that the burden of proof lay on the defendant *B*. *GRISH CHANDER v. GANPAT NARAIN*.

[II-113]

(7). — (e). — Before the deposition of a medical witness taken by a Committing Magistrate can, under s. 509 of the Cr. P. C. be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record or be proved by the evidence of

ACT I OF 1872, s. 114 Ill. (e).—(continued).

witness to have been taken and attested in the accused's presence. It should not merely be presumed, under s. 114, illustration (c) to have been so taken and attested. *EMPRESS v. RIDING AND OTHERS.*

[VII-228]

EMPRESS, v. POHP SINGH AND ANOTHER.

[VIII-11]

(8).—Where a person had in fact for a period of more than a year been exercising all the functions of a Judge of the High Court in virtue of an appointment purporting to be made by the Lieutenant-Governor of the N.-W. P. and Chief Commissioner of Oudh under sanction of Her Majesty's Secretary of State for India, it was held that, though, so far as the validity of the appointment depended upon the provisions of ss. 7 and 16 of the 24 and 25 Vic., Chap. 104, the appointment was apparently *ultra vires*. It must nevertheless be presumed that the appointment was legally made in the exercise of some power unknown to the Court vested in the Secretary of State for India. *QUEEN EMPRESS v. GANGA RAM.*

[XIV-39]

(9).—(f).—*Course of business.*

See s. 16.

(10).—(g).—*Presumption raised by non-production of document.* A deed executed in 1812 became the subject of litigation resulting, on the 17th May, 1813 in a decree the effect of which was to create a usufructuary mortgage of rights and interests in two villages. In 1871, the purchaser of a portion of the mortgagor's rights, alleging that the mortgage-debt had been liquidated from the usufruct, sued to recover possession of the property. The mortgagees resisted the claim for possession, on the grounds that, prior to the execution of the deed in 1812, the mortgagor's ancestor had granted to their own ancestor a *gawanda-dari* right, under which a fixed *jama* of Rs. 121 was payable by them in respect of the lands in the village, that what was mortgaged was not the lands, but only the right to receive the fixed *jama*, and that the fact that the mortgage money had been liquidated from the *jama* did not entitle the plaintiff to oust them from possession. It appeared that the alleged *gawanda-pattar*, the original mortgage-deed, and the decree of the 17th May, 1813 were at one time in the defendants' possession, but the defendants alleged that all three documents were destroyed by fire in 1872. *Held* that the destruction or loss of the three documents alleged by the defendants to have been destroyed not being proved, their non-production placed them under the recognized prohibitions of the law of evidence, and subjected them to the presumption recognized by illustration (g), s. 114 of the Evidence Act, that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. *Held* also that inasmuch as the plaintiff was no party to

ACT I OF 1872, s. 114 Ill. (g).—(continued).

the alleged *gawanda-pattar* nor to the mortgage of 1812, nor to the litigation which resulted in the decree of the 17th May, 1813, and could not therefore be taken to be in a position to produce these documents or to prove their contents by secondary evidence and inasmuch as the circumstances established a *prima facie* case in his favour the burden of proof in regard to the existence of the alleged *gawanda-dari* tenure lay upon the defendants, who, whilst in a position which would involve their being in possession of the documents above-mentioned, and whilst admitting such possession up to the year 1872, had failed to prove either their destruction or their contents by secondary evidence such as could be relied on. *Rajah Kishen Dutt Ram Pauday v. Narendar Bahadoor Singh, (L. R., I. A. 85) referred to. RAM PRASAD AND OTHERS v. RAGHUNANDAN PRASAD.*

[V-180]

(11).—The plaintiffs were owners of an hotel and the defendant of certain adjacent property. The two properties had at one time been united and at that time the Manager of the hotel on behalf of the owner used to obtain water for the purposes of the hotel from a certain spring by means of a road which ran over what subsequently became a portion of the defendant's land. There was another but smaller and much less convenient path from the hotel to the spring. The plaintiffs became owners of their portion of the property in 1886 and the defendant of his portion in 1888. The plaintiffs continued to use the above-mentioned road until 1889, when the defendant refused to permit them any longer to use the road. The plaintiffs accordingly sued the defendant for a declaration of their right of way over the said road. They refused to put in evidence the deed under which they became owners of the hotel property. *Held* upon these facts that the plaintiffs were not entitled to the right claimed. Owing to the non-production by the plaintiffs of their title-deed it must be presumed as against them that the evidence afforded thereby would be unfavorable to their claim. *H. WUTZLER AND ANOTHER v. MAJOR SHARPE.*

[XIII-151]

(1). s. 115.—*Reversioner—Joining another in mutation.* On the death of a Hindu *R L*, his son and grandson, *R*, having predeceased him, his widow *P* was recorded as the proprietor of his estate. On *P*'s death the name of *R*'s widow *K* was recorded as the proprietor, the rightful heir being *S*, brother's son of *R L*. Upon this *S* and one *B P* brother's great-grandson of *R L* jointly applied to have the name of *K* expunged and their own names recorded. In the same year they, *i. e.*, *S* and *B P* joined in confirming a mortgage of the estate by *P*. *Held* that by these admissions of *S* the heirs of *S* were estopped from denying the title of *B P* to the estate. *RAMPHAL LAL, AND OTHERS v. ILACHI KUAR AND ANOTHER.*

[II-98]

ACT I OF 1872, s. 115.—(continued).

(2).—*Sale by Hindu widow—Award—Reversioners.*] The widow of a separated Hindu executed a deed of sale of a certain share in the offerings of a Hindu temple, and the deed purported to pass the whole interest in the share and contained a recital that the sale was made to enable the widow to discharge her husband's debts. Subsequent to the sale, an arbitration, to which the vendee was not a party, took place between the widow, and certain other persons, and the award gave to those persons the one-third share which remained with the widow, and decided that the deed of sale should be treated and considered as a good transfer of the other two-thirds. *Held* that the award confirmed and ratified the title and act of the widow vendor, and that the vendee, though not a party to the award, could rely on it as estopping the other parties from denying his vendor's title as between them and her, and as an answer to any case which they might set up in question of his title. *SRI GOBIND v. GANESH AND OTHERS.*

[X-78]

(3).—*Reversioner attesting alienation by widow.*] The nearest reversioner to the estate of a deceased Hindu signed, as a marginal witness, a deed of sale executed by the deceased's widow, and purporting to convey the estate for legal necessity. It was found that in doing so, he consented to the transfer. Subsequently he brought a suit to have it declared that his reversionary interest was not affected by the sale. *Held* that he was estopped from asking for such a declaration. *MOHAR MISR v. BRISHAMBHAR MISR AND OTHERS.*

[VIII-294]

(4).—*Hindu widow recording name of daughter how far bound by her act.*] On the death of a Hindu the name of his daughter *G*, with the permission of his widow *A*, was recorded in the Collector's register, on his estate. *B* subsequently sued *G* for such estate as an adopted son of the deceased as well in virtue of a gift said to have been made by him. *G* confessed judgment and *B* obtained a decree. Thereupon *A* brought the present suit against *B* claiming the estate as the widow of the deceased, denying that *B* was his adopted son and alleging that the decree had been fraudulently obtained. *Held* that there was nothing to operate as an estoppel against her. *SARUPI v. NATHU.*

[I 10]

(5).—*Hindu widow—Admission of adoption.*] *A* a Hindu widow admitted in Revenue Court that her husband *X* adopted *B* as his son and prayed that his name be recorded in the place of his father. She further stated that *B* was in possession of the estate. Subsequently the daughters of *X* brought a suit against *A* and *B* for a declaration that *B* was not the adopted son of *X* and got a decree. This suit was then brought by *A* against *B* for possession of the property. *Held* that she was estopped from

ACT I OF 1872, s. 115.—(continued).

denying the adoption of *B*. *DURGA v. KHUSHALO.*

[II-97]

(6).—*Selling property, as that of—Subsequent denial of his title.*] *A* the recorded proprietor of a share of a *mahal* sued *B* the *lambar-dar* for his share of the profits of the *mahal*. *B* pleaded adverse enjoyment for over twelve years. It appeared that in 1872, *i. e.*, within the twelve years *B*'s predecessor in interest had caused the disputed property to be sold in execution of his decree against *X* as his property. This same share was purchased by *A*. *Held* that *B* was estopped from denying that in or before 1872 *X* was in possession of the share. *RUP RAM AND OTHERS v. BADRI PRASAD AND OTHERS.*

[II-116]

(7).—*Mortgage by person not the owner—Subsequent purchase.*] In 1871, *M*, the mortgagee of certain property, styling himself the owner of it, mortgaged it to *S*. In 1875 *M* became the owner of such property by purchase. In 1877 such property was put up for sale in execution of a decree against *M*, and *A* purchased it. *S* subsequently sued *M* and *A* to enforce the mortgage of such property to him by *M*. *Held* that, inasmuch as, if *S* had at any time sued *M* to enforce such mortgage after he had become the owner of the mortgaged property, and before *A* had purchased it, *M* would have been estopped from denying the validity of such mortgage, and as there was nothing fraudulent in such mortgage, and *A* had purchased with a knowledge of the facts, after *M* had become the owner, *A* was estopped from denying the validity of such mortgage, and the mortgaged property was liable in his hands to *S*'s claim. *SIRI RAM v. ALI BAKSH.*

[I-77]

(8).—*Mortgage by trustee—Suit to set it aside.*] On the 10th February, 1872, one, *S R* mortgaged to the plaintiff an undefined one *biswa* share out of three *biswas* owned by him. On the 20th March, 1877, *J P* and *G P* brought to sale in execution of money decrees against *S R* two out of those three *biswas*, which two *biswas* were purchased by the defendant. The sale was confirmed on the 23rd April, 1877. Out of the proceeds of that sale Rs. 1,464-14-9 were appropriated by the plaintiff in part-satisfaction of his mortgage. On the 16th April, 1877, the plaintiff sued the auction-purchaser for sale of one *biswa* in satisfaction of his mortgage. *Held* that even if it could be shown (which it could not) that the particular *biswa* mortgaged to the plaintiff was one of those which had passed into the defendant's possession, the plaintiff was estopped by his previous conduct from suing to bring it to sale under his mortgage. *JHINKA v. BALDEO SAHAI.*

[XII-98]

ACT I OF 1872, s. 115.—(continued).

(9).—A trustee, alleging that the trust property, consisting of land, was his own property, mortgaged it. The mortgagee took the mortgage in good faith, for valuable consideration, and without notice of the trust. The mortgagee obtained a decree against the trustee for the sale of the land, and the land was sold in execution of that decree. The trustee subsequently brought a suit to recover the land from the purchaser on the ground that it was trust property and that he had no power to transfer it. To this suit none of the beneficiaries under the trust were parties. *Held* that the plaintiff was estopped by his conduct from recovering possession of the land. *GULZAR ALI v. FIDA ALI.*

[III-182]

(10).—*Attestation as witness.* *Held* that a person can not simply by attesting a document (will) be held to have acquiesced in the recitals thereof so as to be estopped from denying it. *RAMSARUP AND OTHERS v. KISHEN SAHAI.*

[III-142]

(11).—*Decree-holder applying to bring in a representative estopped from denying such character.* Where a person brought on the record at the instance of the decree-holder as the representative of a deceased judgment-debtor was, on his own application, struck off as not being such representative and the decree-holder did not contest the order striking him off:—*held* that the decree-holder, on an appeal by such person as to costs which had been disallowed him was estopped from pleading that the appellant was not a representative of the deceased judgment-debtor and therefore not entitled to appeal. *THE BANK OF UPPER INDIA, LD. v. BISHAN DYAL.*

[XII-10]

(12).—*Sale of occupancy holding—Consent of zamindar.* Under a deed dated in 1879, the occupancy-tenants of land in a village sold their occupancy-rights, and the *zamindars* thereupon instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the *zamindars* had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants. *Held* by the Full Bench that s. 115 of the Evidence Act implies that no declaration, act, or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendees were misled by the fact that the *zamindars* were consenting parties to the sale-deed; that they could not plead ignorance that the deed was unlawful and void; that it had not been shown that they acted

ACT I OF 1872, s. 115.—(continued).

upon the *zamindar's* agreement to take no action, so as to alter their position with reference to the land; and that, under these circumstances, the *zamindars* were not estopped from maintaining that the sale-deed was invalid. *Held* also that the *zamindars* having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court. The judgment of Oldfield, J. (*I. L. R.* 7 *All. p.* 515) reversed, and that of Mahmood J.; (*I. L. R.* 7 *All. p.* 512) affirmed. *JHINGURI TEWARI AND OTHERS v. DURGA AND OTHERS, DURGA AND ANOTHER v. JHINGURI AND OTHERS.*

[V-260]

(13).—Appeal from an order passed by the Commissioner of the Agra Division, dated the 25th of May, 1892, in a case of contesting notice of ejectment under s. 39, Act No. XII of 1881. *Held* that the distinct admission of occupancy right and consent to its sale in satisfaction of a decree on the part of a landholder estopped him from issuing a notice of ejectment under s. 36 against the purchaser of the holding. *DHARAJIT v. BHAJAN LAL.*

[XIII-192]

(14).—*Mutation in-favour of Muhammad dān brother alone—Act of sister not intentional.* One S died leaving three sons and one daughter (Hasrat, the plaintiff in this case). In the Revenue papers the names of the three brothers only were recorded after the death of S which happened more than twelve years ago. The brothers executed a sale deed in favour of Gobardhan (the defendant), Hasrat thereupon brought this suit for the recovery of her share of the ancestral property. *Held* that she was not estopped by s. 115 (Evidence Act) as her act was not intentional. *GOBARDHAN SAHU v. HASRAT.*

[VII-110]

(15).—*Act upon such belief.* Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem. *Held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of Act I of 1872 or by any principle of equitable estoppel from afterwards suing on his own account for redemption. *MUHAMMAD SAMI-UD-DIN KHAN v. MANNU LAL AND OTHERS.*

[IX-136]

ACT I OF 1872, s. 115—(continued).

(16).—*Offering a bid.*] A decree-holder at a sale in execution of his decree purchased a *zamindari* share belonging to his judgment-debtors. Afterwards, in execution of a subsequent decree held by another person, the same with other property was again put up for sale. Prior to the sale, the subsequent decree-holder applied to the officer conducting it, stating the fact of the sale and purchase under the previous decree, and requesting that the sale should be confined to a portion of the judgment-debtors' interest which had not been already sold. This application was disallowed, and the whole interest of the judgment-debtors put up for sale, and the prior decree-holder, who was present, made a bid. Ultimately, however, a portion of the property was withdrawn, and the remainder only was sold, including part of the property sold in execution of the prior decree. The prior decree-holder did not bid again. Afterwards the prior decree-holder brought a suit for a declaration that the share which he had purchased at the sale in execution of his decree was not affected by the auction-sale in execution of the subsequent decree. *Held* that the plaintiff was not estopped from claiming such a declaration by his conduct in bidding at the sale at which the defendant had purchased, inasmuch as it could not be said that by bidding he meant to show that he had no title to the property or had waived his title, or that he had encouraged the defendant to purchase, or had power to forbid the sale. *Rai Seeta Ram v. Kishun Dass* (N.-W. P., H. C. Rep., 1868, p. 402), *McConnell v. Mayer* (N.-W. P., H. C. Rep., 1870, p. 315), *Agrawal Singh v. Faujdar Singh* (8 Calc., L. R., 346) and *E. Solano v. Ram Lall* (7 Calc., L. R., 481) distinguished. *GHERAN v. KUNJ BEHARI AND OTHERS.*

[VII-48]

(17).—*Partition.*] In this case *A* one of the four sons of *H* hypothecated a 20 *biswas* of *mausa N* to the defendant who obtained a decree on the hypothecation bond and attached the 20 *biswas* in execution of the decree. *B* another son of *H* objected to the attachment under s. 278 on the ground that the property was ancestral to which he was jointly entitled. His objection failing in the execution department he brought this suit for the same relief. The defendant pleaded that the estate of *H* had been partitioned and the *mausa* in dispute had been allotted exclusively to *A*. The lower Court found that an agreement of partition had been executed but that it was defective on account of the daughters of *H* not having joined in the partition deed. *Held* that the plaintiff having been one of the parties to the partition it does not lie in his mouth to object to it. *PHUL CHAND v. ABDUL MAJID.*

[V-53]

(18).—*Omission—Equitable acquiescence.*] When a person took a permanent lease of a cultivatory holding direct from the *zamindar*

ACT I OF 1872, s. 115—(continued).

without making any inquiries as to who were the cultivators and on what tenure they held; and where, the permanent lessee having commenced to build, one of the tenants subsequently brought a suit in ejectment against him. *Held* that the lessee should by the knowledge that the land was a cultivatory holding have been put on his guard and have made inquiries as to the exact condition of the title, and not having done so the doctrine of equitable acquiescence could not be applied. *BISHESHAR v. MUIRHEAD.*

[XII-36]

(19).—*Acquiescence—Zamindar not suing for three years for removal of tree.*] The fact that a *zamindar*, who was entitled to claim the removal of certain trees planted by a tenant without his consent, omitted for the space of three years from the planting thereof to sue the tenant for their removal amounts to no such estoppel by acquiescence as would prevent the *zamindar* from successfully suing for the removal of such trees at any time before the expiry of the period of limitation applicable to such a suit. *AHMAD HUSAIN KHAN v. PHOPI.*

[XI-186]

(20).—*Silence in previous litigation.*] The appellants sued the respondent and one *J*, as the legal representatives of their father on a mortgage executed by the father, obtained a decree, caused the rights and interests of the father in the house in dispute to be sold and themselves became the purchasers. The respondent subsequently brought the present suit against the appellants to establish his right to $\frac{1}{4}$ of a moiety of such house on the ground that such house was ancestral property and that under Hindu Law he was entitled to such share. *Held* that there was not any estoppel to the maintenance of the suit as in the former litigation the respondent was not a party on his own account but as the legal representative of his father. *MAKUND RAM AND OTHERS v. AJUDHIA PRASAD.*

[II-51]

(1).—**s. 116.**—This was a suit for the recovery of a house and Rs. 4-4 as rent thereof, on the allegation that it was lent to the defendant at a monthly rental and the defendant had executed a *kabulyat* in favor of the plaintiff. The defendant on the other hand denied the plaintiff's title to the property and their own tenancy. Previous to this suit plaintiff had brought another suit for recovery of rent and obtained a decree. In that suit it was found as a fact that the defendant had actually executed the *kabulyat*. *Held* that the defendant having been adjudged a tenant in the former suit that question was *resjudicata* and that being so the defendants are estopped under s. 116, Evidence Act, from denying the title of the plaintiff at the

ACT I OF 1872, s. 116—(continued).

beginning of the tenancy. *CHHADAMMI v. PAR-BATI AND ANOTHER.*

[IV-274]

(2).—The rule of law which prohibits a mortgagee or tenant from disputing his mortgagor's or landlord's title does not bar the mortgagee or tenant from showing that the title of his mortgagor or landlord under which he entered has determined. Hence where a tenant at fixed rates who, having mortgaged his fixed rate holding by a usufructuary mortgage and put the mortgagee in possession, was ejected by the *samin-dar*, subsequently sued the mortgagee, who had remained in possession after his mortgagor's ejection, for redemption, it was held that the mortgagee could plead successfully that the mortgage had determined by the ejection of the mortgagor. *NAKCHEDI BHAGAT v. NAKCHEDI MISR AND OTHERS.*

[XVI-90]

s. 118.—Child of tender years—Oath. The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established. Having regard to the language of the Oaths Act (X of 1873) a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require. *Queen-Empress v. Maru* (*J. L. R.*, 10 *All.*, 207) referred to. In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and, in answer to questions put by the Sessions Judge, he said that he worshipped *Devi* and understood the difference between truth and falsehood, "that he did not know what would be the consequences here or hereafter of telling lies, but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation. *Held* that there was nothing in the law to sanction this procedure on the part of the Judge. The High Court required the attendance of the boy and of the accused, and, having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred. *QUEEN EMPRESS v. LAL SAHAI.*

[IX-65]

ACT I OF 1872, s. 118—(continued).

QUEEN EMPRESS v. MARU AND ANOTHER.

[VIII-86]

s. 121.—Examination of magistrate—Privilege. A Sessions Judge, finding in the course of a trial as regards the examination of the accused person taken by the Committing Subordinate Magistrate, that the provisions of s. 346 of Act X of 1872 had not been fully complied with, summoned the Committing Magistrate and took his evidence that the accused person duly made the statement recorded. The Magistrate of the district objected to this proceeding of the Sessions Judge, contending that it was "contrary to law." The Sessions Judge referred the question whether or not his proceeding was contrary to law to the High Court.

Per Stuart, C. J., Pearson, J., Oldfield, J., and Straight, J. That the privilege given by s. 121 of Act I of 1872 is the privilege of the witness, *i. e.*, of the Judge or Magistrate of whom the question is asked: if he waives such privilege or does not object to answer such question, it does not lie in the mouth of any other person to assert the privilege: the reference, the objection not having been taken by the Subordinate Magistrate but by the Magistrate of the district, should be answered accordingly.

Per Spankie, J. That a Sessions Judge, while trying a case, cannot compel a Committing Magistrate to answer questions as to his own conduct in court as such Magistrate. *EMPRESS v. CHIDDA.*

[I-37]

s. 125.—Held that the High Court was not competent to compel a Magistrate to disclose the name of the informer who had caused the petitioner to be prosecuted for false information. *IN THE APPLICATION OF MAKHAN LAL.*

[VII-301]

s. 126.—The consent required by s. 126 of the Evidence Act to render communications between pleader and client admissible as evidence must be expressly given on each separate occasion when such evidence is wanted. The fact that a pleader has been permitted in a civil suit to make certain disclosures cannot be construed into any sort of consent to the examination of such pleader on the same matters in a criminal trial arising out of the civil suit. *QUEEN EMPRESS v. GUL KHAN.*

[X-172]

s. 132, proviso.—The word "compelled" in the proviso to s. 132 of Act I of 1872 applies only where the court has compelled a witness to answer a question; and not to a case where the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused. *QUEEN EMPRESS v. MOSS AND OTHERS.*

[XIV-23]

ACT I OF 1872,—(continued).

(1).—s. 133.—*Accomplice—Corroboration.*] Held that a conviction proceeding on the uncorroborated testimony of an accomplice, though legal, was contrary to the practice of the Courts in England and India. *EMPRESS v. GAMHIRA AND OTHERS.*

[II-13]

EMPRESS v. BALDEO.

[I-164]

EMPRESS v. BUDHU.

[I-18]

EMPRESS v. KURE AND OTHERS.

[VI-65]

EMPRESS v. GOBARDHAN.

[VII-156]

EMPRESS v. HARDEO DAS.

[IV-286]

EMPRESS v. KALUA AND ANOTHER.

[IV-314]

(2).—The law in India, as expressed in s. 133 and s. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not *unlawful*; but experience shows that it is unsafe, and hence it is the practice of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, and, when trying a case with a jury, to warn the jury that such a course is unsafe. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated not only as to one but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration. *R. v. Webb* (6 *C and P*; 595); *R. v. Dyke*, (8 *C and P*; 261); *R. v. Addis*, (6 *C and P*; 388); and *R. v. Wilkes*, (7 *C and P*; 272) referred to. The possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property. In the trial of *R, S, and M*, upon a charge of murder, the evidence for the prosecution consisted of (i) the confession of *P*, who was jointly tried with them for the same offence, (ii) the evidence of an accom-

ACT I OF 1872, s. 133—(continued).

plice, (iii) the evidence of witnesses who deposed to the discovery in *R's* house of property belonging to the deceased, and (iv) the evidence of witnesses who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found. Held that there was no sufficient corroboration of the statements of the accomplice or of the co-confessing prisoner *P*. *EMPRESS v. RAM SARAN AND OTHERS.*

[V-311]

(3).—Held, following the grounds explained in *Empress v. Ram Saran* (*W. N.*, 1885, p. 311,) that it would be unsafe to convict the appellant on the only evidence of an accomplice, *EMPRESS v. IMDAD KHAN.*

[VI-7]

s. 134.—Held that the uncorroborated evidence of the complainant in a case, if believed, was sufficient for a conviction. *EMPRESS v. SARFARAZ ALI AND OTHERS.*

[V-264]

s. 145.—If the special diary is used by the Court to contradict the Police officer who made it or by the Police officer who made it to refresh his memory, the accused person or his agent has a right to see that portion of the diary which has been referred to for either of these purposes, that is to say, the accused person or, his agent is entitled to see the particular entry which has been referred to and so much of the diary as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry so used, but no more. The accused person or his agent is not entitled to see the special diary under any other circumstances. In all other respects, except in the cases mentioned, the diary and all entries in it are absolutely privileged. *QUEEN EMPRESS v. MANNU.*

[XVII-174]

s. 154.—Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness was thereupon placed in the witness-box by counsel for the defence, it was held that counsel for the defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination, with the permission of the Court, if the witness proved himself a hostile witness. *QUEEN EMPRESS v. ZAWAR HUSEN AND OTHERS.*

[XVII-229]

ACT I OF 1872,—(continued).

s. 157.—Although a report of the commission of an offence made at a *dhana*, or the deposition of a witness previously made in another case in which the accused is a different person, may be used in a criminal trial to corroborate or cross-examine a witness, such reports or depositions are no evidence of the existence of the facts of which they make mention. *QUEEN EMPRESS v. RAM SUKH AND OTHERS.*

[XVII-47]

s. 161.—*Special diary—Refreshing memory by Police officer—Accused entitled to see.*

See Act I of 1872 s. 145.

s. 167.—At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination-in-chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans who were opposed to the Hindus in the same riot. These copies were read out to the witnesses, who were then cross-examined by the prisoners without any objection by them as to the procedure. *Held* that although the procedure was irregular, the irregularity was cured by s. 167 of Act I of 1872. *EMPRESS v. NAND RAM AND OTHERS.*

[VII-143]

ACT IX OF 1872 (Contract).

(1).—s. 2 (d).—*Consideration.*—*H D* and *S D*, two brothers, constituted a joint Hindu family owning considerable landed property. *H D* having incurred heavy personal debts, the two brothers in 1879 united in applying to have their property taken over by the Court of Wards. This was done, and on the 17th of June, 1889, while such property was still under the management of the Court of Wards, the two brothers entered into an agreement whereby *H D* remained as manager of the property with an allowance of Rs. 12,000 *per annum* for his support, but ceded to his brother absolutely and unconditionally all his proprietary interest in the family property, and all power to make the family property liable in any way for the payment of his debts. On the 6th of October, 1889, the Court of Wards released the property freed from the liabilities imposed upon it by *H D*. In 1891 one *B D* obtained in the Court of the Subordinate Judge at Agra a money decree against *H D*. *H D* died in the following year, and, subsequently to his death, *B D* sought to execute his decree against *S D* as representative of *H D* by attachment of property in the hands of *S D*; *S D* objected to the attachment and his objection was allowed. *B D* appealed, and on this appeal it was held that having regard to the agreement of the 17th of June, 1889, above referred to, the property in question could not be attached as the property of *H D*. The said agreement was not bad for want of consideration; the consideration being that at the request of his brother, which must be presumed from the cir-

ACT IX OF 1872, s. 2 (d)—(continued)

cumstances of the case *S D* had agreed to place his interest in the property under the management of the Court of Wards, and even if this were not so, the agreement would be good either under s. 25, Cl. (2) or under s. 70 of Act No. IX of 1872. *BITHAL DAS v. SHANKAR DAT DUBE.*

[XV-57]

(2).—*Withdrawal of prosecution.*—One *D* (*B* and *C*'s father) executed a bond in favor of *A*. *C* committed some breach of trust in respect of the money subject of the bond and was prosecuted by *A* for the same. On the day fixed for trial *A* agreed to withdraw the prosecution on *B*'s executing a surety bond to secure the payment of the bond executed by *D*. The bond was executed and the prosecution withdrawn but subsequently the High Court ordered his trial to be proceeded with. This suit was brought by *A* to enforce the surety-bond. *Held* that the consideration for the bond having failed the bond was bad for want of consideration. *HET RAM v. DEBI PRASAD.*

[I-2]

(3).—*Failure of.*—A certain firm gave its creditors jointly, and not severally, a mortgage on certain immoveable property as security for the payment of the debts due to them by the firm, the consideration for such mortgage being a promise by all the creditors not to sue the firm for their debts for a certain time. Before the expiration of such time several of the creditors sued for their debts. Subsequently several of the creditors brought separate suits against the firm to enforce the mortgage in respect of their debts. *Held* that, the consideration for the contract of mortgage, *viz.*, the forbearance of all the creditors not to sue for their debts for a fixed time, having failed, the firm was discharged from liability on the mortgage. *SIDH GOPAL v. AJUDHIA NATH AND ANOTHER.*

[III-75]

(4).—*Payment—Uncertified under s. 258 C. P. C.*—The consideration for a mortgage consisted partly of the amount of two decrees held by the mortgagee against the mortgagor. The mortgagee having sued to enforce the mortgage, the mortgagor pleaded failure of consideration as a bar to the enforcement of the mortgage. This plea was based on the allegation that the mortgagee had not certified the adjustment of the decrees as provided by s. 258 of the Code of Civil Procedure, and they were still in force under the terms of that section.

Per Duthoit J., that the failure of the mortgagee to certify the adjustment of the decrees did not constitute a failure of consideration, because he did not covenant to certify such adjustment, and it was not, in fact, necessary for him to do so; because he could not seek execution of the decrees on the ground that, though unsatisfied they were still in force under s. 258 of the

ACT IX OF 1872, s. 2 (d).—(continued.)

Code of Civil Procedure, without becoming liable to penalties; and because, if the mortgagor considered the entering up of the adjustment of the decrees to be imperative, he had his remedy by application to the Court in the terms of s. 258.

Per Mahmood, J. that the adjustment of a decree out of Court, if never certified to the Court, is, under s. 258, ineffectual only so far as the execution of the decree is concerned; that there is nothing in the Contract Act to make such an adjustment invalid as the consideration for an agreement; that an agreement founded on such consideration may be enforced without defeating the objects of s. 258; and that consequently there was, in respect of the amount of the decrees, valid consideration for the mortgage. *Gunamani Das v. Pran Kishori Das* (5 B. L. R., 223; 13 W. R., 69 F. B.); *Meer Mahomed Kazem Jowhury v. Khetoo Bebee* (20 W. R., 150); *Guni Khan v. Koonjo Behary Sein* (3 Calc. L. R., 414); *Davlati v. Ganesh Srastri* (I. L. R., 4 Bom., 295); *Shadi v. Ganga Sahai* (I. L. R., 3 All., 538) and *Sita Ram v. Mahipal* (I. L. R., 3 All., 533) followed; *Patankar v. Devji* (I. L. R., 6 Bom., 146) and *Pandurang Ramchandra Chowghale v. Narayan* (I. L. R., 8 Bom., 300) dissented from. **RAM GHULAM AND ANOTHER v. JANKI RAI.**

[IV-277]

(5).—*Refraining to execute decree.* A had a decree against B which he refrained from executing in consideration of a bond executed by C and D (B's father and brother respectively) by which they bound themselves to pay the money due under the decree. Held that A's refraining to execute the decree against B was a sufficient consideration to make the contract binding on C and D. **NARAIN SINGH AND ANOTHER v. MATA PRASAD SINGH.**

[VII-52]

s. 4.—*Put in a course of transmission.* A letter of acceptance to a proposer not correctly addressed, could not, although posted, be said to have been "put in a course of transmission" to him within the meaning of s. 4 of Act IX of 1872. *Townsend's case* (L. R., 13 Eq., 148) referred to. **RAM DAS CHAKARBATI v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY, LIMITED, CAWNPORE.**

[VII-34]

(1). s. 11.—*Age of majority—European British Subject.* A cheque was endorsed in blank by a European British subject who, at that time, was under twenty years of age, and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured, and a suit was then brought by the bank which had cashed the cheque, to recover the amount from the endorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was

ACT IX OF 1872, s. 11.—(continued.)

a mere matter of form, and he would not be liable for the amount, and that the bank would only cash the cheque when endorsed by him, and in consequence he consented to endorse it, but that he did so without any intention of incurring liability as endorser, that he received no consideration, and that his endorsement was in blank, and not in favour of the bank, and was converted into a special endorsement without his knowledge and consent. The Court held that, at the time of endorsement, the endorser was a minor under English law, and dismissed the suit on the ground of minority. Held that if the Court was satisfied of the fact of the defendant's minority, it should have complied with the provisions of s. 443 of the Civil Procedure Code.

Per Straight, Offg. C. J., and Duthoit, J., that it was by no means clear or certain that there was any rule of international law recognizing the *lex loci contractus* as governing the capacity of the person to contract, but that, assuming such a rule to be established, the specific limitation of the Indian Majority Act (IX of 1875) to "domiciled persons" necessarily excluded its application to European British subjects not domiciled in British India; that s. 11 of the Contract Act must be interpreted as declaring that the capacity of a person in point of age to enter into a binding contract was to be determined by his own personal law wherever such law was to be found; that this rule was not affected by the Majority Act so far as concerned persons temporarily residing but not domiciled in British India, whose contractual capacity was still left to be governed by the personal law of their personal domicile; and that such law in the case of European British subjects was the common law of England, which recognized twenty-one as the age of majority.

Per Oldfield, J., that by the rule of *jus gentium* as hitherto understood and recognized in England, the *lex loci* would govern in respect to the capacity to contract, but that in framing the Indian Majority Act, which was the *lex loci* on the subject in India, the Legislature would appear not to have adopted that rule, but by limiting the operation of the Act to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile.

Per Brodhurst, J., that Act IX of 1875 was intended by the Legislature to be applicable, and in fact was applicable, only to European British subjects domiciled in those parts of India referred to in s. 1, and that to any other European British subject whose domicile was in England, but who was temporarily residing in any part of India above alluded to, the privileges and disabilities of minority attached until he had attained the age of twenty-one years. **ROHILKHAND AND KUMAUN BANK, LIMITED v. ROW.**

[V-101]

ACT IX OF 1872 s. 11.—(continued.)

(2). ————— *Muhammadan—*
Before Act IX of 1875. In a suit upon a bond executed on the 5th June, 1875, by a Muhammadan who at that date was sixteen years and nine months old, the defendant pleaded that at the time when the bond was executed he was a minor, and that the agreement was therefore not enforceable as against him. *Held* that the defendant, having at the date of the execution of the bond, reached the full age of sixteen years, and so attained majority under the Muhammadan Law, which, and not the rule contained in s. 26 of the Bengal Minors Act (XL of 1858), was the law applicable to him under s. 2 (c) of the Indian Majority Act (IX of 1875) before the latter Act came into force, was competent in respect of age to make a contract in the sense of s. 11 of the Contract Act (IX of 1872), and the agreement was therefore enforceable as against him. The rule contained in s. 26 of the Bengal Minors Act is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards; and it is to such persons only, when they have been brought under the operation of the Act as in it provided, that the prolongation of nonage under s. 26 applies. *DAMODAR DAS v. WILAYAT HUSAIN.*

[V-214]

(3). ————— *Hindu.* *Held* that in the case of a Hindu the age of majority within the meaning of s. 11 of the Contract Act is that fixed by s. 3 of Act IX of 1875 (Majority Act) and not that of Hindu Law. *MAMMI MAL v. JAGAN NATH.*

[VII-71]

(1).—s. 13.—*Undue influence—Fiduciary relation—Burden of proof.* In a transaction between two persons where one is so situated as to be under the control and influence of the other, the Courts in this country have to see, that such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognize. Where a fiduciary or quasi-fiduciary relation had existed Courts of equity have invariably placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of this beneficial jurisdiction is not confined to cases only between guardian and ward, attorney and client, father and son, but the relief thus granted stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another. The plaintiff who on the death of the widow of his brother became entitled to the estate of the deceased found

ACT IX OF 1872, s. 16.—(continued.)

himself resisted in his claim by wealthy relatives. He was a man without means. The defendant took him to his house, kept him there, found him all the money for the purpose of carrying on his litigation with his relatives, in which the plaintiff succeeded. While the litigation for mutation of names in respect of the property was pending in the Revenue Court, and while plaintiff was residing with the defendant, he executed a sale-deed in favor of defendant's brother for the nominal consideration of Rs. 9,500, of half the property he claimed, and again shortly after the mutation case had terminated in his favor, he executed a deed of endowment of the remaining half in favor of a temple founded by the ancestor of the defendant and in which the defendant was interested, and the result was that plaintiff was left as poor as he was when he first came into the defendant's hands. Plaintiff sued for cancellation of the deed of the endowment on the ground that the same had been obtained from him by the exercise of undue influence and by means of fraud, and obtained a decree. On appeal by the defendant it was *held*; that looking at all the facts, such a relation between plaintiff and defendant in the course of the year 1885 had been established as to cast upon the latter the obligation of satisfying the Court that the transaction, which was given effect to by the deed of endowment, was an honest and *bona fide* transaction and one that ought to be upheld. *SITAL PRASAD v. PARBHU LAL.*

[VIII-221]

(2). ————— *Pardah woman.* Where a deed executed by a *pardanashin* woman is sought to be set aside it is for the party wishing to uphold the deed to show affirmatively that the transaction intended to be carried out by the deed was a reasonable one, that the executant was fully cognizant of the meaning and legal and practical effect thereof and that she executed the same with her full and free consent, that is to say, that she had independent advice on the subject and was not otherwise, as, *e. g.*, by reason of bodily or mental infirmity, or by reason of fraud or coercion practised upon her, incapable of giving a rational consent to the transaction. One Mariam Bibi a *pardanashin* lady of some seventy years of age, and more or less illiterate, executed on the 11th September, 1888, a deed which purported to divest her immediately of all her property in favour of her son Murtaza Husen who was dumb and imbecile, her daughter Sakina, who was named in the deed as guardian of Murtaza Husen, and that daughter's son, Muhammad Yakub. Muhammad Yakub was betrothed to a daughter of one Fakir Husen and one of Sakina's daughters was married to one Shakurul Husen. Those two persons, *viz.*, Fakir Husen and Shakurul Husen were mainly instrumental in procuring the execution of the deed in question. The deed was drafted in a very

ACT IX OF 1872, s. 16.—(continued.)

artificial language and it was not shown that the executant ever understood its contents or effect. The executant was moreover at the time of execution in ill-health and great mental distress owing to the death of her son, Muhammad Husen, which had happened some months previously. The deed was also executed in the absence of the person who was then the executant's adviser and manager of her property. Lastly, it appeared that as soon as the executant came to know what the true nature of the deed was and that proceedings had been initiated in the Revenue department for mutation of names, she took immediate measures to show her dissent from the provisions of the deed and her disapproval of what had been done thereunder. *Held* that under the circumstances above set forth the deed in question could not be considered as having been executed under the conditions necessary in such cases and must be set aside. *Ashgar Ali v. Delroos Banoo Begam* (I. L. R., 3 Calc. 324), *Mahomed Bukhs Khan v. Hosseini Bibi* (I. L. R., 15 Calc., 684), *Behari Lal v. Habiba Bibi* (I. L. R., 8 All., 267) and *Kaniz Fatima v. Abbas Ali* (W. N., 1887, p. 84), referred to. *MARIAM BIHI v. SAKINA AND OTHERS.*

[XI-213]

s. 19.—*Coercion.* A person, while under arrest in execution of a decree which had been made against him by a Court having no jurisdiction to make it, gave the holder of such decree a bond for the amount of such decree plus a small sum paid for him for the stamping and preparation of such bond, in order that he might be released from such arrest. *Held* that such bond was given under duress, and that it was executed without consideration, the small sum paid by the holder of such decree for preparing and stamping the bond not being in any legitimate sense of the phrase "consideration" for bond, and therefore such bond was void. *BANDEH ALI v. BANSPAT SINGH.*

[II-64]

s. 20.—*Mistake of both parties—Gross negligence.* On the 3rd March, 1881, *N* drew a bill in English at Cawnpore in favour of *F* on a Calcutta firm and gave it to *F*'s agent, who did not understand English. *F*'s agent kept the bill till the 10th March, 1881, without ascertaining its nature. On that date the Calcutta firm on which the bill was drawn became insolvent. *F* subsequently sued *N* for the money he had paid for the bill on the ground that his agent had asked *N* for a bill drawn on himself and not one drawn on the Calcutta firm. *N* asserted in defence to the suit that *F*'s agent had not asked for a bill drawn on himself but merely for a bill on Calcutta. *Held* that, assuming that the sale of the bill was void by reason of both parties being under a mistake as to the bill, yet *F* could not recover the amount of the bill from *N*, because his agent had been guilty of gross negligence in

ACT IX OF 1872, s. 20.—(continued.)

taking the bill and keeping it so long without ascertaining its nature and applying for redress. *NIGHTINGALE v. FAIZULLAH AND ANOTHER.*

[II-61]

(1).—s. 23.—*Assignment of profits by lambardar.* An assignment by a lambardar of profits of a *mahal* is not a contract coming within the prohibition of s. 23 of Act No. IX of 1872, and on such an assignment a suit by the assignee against the lambardar will lie in a Civil Court. *CHADAMA LAL v. KISHEN LAL.*

[XIV-17]

(2).—s. 23 (1).—*Sub-letting the benefits of a license to sell liquor prohibited.* The plaintiff obtained from the excise authorities a license to manufacture and sell country liquor, such license containing a condition against sub-letting the benefits of the license. By s. 42 of the Excise Act (XXII of 1881) the violation of any condition of a license granted under the Act is made a punishable offence. The plaintiff sub-let the license to defendants who on the 5th September, 1884, executed an agreement to pay to the plaintiff a certain sum of money, in which was included the sum of Rs. 1,500, which the defendants had undertaken to pay to plaintiff as rent reserved on the sub-lease. The plaintiff instituted the suit for recovery of the amount due to him on the agreement, and it was decreed by the Court of first instance but dismissed by the lower appellate Court. On second appeal the plaintiff contended on the authority of *Gauri Shanker v. Mumtaz Ali Khan* (I. L. R., 2 All., 411) that his suit had been wrongly dismissed. *Held* that the sub-letting of license to manufacture and sell country liquor having been made punishable as an offence is to be deemed as an act contrary to law within the meaning of s. 23 of the Indian Contract Act (IX of 1872), and the claim to recover money due on such sub-lease was therefore not enforceable in a Court of Justice. *Gauri Shanker v. Mumtaz Ali* (I. L. R., 2 All., 411) distinguished. *DEEIPRASAD v. RUP RAM AND OTHERS.*

[VIII-215]

(3).—Contract to give up *sir*—*Included in another mahal.* This is a suit to eject the defendant from the occupation of land which was his *sir* previous to recent partition proceedings. The plaintiff based his claim on a clause of the partition proceedings:—"That if any sharer's *sir* fell into another *mahal* or portion, the former *sir*-holder should give up both the *sir* and its cultivation. *Held* that this only was not sufficient until it could be shown that the defendant agreed to the inclusion of his *sir* in another sharer's portion of the state; and even in that case the contract would not be lawful as it would be against the provision of law (s. 125, Revenue Act) and therefore void under

ACT IX OF 1872, s. 23 (1).—(continued.)
s. 23 of the Indian Contract Act. **INDAR v. KHUSHHI.**

[VI-88]

(4).—*Suit to enforce a valid agreement on failure of a void agreement.* The appellant mortgaged by way of conditional sale their proprietary rights in certain villages to the respondents. In July 1877, the latter applied for foreclosure. In July 1878, just before the year of grace expired, the parties came to a compromise. By this the respondents agreed to take the proprietary rights of the appellants in some of such villages in lieu of a certain sum, relinquishing their claim on the proprietary rights of the appellants in the other villages, on condition that the latter would not assert their rights as exproprietary tenants in respect of the *sir* land appertaining to the proprietary rights thus transferred to the respondents. In the event of a breach of such a condition it was provided that the compromise should be considered void, and the respondents should be at liberty to assert their rights as conditional vendees who had foreclosed. The appellants in breach of such condition, asserted their rights as exproprietary tenants in respect of the *sir* land in question, and obtained a recognition of the same in the Revenue Court. Thereupon the respondents brought the present suit against the appellants for possession of their proprietary rights in such remaining villages, claiming on the basis of such mortgage and the foreclosure proceedings. The Court (Oldfield and Tyrrell, J. J.) observed that the respondents, on the failure of the appellants to give effect to the compromise transaction of July 1878, were clearly entitled to fall back on their equities under their conditional deed of sale and the foreclosure proceedings taken thereunder. The ruling of this Court in *Lall Dhar Rai v. Gunpat Rai* (N.-W. P. H. C. Rep., 1869, 13th February) was quite in point, and the principle therein adopted was that which should be applied in this case. **BIJONDHA RAI AND OTHERS v. MEGHU RAI AND OTHERS.**

[II-56]

(5).—*Suit to recover the consideration of a void agreement.* Held that the mortgagee of a non-transferable property (*e.g.* the occupancy of a tenant other than a tenant at fixed rate) may bring a suit for the mortgage-money. **GANESH SINGH v. SUJHARI KUAR.**

[VII-252]

(6).—*Sale of sir land—Failure to give possession—Suit for purchase-money.* Where, along with some *zamindari*, certain *sir* lands were sold and the vendors purported by their sale-deed to relinquish their exproprietary rights in the *sir* lands, but failed to put the vendees into possession of either the *zamindari* or the *sir* lands, it was held that the vendees could not recover from the vendors as compensation the consideration money which they had paid

ACT IX OF 1872, s. 23 (1).—(continued.)
in respect of the *sir* lands. **BIKKHAM SINGH AND ANOTHER v. HAR PRASAD AND OTHERS.**

[XVI-167]

(7).—*Zamin-dar's consent.* Under a deed dated in 1879, the occupancy-tenants of certain lands in a village sold their occupancy-rights, and the *zamindars* instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the *zamindars* had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants. Held by the Full Bench that the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Umrao Begam v. The Land Mortgage Bank of India* (J. L. R., 1 All., 547) distinguished. **JHENGURI TIWARI AND OTHERS v. DURGA AND ANOTHER. DURGA AND ANOTHER v. JHINGURI AND OTHERS.**

[V-260]

(8).—*Sale of property—Subject of an injunction under s. 492, C. P. C.* Held that an injunction under s. 492, C. P. C. does not take away, from the persons ordered the power to transfer the title of the property to any one. Consequently a sale or mortgage of the property is not void. The only penalty provided for the breach of such order is that maintained in s. 493. **THE DELHI AND LONDON BANK v. RAM NARAIN.**

[VII-107]

(9).—*s. 23 (4).—Gambling in litigation—Opposed to public policy.* For the purpose of meeting the expenses of a suit for possession of immoveable property, the plaintiff, who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of first instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and that, if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000. Held that the agreement was unfair, unreasonable, extortionate and contrary to public policy, within the meaning of s. 23 of the Contract Act (IX of 1872), and that the plaintiff was entitled to recover possession of the land

ACT IX OF 1872, s. 23 (4)—(continued.)

in suit on payment of compensation for the advances made by the defendant in the former litigation, with interest at 12 *per cent. per annum*. *Chunni Kuar v. Rup Singh* (I. L. R., 11 All., 57), and *Loke Indar Singh v. Rup Singh* (I. L. R., 11 All., 118) referred to. HUSAIN BAKHSI AND OTHERS *v.* RAHMAT HUSAIN AND ANOTHER.

[VIII-273]

(10). — For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiff experienced considerable difficulty in procuring the means to appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that apart from the moneys borrowed by him from time to time he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bona-fide* and, to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed, the plaintiffs were liable to furnish security to the extent of Rs. 4,000, and to advance Rs. 8,500 for other expenses, and they, in fact, did furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed, and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and *mesne* profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto. *Held* that although the case was very different from cases in which persons interfered for their own benefit in litigation not their own or in which *Mukhtars*, *Vakils* or persons of that class are professional money-lenders, taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disproportion between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of the defendant's success, it must be concluded either that they did not believe his claim to be well founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well founded, that the reward contracted for was excessive and unconscionable; and in either case the contract could not be enforced in its terms.

Held also that if the doctrine of equity applicable to such cases were applied in favour of the

ACT IX OF 1872, s. 23 (4) (continued.)

borrower, it should also be applied in favour of the lender; that as there was no reason to suspect the plaintiffs' motives, it would be inequitable to relieve the defendant from all liability; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council when the plaintiffs could have obtained them back; that simple interest at 12 *per cent. per annum* on the amounts of the bonds for that period would be reasonable compensation for such use; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 *per cent.* from the date on which it was made to the date of the decree in the present case; and that he should pay interest on the whole amount thus decreed at 6 *per cent.* from the date of the decree till payment. *Chunni Kuar v. Rup Singh* (I. L. R., 11 All., 57), *Raja Sahib Prahlad Sen v. Boboo Budhu Singh* (12 Moo. I. A., 301); and *Bowes v. Heaps* (2 Ves. and B., 117) referred to. LOKE INDAR SINGH AND OTHERS *v.* RUP SINGH.

[IX-72]

(11). — [English doctrine of *champerty and maintenance*.] The result of the English cases regarding "hard" or "unconscionable bargains" is that in dealings with expectant heirs, reversioners, or remainder men, the fact that the bargain was declined by others as not being sufficiently advantageous, does not raise a presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest, is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity on the subject of such bargains is applicable in England only to dealings with expectant heirs, reversioners, or remainder men. The judgment of the Privy Council in *Sri Mati Kamini Sundari Chaudhrani v. Kali Prossunno Ghose* (L. R., 12. I. A., 215) does not imply that the doctrine is to be applied in India to cases except where it would have been applied in England, or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner, or remainder man, or except there is some fiduciary relationship between the lender and the borrower although there may be no fraud or undue influence, or except there is some incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his bargain. The judgment of the Privy Council in *Ram Coomaz Coondoo v. Chunder Canto Mookerjee* (L. R., 4 I. A., 23) shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in con-

ACT IX OF 1872, s. 23 (4)—(continued.)

sideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona-fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced. For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favor of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application. *Held* that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced. *Held* also that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700; and the bond was there-

ACT IX OF 1872, s. 23 (4)—(continued.)

fore a gambling in litigation, which it would be contrary to public policy to enforce. The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 *per cent. per annum* from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 *per cent. per annum* on the Rs. 3,700, interest and costs, from the date of the decree until payment. **CHUNNI KUAR v. RUP SINGH.**

[VIII-296]

(12).—Condition against alienation.]

By an instrument in writing whereby a suit between the two was adjusted, *A* transferred certain land to *B*. The instrument contained a condition against alienation and a stipulation that the land should not be saleable in execution of decree at the instance of any creditor of *B* and that *A* should have a right of pre-emption at a certain price *per bigha*. *C* having attached the land in execution of his decree against *B*, *A* brought this suit to prevent the sale of the land and to pre-empt it under the agreement. *Held* that the stipulation against alienation being opposed to the law, could not be enforced and the condition for pre-emption was not applicable to sale in execution of decree. **LAL MOTI v. SADA NAND AND ANOTHER.**

[IV-121]

s. 23 (4) & 25 (2).—Past co-habitation — Maintenance — Consideration.] Past co-habitation would not be an immoral consideration, if consideration it can properly be called, for a promise to pay a woman an allowance. Such a promise, however, is to be regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him, for which no consideration, as defined in the Contract Act, would be necessary. **DHIRAJ KUAR v. BIKARMAJIT SINGH.**

[I-57]

(1) s. 25 (2).—Consideration.]

See s. 2 (d) No. 1.

(2).—Pre-existing debt.]

Held that a pre-existing debt affords an ample consideration for a promise to pay it and the rule is not affected by the circumstance that the promise is in the form of a promissory note. **NIRMAL CHAND v. MOHAN LAL AND ANOTHER.**

[V-213]

(3).—s. 25 (3)—Barred debt.] The holder of a decree for money, dated the 22nd June, 1868, applied for execution on the 23rd February, 1869. In September 1869, before the decree had been executed, the judgment-debtor, admitting that a certain amount was due under the decree, agreed to pay such amount by instalments, and that, if default were made, the decree should be executed for the whole amount thereof. Default having been made early in 1873 the

ACT IX OF 1872, s. 25 (3).—(continued.)

decree-holder applied at once for execution of the decree. On the 5th May, 1873, a petition, signed by the judgment-debtor, was preferred on his behalf to the Court executing the decree, such petition being in effect as follows:—"Execution—case for Rs. 6,839-15-3; in this case the decree-holder has filed an application for execution of his decree in consequence of a default in payment of instalments: the fact is that the petitioner has failed to pay the instalments simply owing to illness, otherwise he has no objection to the decree-holder's demand: in future he will not fail to pay instalments: he has written a letter to plaintiff asking him to pardon his breach of promise and to agree to realize the decree-money by the instalments formerly fixed, and to stay execution of the decree for the present: the decree-holder has granted this request: the petitioner therefore presents this petition and prays that monthly instalments of Rs. 150 may be fixed, and execution of the decree be postponed for the present: in case of default being made in payment of two instalments in succession, the decree-holder will be at liberty to realize the balance of the decree-money with interest at 12 *per cent. per annum*." At the time such petition was preferred execution of the decree was barred by limitation. *Held* that a "debt" within the meaning of s. 25 (3) of Act IX of 1872 includes a "judgment-debt" and such petition was a promise to pay a debt barred by limitation within the meaning of that law, and a suit founded on such petition to recover the balance of the money due under the decree was maintainable. **BILLINGS v. STOWELL.**

[I-68]

(4) —————.] The accounts between the appellants and the respondent were stated in writing on the 11th February, 1880, and a certain sum was found due from the respondent to the appellants. Under the account there were the following words signed by the agents of the appellants:—"Balance struck is correct: the amount will be paid in current *Nanashahi Gajashahi* coin." Under these words was the word "correct" signed by the respondent. At the time such fund was found due from the respondent to the appellants some of the items composing it could not have been recovered by reason of the law of limitation. The appellants sued the respondent to recover such sum, basing the suit upon the account signed by him. *Held* that the acknowledgment of the debt and the promise to pay it given by the respondent on the 11th February, 1880, was clearly within the terms of cl. (3) of s. 25 of Act IX of 1872, and was a new contract to pay a debt part of which was barred by limitation. The suit was properly maintainable and was not barred by limitation. **KARAN MAL AND ANOTHER v. BAL KISHEN.**

[I-95]

s. 29.—*Mortgage—Void for uncertainty.*] A

ACT IX OF 1872, s. 29—(continued.)

deed of simple mortgage described the mortgaged property as "our *zamindari* property" (*zamindari apni*), and gave no further specification or description. It was proved that at the date of the mortgage the mortgagors had a definite and ascertained fractional share in two *zamindaris*. *Held* that the words "our *zamindari* property" were sufficiently certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific *zamindari* interest; and that the mortgage was therefore not void for uncertainty. **Kanhia Lal v. Muhammad Husain Khan** (I. L. R., 5 All., 11), **Bishen Dayal v. Udit Narain** (I. L. R., 8 All., 486), **Ram Sidh Pande v. Baigobind** (I. L. R., 9 All., 158), **Rae Manick Chand v. Beharee Lal** (N.-W. P. H. C. Rep., 1870, p. 263), **Deojit v. Pilambar** (I. L. R., 1 All., 275), **Tailby v. The Official Receiver** (L. R., 13 App. Cas.; 523) and **Tudman v. D. Epineuil** (L. R., 20 Ch. D., 758) referred to. **SHADI LAL v. THAKUR DAS AND OTHERS.**

[X-60]

ss. 23 & 30.—*Horse racing—Bet.*] Where a person who had lost a bet on a horse-race requested another to pay the amount of such bet, agreeing to repay him, and the latter paid such amount, *held* that the money so paid was recoverable from the person for whom it was paid, the consideration for the agreement not being unlawful within the meaning of s. 23 of the Contract Act, 1872, and the agreement not being one by way of wager, within the meaning of s. 30 of the same Act. **Knight v. Fitch** (24 L. J. C. P. 122); **Knight v. Cambers**, (24 L. J. C. P. 121); **Jessopp v. Lutwyche**, (10 Exch., 614) and **Beeston v. Beeston** (L. R., 1 Ex. D., 13) referred to. **PRINGLE v. JAFAR KHAN.**

[III-68]

s. 37.—*Privity.*] The firm of *P D* transferred its business with all its demands and liabilities, as shown by its books to the firm of *G D*. At the date of this transfer the firm of *P D* was indebted to a firm called *J M* and *K M*. The debt was not shown by the books of the firm of *P D*, and the firm of *G D* did not know of its existence. Subsequently to this transfer and with reference thereto the firm of *J M* sued *G D* for such debt. *Held* that there was no contract between the defendant and the plaintiff by which the former undertook to pay any debt due from the old firm to the latter. That the suit therefore could not lie. **JIT MAL AND ANOTHER v. GOKUL DAS.**

[I-52]

ss. 42 & 45.—*Held* by the Full Bench (Mahmood, J., dissenting) that when, upon the death of the obligee of a money-bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond. **KANDHIYA LAL v. CHANDAR AND OTHERS.**

[V-34]

ACT IX OF 1872.—(continued.)

s. 56.—In September 1871, *C* mortgaged by conditional sale his occupancy holding to *S B*. In 1879 *B* took foreclosure proceedings against *C*, and having done so, brought the present suit for possession of the land. The suit was resisted by *A P*, the *zemindar*, on the ground that the occupancy right was not transferable. *Held* that after Act XVIII of 1873 came into force the contract of conditional sale became void for illegality under s. 56 of Act IX of 1872 and the circumstances that the contract had been entered into before Act XVIII of 1873 became law, could not give *S B* a right to foreclose after the Act came into force. *SURAJ BAKSH AND OTHERS v. AJUDHIA PRASAD*.

[IV-160]

s. 60.—*Appropriation of payment.* Certain persons engaged in the manufacture of indigo, and requiring money for such manufacture, hypothecated to *A* and *B* an indigo factory and its appurtenances together with the indigo crop of the following season, and the deed provided that the mortgage-money should be paid on demand with certain interest, and that all payments made by the mortgagors should go first towards satisfaction of the interest, and the balance credited to principal. The mortgage transaction was throughout conducted by *A* alone, but both mortgagees contributed half the amount advanced. It was agreed that the proceeds of the crop hypothecated should be sent to *A*, and transmitted by him as agent for the mortgagors to Calcutta for sale in the market; and it appeared that at the time of the advance one main object of *A* was to make it certain that the indigo should be transmitted to Calcutta through him, and that the deed was executed for the purpose of preventing the mortgagors from disposing of the crop in any other way. The indigo was accordingly sent to Calcutta through *A*, and its price was from time to time sent to and received by him from the broker. Between the dates of the mortgage and the first of such receipts, *A* made, on his own account, further advances to the mortgagors; and the arrangement was that as against these advances the cash received by him was to be applied. In a suit by *A* and *B* to enforce the mortgage, the defendants having pleaded payment,—*held* that *A*'s receipt and payment to himself of the moneys received by him as the price of the indigo must be regarded as payments by the mortgagors to him on account both of the mortgaged-debt and of the subsequent advances; and that his power to appropriate such payments to either the former or the latter debt was not affected by the circumstance that he had associated *B* with him in advancing the mortgage-money, or that he alone had acted as the mortgagor's agent in receiving the price of the indigo. *Held* that the terms of the mortgage-deed and the circumstances in which it was executed, the relations of the parties, the fact that the very thing which was to be handed over to *A* was to be given as part security for the debt, the mode in which

ACT IX OF 1872, s. 60.—(continued.)

the indigo was consigned to him for transmission to Calcutta, and the fact that at the time when its price was realised it had passed away into the hands of purchasers and that *A* could not have supposed that he had any charge or lien upon it in their hands, constituted circumstances, within the meaning of s. 60 of the Contract Act (IX of 1872), indicating that the payments were to be applied to the mortgage-debt, and the option of appropriation therefore did not open up to the mortgagees as it might otherwise have done. *Banarsi Das v. Maharani Kuari (I. L. R., 5 All., 27)* and *Bansi Dhar v. Sant Lal (I. L. R., 10 All., 133)* referred to. *BANSI DHAR v. AKHAY RAM AND OTHERS*.

[X-62]

(2).—*Interest.* This was a suit on a bond, dated the 28th June, 1878. The suit having been brought more than three years after the date of the bond, would clearly have been barred by time but for an admitted payment of Rs. 50 made on the 21st July, 1878, by the defendant obligor. The plaintiff alleged that the money had been paid to him as interest on the bond-debt and he was therefore entitled to compute the period of limitation from that date under s. 20 of Act No. XV of 1877. The defendant on the other hand contended that the sum had been paid on account of the principal of the bond-debt, and s. 20 therefore could not apply. The fact of the payment of this sum was endorsed on the bond but it was not stated that the payment was made on account of interest. *Held* that under s. 60 of the Indian Contract Act the creditor had a discretion to appropriate this payment either to the principal or the interest of his debt. It was for the debtor to show that he had acted in such a way in respect of this payment as to limit this discretion of his creditor. There being no such evidence the suit was not barred by time. *NIRPAT v. SHADI*.

[I-119]

(1).—s. 62.—*Guardian—Fraud.* A certificated guardian executed on behalf of her minor son, a bond in lieu of former bond whereby Rs. 669 was secured with interest at 6 *per cent*, and, in case of default, 24 *per cent per annum*. The second bond acknowledged Rs. 1,650 principal with interest at 6 *per cent* as due upon the first. In defence to a suit upon the second bond, the obligor pleaded that this sum had been wrongly acknowledged, inasmuch as at the time when that bond was executed, the obligee had waived his right to interest on the first bond at a higher rate than 6 *per cent*. *Held* that there being no allegation that the obligor, when she executed the bond in suit, was misled, deceived, or defrauded in any way, the plea could not be allowed. *BHUP SINGH AND OTHERS v. JAGAR NATH*.

[VIII-44]

(2).—*Novation—Suit on superseded contract.* *Held* that where an oral contract had

ACT IX OF 1872, s. 62—(continued.)

been superseded by a written one a suit based on the former and not on the latter was not maintainable. *BIRCH v. GAUTIER*.

[II-156]

(3).—*A* sued *B* for Rs. 2,200, the instalments then due under a bond dated in 1866. The suit was compromised whereby *B* admitted that he owed appellant, Rs. 5,500 and agreed to a decree being given against him for Rs. 2,200 with costs and that the balance should form the subject of a bond to be executed within eight days. *B* paid Rs. 2,200 and cost under the decree thus framed. Some ten years after, *A* brought the present suit against *B* in which he claimed instalments under the bond of 1866, alleging that *B* did not execute the bond agreed to in the *Sulahnamah*. Held that the bond of 1866 having been superseded by the *sulahnamah* the suit was not maintainable. *PAHLAWAN SINGH v. SARDAR SINGH*.

[II-167]

(4).—On the 27th February, 1875, *A* gave *B* a bond for Rs. 200 promising the same with interest at Re. 1-8 *per cent. per mensem* within two years on the 24th December, 1879, an endorsement was made on the bond in the following terms:—Received Rs. 40 in part-payment of the principal amount; in future no interest will be charged if the balance is paid in one year, but if it is not paid in one year interest will be charged at 3 *per cent. per mensem* on the sum which remains unpaid. Held that the endorsement amounted to a novation of contract and *B* was therefore not entitled to sue on the bond. *MUHAMMAD SHAH AND ANOTHER v. SARSUTI*.

[III-254]

(5).—Where accounts between a creditor and his debtor very stated, the latter gave the former a bond for the balance found due by him to the creditor;—held that the creditor was precluded from subsequently suing on the accounts stated for the balance which had been found due. *SIRDAR KUAR AND ANOTHER v. CHANDRAWATI, AND ANOTHER*.

[II-55]

(6).—The respondents took from the appellants, his obligors under three former bonds, a new bond, by which the amounts due under the old bonds were consolidated, and a further advance of Rs. 62 in cash was made. The appellants subsequently refused to register the new bond and denied its execution. The respondents pursued their remedies under the Registration Act up to that provided by s. 73; but without success. Abandoning the new bond, they now sued upon their old bonds, and to recover the Rs. 62

ACT IX OF 1872, s. 62—(continued.)

advanced in cash. Held that, under the circumstances there had been no "novation" nor, as the suit was not on the new bond, had the principle laid down in *Bhagwan Singh v. Khanda Baksh* (I. L. R., 3 All., 397) any reference. *MAHABIR RAI AND OTHERS v. DEBI DIAL AND OTHERS*.

[I-98]

(7).—*H* lent Rs. 85 to *D* on a pledge of moveable property. *D* repaid *H* Rs. 40 and at the time of repayment acknowledged orally that the balance of the debt Rs. 45 was still due by him. It was agreed between the parties at the same time that *D* should give *H* a promissory note for such balance and that such property should be returned to him. Accordingly *D* gave *H* a promissory note for Rs. 45 and the property was returned to him. *H* subsequently sued *D* on such acknowledgment ignoring the promissory note which being insufficiently stamped was inadmissible in evidence. Held that the existence of the promissory note did not debar *H* from resorting to his original consideration nor excluding evidence of the oral acknowledgment of the debt. *HIRA LAL v. DATA DIN*.

[I-144]

(8).—The plaintiff in execution of his decree arrested one of the retainers of the Maharaja of Betia. On that the Maharaja requested the plaintiff to discharge his servant from arrest offering to pay the amount of the debt. The Maharaja executed a promissory note in favor of the plaintiff and the plaintiff released the servant; but the promissory note was not stamped. This suit was brought by the plaintiff to recover the amount of the decree against the re-presentative of the Raja on the contract. The Court below dismissed the suit holding that the action could not be maintained without the note being put in evidence and the plaintiff was prohibited by the Stamp Act from putting it in evidence. Held that the suit could be maintained apart from the note. The note was only a collateral security for the fulfilment of the promise made by the Maharaja. *GOBARDHAN DAS v. THE MAHARAJA, OF BETIA*.

[VII-49]

(1). s. 65.—*M R* contracted with *N M* and *H L* for the purchase of two houses from them and agreed to pay Rs. 500 as earnest money. Instead of paying the earnest money he made over halves of currency notes for Rs. 500, retaining the other halves himself. Subsequently *M R* brought a suit for specific performance of his contract; but his suit was dismissed, and the decree dismissing the suit was ultimately affirmed by the High Court. After this *M R* sued *N M* and *H L* for recovery of the half currency notes which he had made over to them. Held, on a finding by the lower appellate Court, that

ACT IX OF 1872, s. 65.—(continued.)

the half notes had in fact been made use of by the defendants in lending money, that the defendants had received an advantage within the meaning of s. 65 of Act No. IX of 1872. **HINGAN LAL, v. MANSA RAM.**

[XIV-157]

(2).—*Held* that a mortgage by a certificated guardian of a minor of the minor's property without first obtaining the sanction of the Court under s. 18 of Act XL of 1858 was not absolutely null and void so as to entitle the minor to the property without first making any restitution to the mortgagees for money spent for the benefit of the minor. S. 65 of Act IX of 1872 was applicable to such cases. **GIRRAJ BAKSH V. KAZI HAIMID ALI.**

[VII-62]

s. 68.—*Inquiries necessary to be made by the lender.* A plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bona fide* belief in the existence of such necessities he can advance his money in safety, even the sum borrowed by the guardian upon the security of the minor's estate is not in point of fact used for his necessities or his benefit. On the other hand a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt—**Hanuman Pershad Pandey v. Babooee Muniraj Kunwari** (6 Moo. I. A., 393) referred to. **KANDHIA LAL, v. MUNA BIBI.**

[XVII-220]

(1). ss. 69 & 70.—*Government Revenue—Payment for a person bound under contract to pay.* A, X and Y severally owned certain shares of certain villages. B instituted three suits against them in respect of their shares. These suits were disposed of on the 3rd April, 1880, in accordance with an arbitration award, whereby it was decided that possession should be given of the shares to B from the *rabi* of 1287 *Fasti* and that he should be liable for the Government revenue for the *rabi* 1287 *Fasti*. B took possession of the shares accordingly but did not pay the Government revenue. As mutation of names had not been effected the Revenue authorities called upon A to pay the revenue and on her property being attached she paid the same on the 10th April and 21st August, 1880. She then brought this suit against B to recover the money so paid. *Held* that the suit was not maintainable as the payment had not been made at the request express or implied of the defendant. **CHUNIA V. KUNDAN LAL.**

[II-150]

(2).—A share of a *mahal*, arrears of Government revenue

ACT IX OF 1872, ss. 69 & 70.—(continued.)

being due in respect of the whole *mahal*, was sold in execution of a decree. The existence of the arrears was notified at the time of sale. The title of the purchaser to the share vested from the date of the sale, Act X of 1877, s. 316, being in force at that date. The Collector attached and realized the amount of the arrears out of the surplus sale-proceeds. *Held* that, inasmuch as at the date of the realization of the arrears out of the surplus sale-proceeds, the purchaser was the proprietor of the share, and it and he were responsible under s. 146 of Act XIX of 1873 (N.-W. P. Land Revenue Act) for the arrears, the payment of the arrears out of the surplus sale-proceeds must be regarded as a payment made *in invitum* by the judgment-debtor for the purchaser, and the judgment-debtor was entitled to be reimbursed by the purchaser. **RAM CHAND AND ANOTHER V. FATEH CHAND AND OTHERS.**

[III-240]

(3).—*Paid by vendee.* On the date of the purchase of a revenue paying estate there were arrears of revenue due. The instrument of sale was silent as to the party liable to pay such arrears. The purchaser was compelled to pay such arrears. *Held*, that the purchaser could not recover the money so paid from the vendor. **DOST MUHAMMAD V. AHMAD ALI.**

[III-210]

(4).—*Paid by trespasser.* B, who was in wrongful possession of land which by right belonged to K, collected rents and paid the Government revenue. K eventually established her title to the property, obtained possession, and recovered the rents from the tenants, and B was obliged to refund the same. Subsequently B sued K to recover the sum which he had paid on account of revenue. *Held* that the claim did not fall within the provisions of ss. 69 and 70 of the Contract Act, and the fact that the plaintiff had been a loser by his wrongful act, or that the defendant had been benefited by the payment he made, would give him no right of action against her. **Tiluck Chand v. Soudamini Dasi** (I. L R., 4 Calc., 566) referred to. **BINDA KUAR V. BIONDA DAS.**

[V-176]

(5).—*Mortgagee, pending attachment, paying off the attaching creditor.* B gave A a *bai-bil-wafa* mortgage of certain land then under attachment in execution of a decree, dated the 7th March, 1875. The attachment during the pendency of which the mortgage-deed was executed terminated on the 29th August, 1874. On the 18th June, 1880, fresh proceedings in execution of the decree were commenced and the land was attached on the 30th June, and 20th November, 1880, was fixed for sale of the property. To save the property from sale A paid up Rs. 96-8, the sum due under the decree. This suit was brought by A to recover this sum from B. He relied

ACT IX OF 1872, ss. 69 & 70.—(continued.)

upon s. 69 Contract Act. *Held* that as the attachment during the continuance of which the deed was executed terminated on the 29th August, 1879, and the expected sale of the 20th November of 1880, under a subsequent attachment of the 18th June, 1880, could not have prejudiced the deed under s. 276, C. P. C., the plaintiff was not interested in the payment of the money and cannot recover it from the defendant. **RAM PRASAD AND ANOTHER v. SALIK RAM SINGH AND OTHERS,**

[II-210]

(6)———*Payment by person not interested.*] The widow of *D* a separated Hindu, hypothecated certain immoveable property which had belonged to her husband. The immediate reversioners to *D*'s estate were his nephew *S*, and the three sons of his brother *O*. After the widow's death, the mortgagee put his bond in suit, impleading as defendants *S*, two of *S*'s four sons, and the three sons of *O*. Only the three last mentioned persons resisted the suit; and the mortgagee obtained a decree directing the sale of the mortgaged property in satisfaction of his claim. From the operation of this decree *S* was wholly exempted, and his sons were made liable only to pay their own costs. Before any sale in execution of the decree could take place, the sons of *S* paid the amount of the decree into Court, thus saving the property from sale. They subsequently sued the sons of *O* for contribution in respect of this payment. It was found that, at the time when the payment was made, *S* was a member of a joint Hindu family with the defendants, and that his sons, the plaintiffs, had, at that time, no interest in the property by transfer from him. *Held* that at the time of the payment the plaintiffs could not properly be regarded as in the position of co-mortgagors with the defendants, so as to have an equitable lien upon the property they had saved from sale; that it was not a case of a payment which the defendants were bound to make in which the plaintiffs were "interested" within the meaning of s. 69 of the Contract Act; and that therefore the fiction of an implied request by the defendants to the plaintiffs to make the payment could not be imported into the case and the plaintiffs were not entitled to contribution. *Held* also that there was no such relationship between the parties as would create or justify the inference of any right in the plaintiffs to look to the defendants for compensation, so as to make s. 70 of the Contract Act applicable; and that if the plaintiffs, as mere volunteers, chose to pay the money not for the defendants but for themselves, they could not claim the benefits of that section. The principle of the decision in *Pancham Singh v. Ali Ahmad* (I. L. R., 4 All., 58) has been recognized and provided for in the Transfer of Property Act. By the use of the word "lawfully" in s. 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or

ACT IX OF 1872, ss. 69 & 70.—(continued.)

reasonably to justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. *Ram Tukul Singh v. Bissessar Lal Sahu* (L. R., 2 I. A., 131) referred to. **CHEDI LAL AND OTHERS v. BHAGWAN DAS AND OTHERS,**

[IX-67]

(7)———*Money spent on joint land.*] *Held* that one of two joint owners of a grove who without the permission of the other, spends money in repairing the whole grove, cannot, in the absence of a contract to that effect, recover from the other joint owner half the amount so spent, unless the case falls within the provisions of ss. 69 & 70 of Act IX of 1872. **MUHAMMAD NIZAMUDDIN KHAN v. HIRA LAL,**

[X-121]

(8)———*Person enjoying benefit of non-gratuitous payment.*] *B* sold certain immoveable property to *A*, one of the terms of the agreement of sale being that *A* should retain a portion of the purchase-money, and therewith pay the amount of a simple decree for money against *B* held by *C*. *A* failed to pay the amount of *C*'s decree, and *B* therefore sued him for the balance of the purchase-money, and obtained a decree. In the meantime *C* had the property attached in execution of his decree against *B*. *A* thereupon paid the amount of *C*'s decree. *B* subsequently took out execution of his decree against *A* for the balance of the purchase-money and *A* paid the amount of the decree. *A* then sued *B* to recover the amount which he had paid in satisfaction of *C*'s decree against *B*. *Held* that *A* was entitled, under s. 70 of the Contract Act, 1872, to recover such amount, *B* having enjoyed the benefit of the payment, and the same not having been intended to be gratuitous. *Semble* that the case came within the provisions of s. 69 of the Contract Act and of the principle laid down in *Duli Chand v. Ram Kishen Singh*, (I. L. R., 7 Cal., 648.) **AJUDHIA PRASAD v. BAKAR SAJJAD AND OTHERS,**

[III-79]

(9).———*Certain property was put to auction in execution of a decree by the Collector. Plaintiff applied to take a lease of the property for a certain term and offered to pay a sum of money which was sufficient to satisfy the decree. The money was paid and the decree satisfied but by some mistake or other the lease to the plaintiff was not granted. Consequently plaintiff has brought this suit against the judgment-debtor for the money which he had paid. Held that as the money was not paid gratuitously and the judgment-debtor had benefited by the payment he was liable for the money.* **MURLIDHAR v. BHIKHI,**

[V-219]

ACT IX OF 1872 ss. 69 & 70.—(continued.)

(10).—One *A*, the owner of certain property, mortgaged it to *G P* for Rs. 15,000. Subsequently he made a gift of all his estate, including the mortgaged properties in the following proportions:—One-fourth to *K H* (plaintiff); one-fourth to *L H*; and half to *I A* represented in the present suit by his widow *H B* (defendant). After the death of *A, G P*, the mortgagee, sued *K H, L H* and *H B* on his mortgage and obtained a decree for sale. Before any steps were taken in execution *K H* deposited in Court Rs. 3,660 praying that the amount be accepted in satisfaction of the lien upon his share of the mortgaged property and the same be exempted from auction-sale. This application was opposed by the decree-holder on the ground that his decree was against the whole of the mortgaged property. The money was taken by him and credited in part-satisfaction of the whole decree. Subsequently, for the balance two of the mortgaged villages were sold and the decree satisfied. The present suit is brought by the plaintiff to recover from the defendant, Rs. 2,105-15-6, the proportion of the Rs. 3,660 which the defendant as donee of half the mortgaged property was bound to recoup him by way of contribution. *Held* that as the payment was not meant to be gratuitous and as the defendant enjoyed the benefit of the payment the suit was maintainable under s. 70 of the Contract Act. *KHAIRAT HUSAIN v. HAIDRI BEGAM*.

[VIII-10]

(11).—*A, B's* nephew, thinking that he was entitled to succeed to his uncle's share of a certain village, paid the amount of a decree held by one *X* against *B* in execution of which such share had been notified for sale. It having subsequently been declared in a suit that he was not the heir, *A* brought this suit against *B* to recover the money. *Held* that the payment made by *A* was a purely voluntary and gratuitous one and as such could not be recovered. Sections 69 and 70 of Contract Act have no application. *SUMER SINGH v. SHIB LAL*.

[II-149]

s. 70.—Consideration.]

See s. 2 No. 1.

(1).—s. 73.—*Breach of Contract—Sale—Vendor entitled to retain deposit.* *Held* that where a contract for sale goes off by default of the purchaser, the purchaser cannot recover any deposit which may have been paid by him to the vendor in pursuance of the contract. *Ex-parte Barrell, In-re Parnell (L. R., 10 Ch. App., 512) and Howe v. Smith (L. R., 27 Ch. D.; 89) referred to. BISHAN CHAND v. RADHA KISHAN DAS*.

[XVII-123]

ACT IX OF 1872, s. 73.—(continued.)

(2).—*Measure of damages.* In the case of a sale, if the purchaser does not perform his part of the contract he is liable in damages to the seller, the measure of damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of contract. *PRAG NARAIN v. MUL CHAND AND OTHERS*.

[XVII-150]

(3).—The non-application of clause (a) of s. 34 of Act No. XII of 1881, to a "*thekadar*" does not exempt the *thekadar* from his liability under s. 73 of Act No. IX of 1872. Hence where a *thekadar* makes default in payment of his rent he is liable to be charged with interest on the sums due up to the date of payment. *GHANSHIAM SINGH v. DAULAT SINGH*.

[XVI-55]

(4).—*To keep premises in good repair.* This was a suit for compensation for breach of a contract to keep a house in a proper state of repair. The plaintiff alleged that he and his family suffered from fever in consequence of the unhealthy state of the house and that his property had been damaged and destroyed in consequence of the house not being water-tight and leaking during the rains. He claimed the following sums:—Rs. 124 fees for medical attendance on himself and family; Rs. 25 chemists bill; Rs. 38 nurse's wages; Rs. 12 tuning a piano damaged and put out of tune by leakage from the roof; Rs. 30-0-9 damages and loss of articles of furniture; Rs. 7-8 loss of poultry destroyed by exposure to water from leakage. The lower Court decreed the claim in toto. *Held* as to the first item that it was clear from the medical evidence that the illness was not proximately due to the state of the house though it was aggravated by it. This point of the claim therefore cannot be maintained. In regard to the other items there had been no proper inquiry or determination. Any damage properly due to the leakage might be recovered. The case was therefore remanded for a re-trial. *FORBES v. RAM SAHAI AND OTHERS*.

[III-46]

(5).—*Measure of damages—Post diem interest.* A suit was brought in 1884 upon a hypothecation-bond executed in April, 1875, in which the obligors agreed to repay the amount borrowed with interest at Re. 1-8 per cent. per mensem in June of the same year. There was no provision as to payment of interest after due date. The bond specified certain property as belonging to the obligors and contained the following provision:—"Our rights and property in the aforesaid taluka Rajapur shall remain pledged and hypothecated for this debt." Interest was claimed in the suit at the rate of Re. 1-8 per cent. per mensem as well for the period

ACT IX OF 1872, s. 73—(continued.)

after as for the period before the due date of the bond. *Held* that although cases might arise in which a jury or a Judge might refuse to give a plaintiff any interest, *i. e.*, damages, *post diem*, at all, the circumstances would have to be of a very exceptional character, as, for example, where the interest contracted to be paid before due date was exorbitant and extortionate. *Cooke v. Fowler* (*L. R.*, 7 *H. L.*; 27) referred to. *Held* that in determining the amount of damages the question whether the plaintiff has unnecessarily delayed bringing his suit, and so allowed his claim to mount up to a sum far in excess of the principal money originally advanced, may be taken into consideration as a reason for not making the original rate of interest the basis on which to assess such damages. *Juala Prasad v. Khuman Singh* (*J. L. R.*, 2 *All.*, 617) referred to. The principle upon which the obligee of the bond may recover interest after due date does not rest upon any implied contract by the obligor to pay such interest, but proceeds upon the breach of contract which has taken place by reason of the non-payment on due date, and the reasonable amount to which the obligee is entitled for such breach. The decision of the question by what standard the damages should be measured must depend in each case upon its special circumstances. *BISHEN DAYAL AND OTHERS v. Udit Narain*.

[VI-216]

(6). ————— This was a suit based upon a bond for a sum of Rs. 3,000 with compound interest at the rate of 8 as. *per cent. per mensem*, and simple interest at the rate of 8 as. *per cent. per mensem*, by way of damages from the due date up to the date of realization. The bond in suit expressly provided for compound interest but there was no stipulation for interest *post diem*. The Court of first instance, holding that the stipulation as to compound interest was penal, dismissed the claim as to Rs. 524-9-0 interest claimed by way of damages. *Held* that the amount of interest claimed by way of damages was reasonable. The whole of the plaintiff's claim must be decreed. *Lalli v. Ram Prasad* (*J. L. R.*, 9 *All.*, 74) and *Bishen Dayal v. Udit Narain* (*J. L. R.*, 8 *All.*, 486) referred to, and approved. *BIHARI v. ZALIN RAI AND OTHERS*.

[VIII-220]

(7). ————— The appellants sued the respondent on two bonds. In the first it was provided (i) that the respondent should pay the principal amount within two years at Rs. 2 *per cent. per mensem*; (ii) that such interest should be paid every six months; (iii) and that in case of default in payment of the same, the appellants might at once claim the amount of the bond. The second bond differed from the first only in this respect that in the third clause it contained a further provision that in case of default compound in-

ACT IX OF 1872, s. 73—(continued.)

terest should be payable. The question was to what amount of interest the appellants were entitled. *Held* that the appellants were entitled to interest for the periods after the bonds became due at the rate payable before that date (*vis.*, Rs. 2) and such rate should not be reduced because they had not availed themselves of their right of suing when default occurred; and that they were entitled to recover in respect of the second bond compound interest at the rate agreed upon. *Baldeo Pandey v. Gokul Rai* (*J. L. R.*, 1 *All.*, 603) followed. *CHAMMI LAL AND ANOTHER v. GANESH KUAR*.

[III-35]

(8). ————— Where a bond made no provision for *post diem* interest, but did provide for interest at 12 *per cent.* up to due date. *Held* that in giving a decree for damages for non-payment at due date the Court was by no means bound to adopt the rate of interest named in the bond, though, when the interest in the bond was reasonable, it might be a fair guide for the rate to be allowed as damages. *RAJPATI SINGH v. KESH NARAIN SINGH AND OTHERS*.

[X-149]

(9). ————— The appellants held a bond bearing date the 18th February, 1878, executed by the respondent, whereby the latter covenanted to repay the principal, with interest at the rate of 24 *per cent. per annum* on the 4th June, 1879. After the latter date, the bond made no provision for the payment of interest. Under these circumstances the lower Courts fixed the interest at 12 *per cent. per annum*. *Held* that there was no reason for interference with the decision of the lower appellate Court. *NARAIN JATI v. DALIP MISR*.

[VI-135]

(10). ————— Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract. *BHAGWANT SINGH v. DARYAO SINGH AND OTHERS*.

[IX-165]

(1.) s. 74.—*Stipulation to pay interest in case of default—Penalty.* *Held* that a covenant by a mortgagor to give possession over the mortgaged property to the mortgagee and in case of default in giving possession to repay the mortgage-money with interest at 24 *per cent. per mensem* was not of a penal character. *DHARAM SINGH v. HARDEO SINGH*.

[II-43]

(2). ————— The obligor of a bond promised therein to pay the amount on a certain day, without interest, and, if he made default, to pay the amount with

ACT IX OF 1872, s. 74—(continued.)

interest at the rate of Rs. 2 *per cent. per mensem*. *Held*, in a suit on the bond, that such interest, was not penal in its character, but contract interest, the liability to pay which was not made contingent on any breach of any part of the contract, and therefore should not have been reduced. **KUNJBEHARI LAL v. AJUDHIA PRASAD AND OTHERS.**

[III-210]

MAYARAM v. NAUBAT AND OTHERS.

[V-62]

(3). ————— The bond in suit provided that the obligor would repay the principal sum borrowed, Rs. 3,000, with interest at Re. 1-8 *per cent. per mensem* within one year, that if the obligor should pay the obligee any thing within the term of the bond such payment should be appropriated to the satisfaction of the interest due to the date of such payment, and the balance, if any, to the principal sum; and that whatever interest should be due on the expiration of the term of the bond should be added to the principal and interest should be chargeable on it annually, and the obligor should pay compound interest to the date of the satisfaction of the debt at the rate of Re. 1-8 *per cent. per mensem*. *Held* that the interest agreed to be paid was not in the nature of a penalty and the obligee was entitled to recover interest as stipulated in the bond. **SARJU PRASAD v. BENI MADHO.**

[III-208]

(4). ————— Where in a contract under which interest is payable it is agreed between the parties that if such interest be not paid punctually the defaulter shall be liable to pay interest at an enhanced rate from the time when interest first become payable under the contract, such agreement does not come within s. 74 of Act IX of 1872. **BANKE BEHARI AND OTHERS v. SUNDAR LAL AND OTHERS.**

[XIII-180]

DARJAN SINGH v. MUHAMMAD ABDUL ALI KHAN.

[VI-31]

SHAM LAL v. BANNI BEGAM.

[II-95]

BANWARI DAS v. MUHAMMAD MASHIAT AND OTHERS.

[VII-254]

NARAIN DAS AND OTHERS v. CHAIT RAM AND OTHERS.

[IV-19]

Per contra.

KHURRAM SINGH v. BHAWANI BAKHSH.

[I-8]

KHARAG SINGH v. BHOLA NATH AND OTHERS.

[I-102]

ACT IX OF 1872, s. 74.—(continued.)

RAM LAL v. SADASUKH AND OTHERS.

[IV-280]

NARAIN DAS AND OTHERS v. CHAIT RAM AND OTHERS.

[IV-19]

(5). ————— Where in a contract under which interest is payable it is agreed between the parties that if such interest be not paid punctually the defaulter shall be liable to pay interest at an enhanced rate (whether from the time of default or from the time when interest first became payable under the contract) such agreement does not come within s. 74 of the Indian Contract Act, and is to be construed according to the intentions of the parties as expressed therein, and not as a stipulation for a penalty. Such agreement is to be enforced according to its terms, unless it be found to have been, when made, unconscionable or fraudulent. The English doctrine of penal stipulations as applied to such agreements considered and not followed. **BANKE BEHARI AND OTHERS v. SUNDAR LAL AND OTHERS.**

[XIII-130]

(6). ————— In a bond it was provided that if the obligees were compelled to sue thereupon, the obligor should pay interest subsequent to the institution of the suit at the rate of 12 *per cent per annum*. *Held* that the plaintiff (obligee) was entitled to get interest at the rate of 12 *per cent.* up to the date of the decree. **KASHI NATH AND OTHERS v. GAJRAJMATI.**

[III-171]

(7). ————— In this suit for money on a bond the lower Court awarded interest at 2 *per cent.* to the plaintiff up to the date the bond became due. As to interest *post diem*, there being no specific stipulation the Court reduced it from Rs. 2 to Re. 1 *per cent.* *Held* that as the defendant had contracted to pay Rs. 2 *per cent.* as interest and as it was not a case of penalty the Court had no power to reduce the interest. Interest at Rs. 2 *per cent.* should therefore be allowed. **PURAN MAL v. JADAUN SINGH.**

[IV-40]

(8). ————— The High Court as a Court of equity possesses the power exercised by the Court of Chancery of granting relief in cases of such unconscionable or grossly unequal and oppressive bargains as no man of ordinary prudence would enter into, and which, from their nature and the relative positions of the parties, raise a presumption of fraud or undue influence. The principles upon which such relief is granted apply to contracts in which exceedingly onerous conditions are imposed by money-lenders upon poor and ignorant persons in rural districts. The exercise of such power has not been affected by the repeal of the usury laws. *Chesterfield v. Janssen* (1

ACT IX OF 1872, s. 74.—(continued.)

White and Tudor's leading cases in equity, 4th edition 541; 2 Ves 155) *O'Rorke v. Bolingbroke*, (L. R., 2 App. Cas. 814) *Earl of Aylesford v. Morris*, (L. R., 8 Ch. App. 484) *Nevill v. Snelling*, (L. R., XV. Ch. D. 679) *Beynon v. Cook*, (L. R., 10 Ch. App. 389) referred to. An illiterate *kurmi* in the position of a peasant proprietor executed a mortgage-deed in favor of a professional money-lender to whom he owed Rs. 97 by which he agreed to pay interest on that sum at the rate of 24 *per cent. per annum* at compound interest. He further agreed that *dharta* or a yearly fine, at the rate of one anna per rupee, should be allowed to the mortgagee to be calculated by yearly rests. It was also provided that the interest should be paid from the profits of certain *malikana* land of the mortgagor, and that if the interest were not paid for two years, the mortgagee should be put in possession of this land. As security for the debt, a six pies *zamindari* share was mortgaged for a term of eleven years. The effect of the stipulation as to "*dharta*" was that one anna per rupee would be added at the end of every year, not only to the principal mortgage-money but also to the interest due, and the total would be again regarded as the principal sum for the ensuing year. Ten years after the date of the mortgage, the mortgagor brought a suit for redemption on payment of only Rs. 97 or such sum as "the court might determine as due to the mortgagee." At that time the accounts made up by the mortgagee showed that the debt of Rs. 97 with compound interest had swollen to Rs. 873 of which the "*dharta*" alone amounted to Rs. 211. Held that the stipulation in the deed as to "*dharta*" was not of the kind referred to in s. 74 of the Contract Act (IX of 1872) and that there was no question of penalty but that, looking to the relative positions of the parties and the unconscionable and oppressive nature of the stipulation the benefit thereof should be disallowed to the mortgagee and the mortgagor permitted to redeem on payment of the mortgage money and interest, no appeal having been preferred by him from the decree of the first Court making redemption subject to the payment of interest. LALLI v. RAM PRASAD AND OTHERS.

[VI-318]

(9.)—The obligor of a bond promised to pay the amount on demand with interest at the rate of Rs. 6-4-0 *per cent. per mensem*, to pay the interest every six months, and, if he made default in the payment of the interest for any six months, to pay interest on such interest at such rate. Held, in a suit on the bond, default in the payment of interest as agreed having occurred, that, as the obligor expressly undertook to pay such high rate of interest, and there was no question of penalty, that is to say, of a liability to damages for breach of the terms of a contract in the sense of s. 74 of the Contract Act, the contract rate of interest stipulated to be paid could not be interfered with. BHOLA NATH AND ANOTHER v. FATEH SINGH AND ANOTHER.

[III-210]

ACT IX OF 1872, s. 74.—(continued.)

(10.)—In a deed of mortgage, dated in July, 1870, the mortgagors covenanted among other things, as follows:—"That, having repaid the principal amount in the course of three years, we shall take back this bond, and we shall continue to pay annually interest on the said amount at the rate of Re. 1-2 *per cent. per mensem*; that, should we in any year fail to pay the amount of interest, it shall, at the close of the year be consolidated with the principal amount, and we shall pay compound interest at Re. 1-2 *per cent. per mensem*.....that, in the event of non-payment of the principal and interest on the expiration of the appointed time, the mortgagee "shall be at liberty to recover from us the whole amount due to him with interest by means of a law suit." Held that the terms of the bond amounted to a covenant to pay interest at the stipulated rate after the period of three years, so long as the principal remained due; that, the bond containing an express covenant for the payment of interest at that rate, the interest was not affected by the considerations of the reasonableness or otherwise of the rate; and that the mortgagee was therefore entitled to interest up to the date of the decree at the rate of Re. 1-2 *per mensem*. Baldeo Pandey v. Gokul Rai (J. L. R., 1 All., 603) referred to. CHHAB NATH v. KAMPTA PRASAD AND ANOTHER.

[V-27]

(11.)—A mortgage bond recited that the obligors had borrowed Rs. 7,000 in cash, that they covenanted to pay this sum on demand with simple interest at Re. 1 *per cent. per mensem*, that in the event of failure to pay the interest for any year within that year the obligees would be "at liberty to recover the interest due with interest thereon at Re. 1 *per cent. per mensem*." Held that the stipulation was not of the nature of penalty. MAKUND RAM AND OTHERS v. THAKUR DAS AND OTHERS.

[VII-78]

(12.)—A bond provided for the payment of the principal amount with interest at the rate of 12 *per cent. per annum* on a certain date; that such interest should be payable every half year; that if it was not so paid compound interest should be payable; and that if the bond-debt was not paid at such date the obligee should be entitled to interest at 18 *per cent. per annum*. Held that the Court below was right in regarding the provisions respecting compound interest and the interest payable after default as penal and awarding instead thereof interest at the rate of 18 *per cent. per annum* from the date of the first default, viz., the failure to pay the first half year's interest. ILAHI BAKHSH AND ANOTHER v. JUGAL KISHORE.

[I-51]

(13.)—The bond sued upon dated the 30th March, 1869, and

ACT IX OF 1872, s. 74.—(continued.)

payable on demand, provided that interest on the principal amount at the rate of one *per cent. per mensem* should be payable half yearly, and in case of default the interest should be added to the principal and bear interest at Re. 1-8 *per cent. per mensem*. No interest having ever been paid, the present suit was brought on the 25th January, 1881, for the principal and compound interest. The Court of first instance holding that the stipulation as to compound interest was penal allowed interest at one *per cent. per mensem* from the date of the bond up to the date of the first default and at Re. 1-8 *per cent. per mensem* from that date up to the date of the institution of the suit. *Held* that the Court had properly disposed of the case and had equitably refused to allow compound interest. **POKHAR PRASAD v. CHADAMMI LAL AND OTHERS.**

[I-171]

(14). ————— The lender of money, for the use of which interest is to be paid, may, at the time of making the loan, protect himself against breach of the borrower's contract to pay the interest when due, either by a stipulation that in case of such breach, he shall be entitled to recover compound interest, or by a stipulation that, in such a case, the rate of interest shall be increased. But a condition that, upon failure by the borrower to pay the interest when due, both compound interest and an increased rate shall be payable, amounts to a penalty, inasmuch as the two stipulations together can not be regarded as a fair agreement with reference to the loss sustained by the lender. In a bond dated in February, 1877, for a sum of money payable in June, 1882, it was provided that interest should be paid at the rate of Rs. 9 *per cent. per annum* on the *Puranmashi* of every *Jaith*, and that, if the interest were not duly paid, the rate should be increased to Rs. 15 *per cent. per annum*, and compound interest shall be payable. There was no provision for payment of interest from the time when the principal became due. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest from the date of the bond to the date of the institution of the suit at Rs. 15 *per annum*, and compound interest for the same period at the same rate. *Held* that the stipulations contained in the bond must be regarded as penal, and it was therefore the Court's duty to limit the penalty to what was the real amount of damage sustained by the plaintiff in consequence of the defendants' breach of the contract to pay the interest at the due date. *Held* that, for this purpose, the proper course was to reduce the interest to 9 *per cent. per annum*, reckoned at compound interest, with yearly rests, to the due date of the bond; and that, inasmuch as the plaintiff was to blame for not having enforced his remedy at an earlier date, he should only recover simple interest at Rs. 9 *per cent.* from the due date of payment, upon the entire sum which was due when the bond became due, *i. e.*,

ACT IX OF 1872, s. 74.—(continued.)

the principal added to the compound interest calculated at Rs. 9 *per cent.* The same obligee held another bond executed by the same obligors in June, 1879, for a sum of money payable in June, 1882, with interest at Rs. 9 *per cent. per annum*. There was a provision in the bond that if the principal and interest were not paid on the due date, the obligee should be entitled to recover the principal with interest at the rate of Rs. 24 *per cent. per annum* from the date of the bond. In December, 1884, the obligee brought a suit on the bond against the obligor, claiming interest on the principal amount from its date to the date of the institution of the suit at the rate of Rs. 24 *per cent. per annum*. *Held* that the increased rate of interest might fairly be considered as representing the damages sustained by the lender by reason of the borrower's failure to pay interest at the specified time, and should therefore be paid down to the due date of the bond; and that, as the plaintiff failed to enforce payment for a long time, the interest, from the due date, might fairly revert to the old rate of Rs. 9 *per cent. per annum*, and the amount should be calculated from that date, on that basis, on the whole amount of principal and interest then due on the bond. **DIP NARAIN AND OTHERS v. DIPAN RAI AND OTHERS.**

[VI-48]

(15). ————— *A* gave *B* a bond for Rs. 750; Rs. 400 principle and Rs. 350 interest calculated for ten years; and agreed to pay the same in ten instalments of Rs. 75 each without interest. It was also agreed that in case of default of any one instalment the whole amount will be recovered at once. The very first instalment not having been paid, *B* brought this suit for Rs. 750. *Held* that s. 74 of the Contract Act was applicable to the case and *B* was entitled only to reasonable compensation for the breach and not to the entire sum of Rs. 350 interest for ten years. **KUNJ BEHARI LAL AND ANOTHER v. GULAB SINGH AND OTHERS.**

[IV-105]

(16). ————— *Excessive interst—Hard bargain.* *Held* that a stipulation in a bond to the effect that the money would be paid by a certain date with interest at one *per cent. per mensem* and in case of default at 2 *per cent. per mensem* was not so extortionate or exorbitant as to relieve the contracting party from the obligation of his contract on equitable grounds. **SHAM LAL v. BANNI BEGAM.**

[II-95]

(17). ————— In the case of an agreement to pay interest upon a loan, a Court cannot disallow the interest agreed upon because it appears to be at an extravagant or an excessive rate. Unless the debtor belongs to a category of persons whom a Court of equity would relieve from the terms of his contract, or what has been agreed to be paid in the name of

ACT IX OF 1872, s. 74.—(continued.)

interest is not in reality interest at all but a penalty for the non-performance of the contract, or the contract has been entered into through fraud, coercion, undue influence, or other circumstances entitling the debtor to relieve, the debtor must be compelled to pay the amount of interest that he has agreed to pay, though he may have agreed to pay compound interest at what may seem to be an extravagant rate. **TARA CHAND v. GIRDHARI LAL AND ANOTHER.**

[IX-167]

BANKE BEHARI AND OTHERS v. SUNDAR LAL AND OTHERS.

[XIII-130.]

(18). ————— A sum of Rs. 99 was lent on a mortgage bond, dated 15th August, 1876, with compound interest at 2 *per cent. per mensem*. Under the terms of the bond the plaintiff had power to enforce the bond at any time by bringing to sale the mortgaged property, but he did not bring the suit until 27th July, 1885. *Held* that under the circumstances compound interest should not be allowed, the defendant was being pressed for revenue due, and advantage was taken of the circumstance. The bargain thus seems a hard and unconscionable one and should not be enforced by a Court of equity. *Held* that the Court has power to refuse to give effect to such transactions. **MADHO SINGH AND OTHERS v. KASHI RAM.**

[VII-19]

(19). ————— *Penal stipulation—Reasonable compensation—Measure of damages.* Under s. 74 of the Contract Act, 1872, the Courts are not bound, even in cases where the parties to a contract have, in anticipation of a breach, expressly determined by agreement what shall be the sum payable as damages for the breach, to award such sum for a breach, but may award for the same "reasonable compensation" not exceeding such sum. As a general principle, compensation must be commensurate with the injury sustained. Acting upon this principle, when the injury consists of a breach of contract, the Court would assess damages with a view of restoring to the injured party such advantage as he might reasonably be expected to have derived from the contract, had the breach not occurred. *Held*, therefore, where the parties to a contract to deliver a certain quantity of raw indigo on a certain day agreed that a certain sum should be paid as compensation in case such indigo was not delivered as agreed, that the method of assessing damages in case of a breach of the contract would be to ascertain the quantity of indigo which could have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which the indigo might have been fairly sold in the market during the season to which the contract related, and to deduct from such price the ordinary charges of producing and selling the quantity

ACT IX OF 1872, s. 74.—(continued.)

of indigo in question; and that more than the amount so ascertained ought not equitably to be awarded, such amount being "reasonable compensation" for a breach of the contract. **NAIT RAM v. SHIB DAT AND OTHERS.**

[III-2]

(20). ————— In this case the original rate of interest stipulated was Rs. 7-8 *per cent. per annum*, compound interest and the enhanced rate stipulated, in case of default, was Rs. 37-8 *per cent. per annum*. The Court awarded interest at Rs. 11-4 *per cent. per annum* on the unpaid amount of interest from the date of default to the date of the decree. **KHURRAM SINGH v. BHAWANI BAKSH.**

[I-8]

(21). ————— In this case the original rate stipulated was Rs. 1-4 *per cent. per mensem*, compound interest, at six-monthly rates and the enhanced rate stipulated was Rs. 2 *per cent. per mensem*. The Court awarded Re. 1-4 *per cent per mensem* from the date of the bond to the date of the decree and compound interest from the date of default to the date of the decree at the rate of annas 4 *per cent. per mensem*. **KHARAG SINGH v. BHO-LA NATH AND OTHERS.**

[I-102]

(22). ————— In this case the original rate stipulated was Re. 1 *per cent. per mensem*, compound interest, at six-monthly rates and the enhanced rate stipulated was Rs. 2 *per cent. per mensem*. The Court awarded Rs. 2 *per cent. per mensem* up to the date the bond became due and Re. 1 *per cent. per mensem* after that date. **RAM LAL v. SADASUKH AND OTHERS.**

[IV-280]

(23). s. 74—*Exception.* *Held* that the failure by an administrator to make a true inventory of the estate and exhibit the same to the Court on the fixed date (which he was bound to do under the bond) was a breach of the condition of the bond, which entitled the assignee of the bond to recover the damages he had sustained by such breach. But he was not entitled to recover the whole amount mentioned in the bond as recoverable in case of breach of the bond. The case not coming within the exception to s. 74, Contract Act. **LACHMAN DAS v. CHATER AND ANOTHER.**

[VII-279]

s. 90.—*K*, a servant in the employment of the East India Railway Company, was recommended by the Traffic Manager a *bonus* in consideration of long and good services. This recommendation was sanctioned, and the amount of the *bonus* was received by the District Paymaster. Before payment to *K*, the money was attached

ACT IX OF 1872, s. 90.—(continued.)

in execution of a decree obtained against him by *J. Held* that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July, 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery; that as there had been no such delivery as completed the transfer (s. 123 of the Transfer of Property Act, and s. 90 of the Contract Act), the money was not at *K's* disposal, and he could not have enforced payment; and that the money was therefore not liable to attachment in execution of a decree against him. **JANKI DAS v. THE EAST INDIAN RAILWAY COMPANY.**

[IV-210]

s. 107.—In the case of a sale, if the purchaser does not perform his part of the contract, he is liable in damages to the seller, the measure of damages being the difference between the contract price and the price which the seller could have obtained for the article at the time of the breach of contract. If a vendor, on breach of contract by non-payment of the purchase-money, elects to exercise the right of re-sale given to him by s. 107 of the Indian Contract Act, 1872, not only is the vendor bound to wait a reasonable time after giving notice to the vendee of his intention to re-sell before actually re-selling, but he is also bound to exercise his right of resale within a reasonable time after the date of the breach. **PRAG NARAIN v. MUL CHAND AND OTHERS.**

[XVII-150]

(1). s. 127.—*Consideration—Contract to withdraw prosecution.* One *D* (*B* and *C's* father) executed a bond for Rs. 1,939 in favor of *A*; *C* committed some breach of trust in respect of the money subject of the bond; and was prosecuted by *A* for the same. On the day fixed for the trial *A* agreed to withdraw the prosecution on *B's* executing a surety-bond to secure the payment of the bond executed by *D*. The bond was executed and the prosecution withdrawn but subsequently the High Court ordered that the offence could not be compounded and ordered his trial to be proceeded with. This suit was brought by *A* to enforce the surety-bond executed by *B*. *Held* that the consideration for the bond (withdrawal of the prosecution) having failed the bond was bad for want of consideration. **HET RAM v. DEBI PRASAD.**

[I-2]

(2).—*Refraining to execute decree.* *A* had a decree against *B* which he refrained from executing in consideration of a bond executed by *C* and *D* (*B's* father and brother respectively) by which they bound themselves to pay the money due under the decree. *Held* that *A's* refraining to execute the decree against *B* was a sufficient consideration to make the contract binding on *C* and *D*. **NARAIN SINGH AND ANOTHER v. MATA PRASAD SINGH.**

[VII-52]

ACT IX OF 1872.—(continued.)

(1). s. 128 *Suit against principal and surety jointly.* This was a suit against a lessee and two other persons who by separate agreement stood surety for the due performance of the conditions of the lease. Prior to this suit plaintiff had sued the lessee alone (as he was obliged to do) in the Revenue Court and had realized part of the rent. This suit was for what was left unrealized. The suit was dismissed by the lower Court on the ground that the plaintiff should have proceeded first against the surety in the Revenue Court. *Held* that the lower Court was wrong and that the suit was maintainable. **MAHTAB KUARI v. DEBI DIN AND ANOTHER.**

[VI-241]

(2).—*Suit against surety alone.* *Held* that a person may proceed against the surety alone without having previously proceeded against the principal defendant and without implicating him in the suit. **INAYATULLAH v. RANI.**

[VI-306]

(3).—*Where a contract of guarantee has been given, and the principal debtor makes default, the creditor may at once prefer his claim against the surety, or if there be more than one then against all or either of them unless the contract of guarantee contains any stipulation to the contrary.* **KARIM BAKHSH AND OTHERS v. BITHUL DAS AND OTHERS.**

[II-132]

s. 131.—*Lessor and lessee—Guarantee.* One *B* proposed to take a lease of *zamindari* property from *M* for the period of eight years at a rental of Rs. 3,900, *per annum*. *M* declined to grant the lease until the payment of rent during the terms of eight years was guaranteed by one *S*, the father of the plaintiff. *S* on his part required a guarantee or indemnity against any rent which might not be paid by *B*, and which he might under his proposed guarantee become liable to pay. The defendant's father, *G*, accordingly gave a guarantee to *S* in the following terms:—"And for your satisfaction, I write that if any money remains due from *B* on account of the lease for any year or harvest, and if you have to pay the same on account of the suretyship, I am responsible to you to pay that amount to you. Rest assured." *S* then gave his guarantee to *M*, and he granted the lease to *B*. *G* died on 22nd May, 1880. *B* failed to pay the rent due for the year 1883. *M* having died, his representatives sued *S* on his guarantee and recovered from him the rent due and certain costs and expenses. *S* then died, and the plaintiff, as his representative, brought this action against defendant, the legal representative of *G*, to recover the amount of the decree and costs which *S* had to pay. The Court of first instance decreed the whole claim with costs to be recovered from the estate of *G*, and this decree was confirmed in appeal by the District Judge. On 2nd appeal

ACT IX OF 1872, s. 131—(continued.)

it was contended that under s. 131 of the Indian Contract Act, the death of *G* was a complete answer to the claim. *Held*, that assuming that the case was that of a continuing guarantee within the meaning of s. 131 of the Indian Contract Act, still, having regard to the object for which the two guarantees were given, it must be concluded that the parties intended in the one case that the lessor should be guaranteed for all rent which might become due during the currency of the lease, and that *S* should be guaranteed for any of that rent which by reason of his contract of guarantee he should be made to pay, and consequently, even if it were a continuing guarantee, the liability of *G* was not determined on his death. *Held* further, that neither *G*, if he were alive, nor on his death the defendant, as his representative, can be made liable for costs and expenses which *S* had incurred in defending the previous suit against him for rent brought by the lessor, there being no evidence to show that *S* acted as a prudent man would have done in defending the action against him or was authorized by defendant to defend the suit. *Loyd's v. Harper*, (L. R., 16 Ch. D., 290) referred to. *GOPAL SINGH v. BHAWANI PRASAD*.

[VIII-211]

s. 134.—*T*, the son-in-law of *S*, was indebted to *C* in considerable sums of money. On the request of *S* and on his making a deposit of Rs. 1,300 as a guarantee (for which *C* gave a receipt, in the form of a promissory note), *C* granted *T* one week's time for the payment of the debt. The money not being paid within the week *C* went to *T* and obtained from him his promissory note payable on demand for the sum of Rs. 1,800. *Held* that this arrangement discharged the obligation of the surety (*S*) and he could successfully sue for his Rs. 1300 deposited with *C*. *CREET v. SETH AND SETH*.

[VII-136]

s. 134, 135 & 137.—*Surety-Omission—Discharge of surety.* The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance. S. 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as to the effect of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. *Hajarimal v. Krishnarav* (I. L. R., 5 Bom., 647) and *Krishito Kishori Chowdhraim v. Radha Romun Munshi* (I. L. R., 12 Calc., 330) dissented from. *Hazari v. Chunni Lal* (I. L. R., 8 All., 259) referred to. *RADHA AND OTHERS v. KINLOCK*.

[IX-94]

ss. 135, 137, 139 & 141.—*Surety—Omission—Discharge of surety.* A decree-holder, in execution-proceedings, agreed to accept payment

ACT IX OF 1872, ss. 135, 137, 139 & 141—(continued.)

of the decretal amount by the judgment-debtors in annual instalments. He also accepted from certain other persons a surety-bond in the following terms:—"In case of default of paying the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder we, the executants, stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution and the decree became time-barred. He then sued the sureties to recover the amount of the decree. *Held* that the terms of the bond requiring the creditor to execute his decree within one month were peremptory, and imported much more than the usual agreement under such circumstances, that the decree-holder might execute his decree, if he pleased, on a default; that the legal consequence of his omission to execute the decree being the discharge of the principal debtors, the sureties would, under s. 134 of the Contract Act, stand discharged likewise; that his action was much more serious than "mere forbearance" in favor of his debtors, in the sense of s. 137; that he had done an act inconsistent with the equities of the sureties and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired (s. 139); that he had deprived the sureties of the benefit of the security constituted by the decree; that they were therefore discharged to the extent of the value of that security (s. 141); and that the suit must consequently be dismissed. *HAZARI AND OTHERS v. CHUNNI LAL*.

[VI-75]

ss. 150-152.—The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident, it lies upon the bailee to account for its occurrence, and thus to show that it has not been caused by his negligence. In such cases it is for him to give a *prima facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, and is not *prima facie* improbable, the Court is bound in law to find in his favor, and the mere happening of the accident is not sufficient proof of negligence. *SHIELDS v. WILKINSON*.

[VII-44]

s. 170.—*Remuneration.—Lien.* *S* delivered *J* an organ to repair, *J* promising to repair it for Rs. 100. *J* subsequently refused to repair it for that sum, and claimed to be entitled to retain the organ until he received certain remuneration for the work done. *Held*, that, as where there is an express contract, it must be performed in its entirety or nothing can be claimed under it, and there is only room for a *quantum meruit* claim, where no express contract has been made, *J* was

ACT IX OF 1872, s. 170.—(continued.)

not entitled to retain the organ until he was paid. *SKINNER v. JAGAR.*

[III-263]

s. 188.—Implied agency—Husband and wife.] *Held* by the Division Bench that the liability of a husband for his wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done. In a suit by a creditor to recover from his debtor and her husband the amount of money lent by the plaintiff to the former on her notes of hand, it appeared that the defendants had always lived together, that the wife had an allowance wherewith to meet the household expenditure and all her personal expenses, and that the money had been borrowed without the husband's knowledge and not to meet any emergent need, but to pay off previous debts, and had been raised by successive borrowings over a considerable period, the debt having increased by high rates of interest. It was also found that it had not been shown that the plaintiff looked to the husband's credit, or that the husband had ever previously paid his wife's debts for her. *Held* that under these circumstances no agency on the wife's part for her husband had been established, and that the husband was therefore not liable to the claim. *GIRDHARI LAL v. CRAWFORD.*

[VI-325]

s. 187.—Agent.—Authority to borrow money] *Held* that a power of attorney which gave an agent authority "to make, sign, seal, execute and deliver any agreements, contracts, conveyances, assignments, leases or counterparts of leases, bills of sale, bonds, mortgages, reconveyances, &c.," and "generally to act in the management and superintendence" of the affairs of the principal, and "in any of the afore-said capacities, without any reservation whatsoever, and to do, perform and execute all acts and things as fully and effectually as" the principal "might or could do if personally present and did the same, notwithstanding no special power or authority is contained in these presents" authorized the agent to borrow money for the use of the principal. *DURGA DATI v. FINLAYSON & CO.*

[II-39]

s. 201 & 218.—Held that where an agent for the sale of goods receives the price thereof the agency does not terminate, with reference to ss. 201 and 218 of Act IX of 1872 until he has paid the price to the principal. *BABU RAM AND ANOTHER v. RAM DAYAL AND ANOTHER.*

[X-99]

s. 233.—Principal and agent.—Liability of.] *Held* that where a person contracts with another believing him to be the principal but afterwards discovers that he is only an agent for another he can hold that other responsible but that if he chooses to hold the contractor only liable and

ACT IX OF 1872, s. 233.—(continued.)

obtains a decree against him he can not hold the other also liable. *BIR BHADDAR v. SARJU PRASAD.*

[VII-229]

ss. 239, 240.—Partnership.] *Held*, on the construction of the agreement in this case, that such agreement did not create a "partnership" between the parties thereto, as defined in s. 239 of Act IX of 1872, but was an agreement of the kind mentioned in s. 240 of that Act. *BHAGGU LAL v. DEGRUYTHER.*

[I-122]

s. 250.—Liability of partners for allowing third person to represent.]

See s. 265. *HARRISON AND ANOTHER v. THE DELBI AND LONDON BANK AND ANOTHER.*

[II-87]

(1).—s. 265.—Jurisdiction.] The appellant *J S* instituted the present suit in the Court of the District Judge. The Judge being of opinion that the suit was one for dissolution of a partnership and not merely one for winding up the business of the firm after the termination of the partnership to which s. 265 of the Indian Contract Act was applicable, returned the plaint for presentation to the proper Court. The appellant appealed to the High Court. *Held* that as there was nothing on the face of the plaint to show that the partnership was subsisting, the suit must be regarded as an ordinary one under s. 215 C. P. C. and as such should be entertained in the Munsif's Court. The appeal must be dismissed. *JAIPAL SINGH v. MATADIN RAM.*

[III-205]

(2). — — — — — T, B, R, and W, the owners of a certain estate in equal shares, in 1863 entered into a partnership for "the cultivation of tea and other products" upon such estate. In 1864, *H, E, and I,* joined the firm. In 1870 *H* died; and in 1871, *T* purchased his share and those of *E* and *I,* and in 1873 of *R.* In 1875, *T* gave the Delhi and London Bank a mortgage on such estate as security for the repayment of money which he had borrowed from the Bank ostensibly for the purposes of the estate. The Bank obtained a decree against him personally for the money, in execution of which his rights and interests in the estate were put up for sale on the 20th June, 1877, and were purchased by the Bank, which obtained possession of the estate in August, 1877. In August, 1879, *B* and *W's* executor sued *T* and the Bank, claiming a declaration that they were or had been partners with *T* in the estate; that if the partnership should be held to be subsisting, it might be dissolved, or that if it had ceased to exist, the date of its termination might be fixed; and that in either event a liquidator might be appointed to take an account, and after realizing assets and discharging liabilities, might be ordered to pay them each one-third of such balance as remained. The suit was instituted in the

ACT IX OF 1872, s. 265.—(continued.)

Court of a District Judge. He transferred it to the Court of a Subordinate Judge. The High Court subsequently transferred it to its own file. *Held* that the suit was not one falling within the purview of s. 265 of the Contract Act; but assuming that it was such a suit, and the Subordinate Judge had no jurisdiction, the High Court was nevertheless competent to transfer it. That the Bank, as *T's* representative by purchase, had been properly joined as a defendant in the suit. That, as the effect of the purchases by *T* in 1871 and in 1873 was to relieve the estates of *H, E, I,* and *R* of all past and future liabilities of the partnership, in respect of which *B* and *W* still continued as liable as *T*, and to which they would have to contribute to discharge, such purchases should be regarded and treated as made on behalf of the partnership, and therefore at the time of the execution of the mortgage of the estate *B, W,* and *T* were interested in the estate to the extent of one-third each. That, although *T* was not authorized, either actually or impliedly, by *B* and *W* to mortgage the estate, and the mortgage therefore was not binding on them, yet as they allowed him to conduct the business of the estate in such a manner as to make it appear that the control and management of it rested with him, and he was for all ordinary business purposes their representative, *B,* and *W* were bound, in any accounting that might take place, to recoup the defendant Bank for such advances as were made to *T* for the necessary purposes of the estate, in the same proportion as they must discharge debts due to other creditors. That *T* was entitled to be reimbursed such moneys of his own as he had expended within the legitimate scope and for the proper purposes of the partnership as originally contemplated by the parties. Directions to the liquidator appointed how to proceed. **HARRISON AND ANOTHER v. THE DEHLI AND LONDON BANK.**

[II-87]

(3.)—The ordinary Civil Courts have jurisdiction to try a suit for dissolution of a partnership, their jurisdiction to try such suits not being ousted by s. 265 of the Contract Act, 1872. **RAM JIWAN MAL AND ANOTHER v. CHAND MAL AND OTHERS.**

[V-18]

KALLAN DAS v. GANGA SAHAI.

[III-100]

(1.) **Ch. IX.—Partnership, suit for accounts before dissolution.** It is only in exceptional cases that a suit can be brought by one partner against another, which involves the taking of partnership accounts prior to dissolution. A suit was brought by the widow of a partner in an indigo concern against her deceased husband's co-partner in respect of certain alleged

ACT IX OF 1872, Ch. XI.—(continued.)

losses of the concern, and to recover a moiety of moneys expended by her husband in advances made to indigo cultivators on behalf of the partnership. At the time when the suit was brought, the partnership had not been dissolved. *Held* that, the partnership not having been dissolved, the plaintiff was not entitled to an account, and the suit must therefore fail. *Brown v. Tapscott*, (6 *M. W.* 119) and *Elme v. Smith* (7 *Bing.* 709) distinguished. **KASA MAL v. GOPI.**

[VI-316]

(2.)—*Held* that an action by one partner against the other for an account during the pendency of the partnership without asking for the dissolution of the partnership does not lie. **UDAI CHAND v. RAGHUNATH RAI.**

[VII-87]

(3.)—*Suit by some partners only.* Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand v. Balram Das* (*J. L. R.*, 1 *All.*, 453) and *Gobind Prasad v. Chandar Sekhar* (*J. L. R.*, 9 *All.*, 486) referred to. **IMAMUDDIN AND ANOTHER v. LILADHAR.**

[XII-104]

Act XV of 1872 (Christian Marriage.)

ss. 18 & 66.—The maxim *ignorantia juris non excusat* cannot be applied to a declaration, though in fact false, made under s. 18 of Act No. XV of 1872, inasmuch as the declaration required by that section to be made is a declaration as to the belief only of the person making it; and further in order to entail the penal consequences provided for by s. 66 of the said Act such false declaration must be made "intentionally." **QUEEN EMPRESS v. ROBINSON.**

[XIV-49]

Act X of 1873 (Oaths).

s. 5.—Having regard to the language of the Oaths Act, a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may be. *Queen v. Maru* (*J. L. R.*, 10 *All.*, 207) referred to. **QUEEN EMPRESS v. LAL SAHAI.**

[IX-65]

s. 6.—Section 6 of the Oaths Act imperatively requires that no person shall testify as a witness except on oath or affirmation; and, not withstanding s. 13 of the same Act, the evidence of a child of eight or nine years of age is inadmissible if it has been advisedly recorded without any oath or affirmation. *The Queen v. Sewa Bhagta* (14 *B. L. R.*, 294) dissented from. The nature of judicial oaths and affirmations and the history

ACT X OF 1873, s. 7.—(continued)

of Indian legislation on the subject discussed.
EMPRESS v. MARU AND ANOTHER.

[VIII-86]

QUEEN EMPRESS v. LAL SOHAI.

[IX-65]

(1.) ss. 8 & 11.—*Evidence given on particular oath—conclusive.* The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given, and the court gave a decree in accordance with the award overruling plaintiff's objection that the award was illegal. *Held* (Oldfield, J.) that the procedure adopted by the arbitrator being illegal, and not being warranted by the Oaths Act there was no award on which a decree could legally be made. *Held* (Stuart C. J.) that the procedure of the arbitrator did not require to be warranted by the Oaths Act. **BHAGIRATH v. RAM GHULAM.**

[II-34]

(2.)—The plaintiff in a civil suit offered to be bound by the statement which the defendant might make on oath holding the arm of his son. The defendant accepted the proposal, took the required oath, and made a statement which had the effect of defeating the plaintiff's claim. When the defendant came into Court to take the oath the plaintiff attempted to revoke his proposal, but alleged no further reason than that he did not understand what he had intended and did not think the defendant should speak the truth. *Held* that the form of oath above indicated ought not, having regard to s. 8 of Act No. X of 1873 to have been administered, but as it had been administered and was a form of oath specially binding upon Hindus, the statement made upon it should be accepted. *Held* also that when one party to a suit offers to be bound by the oath of the other party, and such other party accepts the proposal, the party so offering to be bound should not be allowed to revoke his proposal except upon the strongest possible grounds proved to the satisfaction of the Court to be genuine grounds for revoking the proposal. **Lekhray Singh v. Dulhma Kuar** (I. L. R., 4 All., 302) referred to. **RAM NARAIN SINGH v. BABU SINGH.**

[XV-158]

ss. 10 & 11.—Where a case had been decided under the provisions of ss. 10 and 11 of the Oath's Act (Act X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties, *Held*, that the case

ACT X OF 1873, ss. 10 & 11.—(continued.)

should be remanded to the Lower Court for disposal according to the usual procedure. **MAHABIR PRASAD MISSEER AND OTHERS v. MAHADEO DAT MISSEER AND OTHERS.**

[XI-143]

(1.) s. 11.—*Evidence given on particular oath—conclusive.* In this case defendant offered to abide by any statement which the plaintiff might make provided he should swear "by his future hopes, his children and the holy Ganges". Plaintiff made a statement upon oath but not in the particular form. *Held* that the oath was not conclusive as against the defendant with reference to s. 9 of the Indian Oath Act and the case must be remanded to be tried on the merits. **KHASI RAM v. BHULLU AND ANOTHER.**

[V-188]

(2.)—*Agreement—Conclusive.* An agreement between parties to a suit that if a certain witness produced a certain document and certain specified words were found therein then judgment should be given for the plaintiff, while if such words were not found therein judgment should be given for the defendant, though conclusive on the parties to it in respect of the matter of the evidence given thereunder is not conclusive on the Court so as to oblige it to accept the evidence so given as conclusive upon it. **Vasudeva Shanbog v. Naraina Rai** (I. L. R., 2 Mad., 356) referred to. **MUHAMMAD ZAHUR v. CHEDA LAL.**

[XII-3]

s. 13.

See s. 6.

ss. 28 & 40.—*Application to add the Local Government as defendant.* Where a plaintiff in a suit brought under Act No. XV of 1873, against a Municipal Committee not having made the Local Government a party defendant to the suit as originally filed, subsequently applied to have the Local Government made a party, it was *held* that such application to add the Local Government as a party should state that the notice required by s. 424 of the Code of Civil Procedure had been served as provided by that section. **RAM DIAL AND ANOTHER v. THE PRESIDENT OF THE MUNICIPALITY OF KALPI.**

[XVI-22]

ACT XV OF 1873 (Municipalities, N.-W. P. and Oudh.)

s. 38.—*Public highway.* There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land. S. 38 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act) was not intended to deprive persons of any private right of property they might have in the land used as a public high way, or to confer such rights on the Municipality, nor has the section any such effect. In a case where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—*held* that the owners

ACT XV OF 1873, s. 38.—(continued.)

had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition. **NIHAL CHAND v. AZMAT ALI KHAN.**

[V-56]

(1).—s. 43.—Limitation and cause of action.]

The lessee of certain land belonging to the plaintiffs, situate within the limits of a Municipality, applied to the Municipal Committee for permission to establish a market on such land, and such permission was refused by the Committee on the 26th November, 1878. Meanwhile the plaintiffs in behalf of the lessee and in their own behalf as proprietors of such land, applied to the Committee for such permission, sending such application by post. No orders were passed by the Committee on such application because it had come by post. On the 18th April, 1879, the plaintiff, sued the Committee for a declaration of their right to establish a market on such land and for a perpetual injunction restraining the Collector as President of the Committee from interfering with their so doing. The cause of action alleged was the refusal of the Committee of the 26th November, 1878.

Held by Stuart, C. J., on the question whether such suit was barred by the provisions of s. 43 of Act XV of 1873, not having been brought within three months next after the date of the alleged cause of action, that it was not so barred, inasmuch as the provisions of that section were only applicable to suits brought against a Committee for something done under that Act, in which compensation was claimed, and not to those in which compensation was not claimed; and that therefore the present suit was not governed by the provisions of that section, but of No. 120, sch. ii of Act XV of 1877. Also that the rejection of the lessee's application gave the plaintiffs a cause of action as there was privity between them and the lessee; and that, as there was nothing in the Municipal rules prohibiting the presentation of an application by post, the application of the plaintiffs should not have been rejected.

Held by Duthoit, J. that the suit of the plaintiffs was governed by the provisions of s. 43 of Act XV of 1873, and was therefore beyond time. *The Municipal Committee of Moradabad v. Chatri Singh* (I. L. R., 1 All., 269) *Manni Kasaundhan v. Crooke* (I. L. R., 2 All., 296) and *Chunder Sakhur Bundopadhya v. Obhoy Churn Bagchi* (I. L. R., 6 Calc., 8) referred to. **BIRJMOHAN SINGH AND OTHERS v. THE COLLECTOR OF ALLAHABAD AS PRESIDENT OF THE MUNICIPAL COMMITTEE OF ALLAHABAD.**

[II-63]

(2).—Held by the Full Bench (reversing the decision of Duthoit, J., and affirming that of Stuart, C. J.), that such suit was not barred by limitation under the provisions of s. 43 of Act XV of 1873, because it had not been brought within three months after the date of the alleged cause of action, inasmuch as the provisions of that section were only applicable to suits brought

ACT XV OF 1873, s. 43.—(continued.)

against a Committee for something done under the Act in which compensation was claimed, and not to those in which compensation was not claimed. *Held*, also by the Full Bench (confirming the decision of Stuart, C. J.) that the refusal of the Municipal Committee to allow the plaintiff's lessee to establish the market gave them a cause of action. **BIRJ MOHAN SINGH AND OTHERS v. THE COLLECTOR OF ALLAHABAD AS PRESIDENT OF THE MUNICIPAL COMMITTEE OF ALLAHABAD.**

[I-148]

(1). s. 45.—Evasion of Octroi—Intention.]

Certain traders of Ludhiana consigned 333 bags of grain to the accused, traders residing in Meerut. The bags were weighed by the Railway authorities and entered in the Railway receipt as weighing 527 maunds. The consignees submitted this receipt to the Octroi Office at Meerut and paid duty on 527 maunds as mentioned in the receipt. Almost immediately after this despatch it was discovered that the bags had been under weighed at Ludhiana. The accused were upon this discovery required to make good the balance of freight which they did. The next day the accused petitioned the Municipality offering to pay up the balance of the Octroi duty. But the Municipality had already on the same date brought a charge against the accused for evasion of payment of Octroi duty under s. 45 of Act XV of 1873. Subsequently the Railway authorities preferred a criminal charge against the Clerk at Ludhiana in respect of the under weighing. *Held* on reference by the District Magistrate that the Joint Magistrate was perfectly justified in discharging the accused on the finding that the prosecution have failed to prove that the conduct of the consignees (accused) was the result of conspiracy with the Ludhiana consignees or that they had any fraudulent intention. **EMPRESS v. KIRPA RAM AND OTHERS.**

[II-231]

(2) ———Municipal rules.—Public nuisance.

The accused were punished under section 45 of Act XV of 1873 for infringing the following Municipal rule framed under section 72 of that Act:—"The establishment or maintenance of a public market bazar, gang or slaughter-house in any place without sanction of the Committee etc." *Held* that the letting of 5 shops in an enclosure or sarai to persons who opened there the business of buying and selling grain was not establishing a public market, &c., within the meaning of the section and further as it was not shown how the public order or convenience was affected the conviction must be quashed as bad. **EMPRESS v. SHANKAR LAL AND OTHERS.**

[II-241]

ACT XVI OF 1873 (Village and Road police, N.-W. P.).

s. 8 cl. (3).—Although rule VI of the rules framed by the Government of the N.-W. P.

ACT XVI OF 1873.—(continued.)

under Act VIII of 1870, s. 2 declares it to be the duty of the village *chaukidar* to report, on the occasion of his periodical visit to the police station, not only the occurrence among proclaimed families in the village, of births, of the deaths of infants, and of the removal of pregnant women to other villages but also "other death, removals and arrivals," this last duty is not cast upon him by the provisions of the Infanticide Act itself; for rule VI is not on this point consistent with the Act. *Held*, therefore, that a *chaukidar* who had omitted to report the departure of a woman of a proclaimed family from her home was not guilty of an offence under the Infanticide Act. *Held* also that the heads of proclaimed families are not bound by any of the rules framed under the Infanticide Act to give information to the *chaukidar* regarding the departure of the women of their families. *EMPRESS v. BHUPAL.*

[IV-132]

(1). s. 11.—*Village chaukidar—Misconduct.*
The *chaukidar* of a certain village was punished under s. 11 of Act XVI of 1873 by reason of having been found outside the house of the *chaukidar* of another village at a time when illicit distilling was going on within. *Held* that the distilling not having taken place in his village the accused could not be said to have been guilty of misconduct in his office or of neglect of duty. *EMPRESS v. SANAWA.*

[II-160]

(2).—*Omitting to give information.*
A dacoity was committed in the lands of a certain village. The village *chaukidars* did not give information of the occurrence till the next day. They were charged and convicted of an offence under s. 11 of Act XVI of 1873 (neglect of duty). *Held* that under the Act the village *chaukidars* were not bound to give immediate information of an offence not committed within their village. *EMPRESS v. KHUDA BAKHSI AND OTHERS.*

[VI-65]

ACT XIX OF 1873 (N.-W. P. Land Revenue).

(1). s. 3 (4).—*Produce of grove—Rent cess.*
Held that the payment periodically by a tenant of a defined portion of the produce of his grove to his landlord would be of the nature of rent given in kind and not of a cess in the sense of s. 66 of Act XIX of 1873. *MAHABIR AND OTHERS v. SHEODIHAL AND OTHERS.*

[V-320]

(2).—*Held*
that a suit for a declaration of the plaintiff's right as a *zemindar* to half the produce and wood of a certain grove based on the custom of the village was not a suit for rent but for a cess. *ABLAH RAI AND ANOTHER v. RAM SARAN SINGH.*

[XII-10]

ACT XIX OF 1873.—(continued.)

s. 3 (8).—The practice adopted by *patwaris* in some parts of the N.-W. P. of applying the term "*Fasli* year" to the "agricultural year" as defined in Act No. XIX of 1873, s. 3, cl. (8) is erroneous. Where parties to a deed describe a date as being in such and such a "*Fasli* year", they must be taken, in absence of mutual mistake, to refer to the calendar *Fasli* year. In interpreting a document a clause which is inconsistent in any construction thereof with the remaining provisions of the document must be rejected. *Yad Ram v. Amir Singh (W. N., 1882, p. 174)* and *Sheobaran Singh v. Bisheshar Dayal Singh (W. N., 1892, p. 236)* referred to. *CHATARBHUJ v. DWARKA PRASAD AND ANOTHER.*

[XVI-123]

s. 55.—*Malikana allowance.* At the settlement of a certain village, a *malikana* allowance of 10 per cent. on the revenue was reserved for C, the *talukdar* to whom the village belonged. At the same settlement, the *muafi* holding of A in the village was resumed, and assessed to revenue; but A refused to engage for it, and it was therefore merged for revenue purposes in the *mahal* of the village, though still held by A. In 1872, A obtained in the Civil Court a decree by which he was declared to be the proprietor of his holding, and to be entitled to engage for it separately; and thereupon the Collector constituted the holding a separate *mahal*, by causing a *khewat* to be prepared, and fixing the proportion of the revenue assessed upon the entire *mahal*, which the *muafi* holding should bear. Subsequently the *zamindars* of the village applied to the Collector that A might be made to contribute towards the payment of the *malikana* allowance of the *talukdar*. The Collector passed an order declaring A to be liable to such contribution; and A then instituted a suit for cancellation of the Collector's order, for a declaration of his non-liability to contribute to the *malikana* allowance of the *talukdar*, and for a refund of contribution already paid. *Held* that inasmuch as the decree of the Civil Court in 1872 and the proceedings of the Collector consequent thereto constituted the *muafi* holding a "*mahal*" in the terms of (I. L. R., 5 All. 40, s. 3). Act XIX of 1873, and by the terms of s. 53, 55, of the same Act, a *malikana* allowance, such as that under reference, is "revenue," and s. 241 (b) bars the jurisdiction of the Civil Courts in matters regarding the amount of revenue to be assessed on any *mahal*, the suit was not cognizable by a Civil Court. *GAYA DUTT AND ANOTHER v. KUTUB-UN-NISA.*

[IV-182]

(1). s. 62.—*Partition—Separate Wajib-ul-arz.*
It is within the implied, though not within the specified, powers of a Collector while constituting new *mahals* by partition of a previously existing single *mahal* to frame a new *wajibularz* for each of the new *mahals* so constituted. *KEDAR NATH AND ANOTHER v. RAM DIAL AND OTHERS.*

[XIII-173]

ACT XIX OF 1873, s. 62.—(continued.)

(2).—Where a *mahal* is divided by perfect partition into two or more *mahals* a separate record of rights should be framed for each of the new *mahals*. *ABDUL HAI AND OTHERS v. RAM SINGH AND ANOTHER*.

[XVII-202]

(1).—ss. 62 & 64.—*Settlement of disputes by Settlement Officer—Res-judicata.* All entries in the record of rights made under ss. 62 and 63 of Act XIX of 1873 are to be founded on actual possession; and all disputes taken up by the Settlement Officer of his own motion, or upon the complaint of the party concerned, are to be investigated and decided by him on that basis (s. 64); and all persons not in possession, but claiming the right to be so, must be referred by him to the Civil Court. The Settlement Officer is not competent to determine the rights of the parties. His decision that one of the parties is the mortgagee and the other the proprietor is not a judicial decision, but one beyond his competency. *RAM PRASAD v. DALTHANMAN*.

[I-24]

(2).—At the framing of a record-of-rights a dispute arose between the appellant and the respondent as to whose name should be recorded in respect of certain land, of which both parties claimed to be in proprietary possession. On the 8th June, 1876, the Settlement Officer ordered that the respondent's name should be recorded in respect of such land. The dispute was subsequently re-opened, and on the 3rd June, 1879, the then Settlement Officer ordered that the record-of-rights should be amended and the appellant's name should be recorded in respect of such land. Thereupon the respondent brought the present suit against the appellant for possession of such land, asking that the order of the 8th June, 1876, might be affirmed and that of the 3rd June, 1879, cancelled. This suit was instituted on the 28th July, 1879. The lower Courts gave the respondent a decree, holding that the order of the 8th June, 1876, not having been set aside by a suit for that purpose within three years, had finally determined the dispute between the parties. The Court observed that the decision of a Settlement Officer on a question of title such as was raised in this suit was not final; nor was there any limitation in Act XV of 1877 for a suit to contest orders such as that of the 8th June, 1876, made under Act XIX of 1873. *IBRAHIM ALI v. HADI ALI*.

[I-15]

(3).—*Held* that the determination by a Settlement Officer of a dispute as to whether certain lands were held by B as inferior proprietor at a fixed rent or as lessees operated as *res-judicata* to the same question being raised in the Civil Courts. *RUP SINGH AND OTHERS v. SUKHDEO AND OTHERS*.

[II-111]

ACT XIX OF 1873, ss. 62 & 64.—(continued.)

(4).—*Held* that an order of the Settlement Officer by which it was decided that the land in dispute was *samindari Muafi* and not *Muafi Hakim* was not final and that the Court could go behind it as it was recorded by the Settlement Officer without having the parties before him. *MURAD ALI AND ANOTHER v. RAM DIAL AND ANOTHER*.

[III-201]

(5).—*Held* that an order by a Settlement Officer directing that certain persons should be recorded as sub-proprietors of certain land, as they claimed to be, and not as lessees as certain other persons asserted that they were, did not operate as *res-judicata* in a suit by the latter persons against the former for a declaration that the former were not sub-proprietors of the land, but lessees thereof, the Settlement Officer not being competent, under Act XIX of 1873 (N.-W. P. Land Revenue Act), to try such a question of right. *TOTA RAM AND OTHERS v. HARKISHAN AND OTHERS*.

[IV-247]

(1). s. 65.—*Lambardar*. *Held* that a *lambardar* may obtain adverse possession of the share of a cosharer by withholding and appropriating to his own use the profits thereof, a *lambardar* not being a trustee of the shares of the cosharers, although he may be bound to pay them the profits of their shares. *TULSHI SINGH AND ANOTHER v. LACHMAN SINGH AND OTHERS*.

[I-20]

RAM NARAIN AND OTHERS v. MADHO AND OTHERS.

[I-100]

(2).—*Held* that where the Collector of a district appointed by order one of two co-sharers in a *mahal* to be *lambardar* and directed the tenants to pay rent to her, no *lambardar* having been appointed at the settlement of the *mahal*, or at any time by agreement between the co-sharers, such appointment by the Collector did not empower the *lambardar*, so appointed, to collect the rents of the tenants. *Held* also that in the absence of either an arrangement recorded at the settlement under s. 65 of Act No. XIX of 1873 or a local custom or special contract, one of several co-sharers in a *mahal* could not be taken to have a general right to receive the whole of the rent payable by a tenant in the *mahal*. *PARBATI v. NIADAR*.

[XVI-14]

See s. 3 (4) NOS. 1 AND 2.

(1).—s. 66.—*Produce of grove—Rent—Custom.* Where a plaintiff sued as a *zamindar* to obtain a declaration of his right to half the produce and wood of a certain grove, claiming the same as due by a custom of the village recorded

ACT XIX OF 1873. (continued.)

in the *wajib-ul-arz*: held that such a suit could not be construed as a suit for rent, nor as a suit for damages cognizable by a Small Cause Court, but that it was a suit for a cess within the meaning of s. 66 of Act XIX of 1873, and as such was not maintainable if the custom alleged by the plaintiff was not recorded in the manner prescribed by the said section. **ABLAKEH RAI AND ANOTHER v. RAM SARAN SINGH.**

[XII-10]

(2).—*Consolidated cesses—Suit for*] This was a suit by the *zamindars* of a certain village against the *muafidars* with whom the village had been settled for certain cesses. The *wajibul-arz* of the village stated that the *muafidars* should pay the *zamindars* their *zamindari* duties. Before 1877 the *zamindars* had always received the dues which was taken from the tenants with their rents. In that year the *muafidars* abolished these payments and instead of taking 3/4th of the produce from the tenants as before took one half. The plaintiffs alleged their cause of action to have accrued on the 15th June, 1878. The defence was that the plaintiffs were not entitled to recover the cesses claimed from the defendants and that the suit was barred by limitation. Held that the suit fell under article 132 of Act XV of 1877 (explanation) and was not barred and that it was maintainable against the defendants. **RAHAT ALI AND OTHERS v. MAHARAJ SINGH AND OTHERS.**

[II-28]

(3).—*Haqqi chaharrum.*] A *haqqi chaharrum* is not a cess within the meaning of s. 66 of Act No. XIX of 1873. **Durga Prasad v. Salig Singh** (S. A. No. 692 of 1891) followed. **BHAGWATI PRASAD v. GAJADHAR AND OTHERS.**

[XIII-205]

s. 77.—*Rent fixed by settlement officer—Prospective.*—Held that under s. 77 of the N. W. P. Land Revenue Act, the rent fixed by the Settlement Officer was payable from the 1st July following the date of his order, and not before. **RADHA PRASAD SINGH v. JUGAL DAS.**

[VII-12]

(2).—*Order of a Settlement Officer under s. 77 of Act No. XIX of 1873 determining rent is a purely prospective order and will not entitle the landlord to sue his tenant for rate at the rent fixed thereby for any period antecedent to the 1st of July next following the date of such order.* **Mahadeo Prasad v. Mathura** (I. L. R., 8 All., 189) distinguished. **DEBI SINGH v. JHANNO KUAR AND ANOTHER.**

[XIV-22]

s. 78—89.—*Resemption of rent free grants.*] See s. 30 of Act XII of 1881.

ACT XIX OF 1873.—(continued.)

s. 82.—Held that s. 82 of Act XIX of 1873 has reference to cultivatory holdings, and is not applicable to rent-free land in a town solely occupied by buildings. **AHMAD KHAN AND ANOTHER v. HAMNI AND ANOTHER.**

[I-70]

(1).—s. 91.—*Presumption as to entries.*] On an application for partition, a question arose whether certain lands recorded as common to the *mahal* were such or exclusively belonged to and were possessed by the objectors to the application for partition. Held that the burden of proving that such lands exclusively belonged to and were possessed by the objectors lay upon them. In the absence of any evidence to the contrary, the entries in the settlement and subsequent records are *prima facie* proof of right and common possession. **KISHEN LAL AND OTHERS v. FAZAL HAQ.**

[I-12]

(2).—*Appellants' claim in this suit, was based on village custom in proof of which he produced a passage in the *wajibularz* affirming its existence. Observed that this was a piece of evidence no doubt, but it required to be supported by proof of instances in which the custom had taken effect.* **MUHAMMAD ALI v. HARBHAGAT RAI AND ANOTHER.**

[II-29]

(3).—*Held that a rent-roll to be entitled to the benefit of the presumption which the law (s. 91 of Act XIX of 1873) gives it, it is essential that the Court be satisfied that it is a trustworthy document and is what it purports to be—the record of rents avowed by the parties and ascertained by the Settlement Officer.*—**Uchbur Pandey v. Bhurasa Rai** (S. D. A 1863, p. 577.) **PARABHU v. GANPATIJI AND ANOTHER.**

[VI-28]

(4).—*Object of *wajib-ul-arz*.*] The object of the *wajib-ul-arz* is to supply a reliable record of existing local custom. It was never intended that the *wajib-ul-arz* should be used as an indirect means of giving effect to the wishes of a sole proprietor with regard to the nature of his tenure or the mode of devolution of the property which should obtain after his death. **SUPERUNDDHWAJA PRASAD v. GARURADDHWAJA PRASAD.**

[XIII-85]

Chap. IV.—*Co-sharer—Mortgagee.*] The word "co-sharer" in Chap. IV of Act XIX of 1873 relating to the partition of *mahals* does not include the representative of a co-sharer, such as a mortgagee. **KISHAN LAL v. RUP CHAND AND ANOTHER.**

[IX-169]

ACT XIX OF 1873.—(continued.)

s. 107.—*Property.*—*Held* that the word "property," as used in s. 107 of Act XIX of 1873 can not be taken to mean isolated plots of land which fall short of being the share of a co-sharer of a *mahal*. Act XIX of 1873 relates to such partitions as would affect the interest of Government in the imposition, apportionment or collection of revenue. *RAM DAYAL v. MEGU LAL*.

[I-165]

(2.) ———— *Held* that a joint occupancy-tenant is entitled to sue for and, a Civil Court is competent to grant a decree for partition of the joint occupancy-holding, though, if the *zamindar* is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the *zamindar* and the occupancy-tenants as they stood prior to the partition. *Sundar v. Purabi* (L. R. 16 I. A. 186) *Baring v. Nash* (1 Vesey and Beames, 551) *Oomesh Chunder Shaha v. Man. ch Chunder Bonick* (8 W. R., 128) and *Bhagi v. Girdhari*, (W. N. 1895, p. 143) referred to. *MUHAMMAD BAKHSH AND OTHERS v. MANA AND OTHERS*.

[XVI-82]

(1.) s. 108 *Person entitled to perfect partition—Hindu widow.* A childless widow, who has succeeded to her deceased husband's share of a *mahal*, such share having been his separate property, and is recorded as a co-sharer of such *mahal*, is as much entitled under s. 108 of Act XIX of 1873, as any other recorded co-share is, to claim a perfect partition of her share. The circumstance that she may after partition alienate her share contrary to Hindu Law, will not bar her right as a co-sharer to partition. If she acts contrary to the Hindu Law in respect of her share, the reversioners will be at liberty to protect their own interest. *JHUNA KUAR v. CHAIN SUKH AND ANOTHER*.

[I-8]

(2.) ———— *Person entitled to perfect partition. Mortgagee not in possession.* Application to the revision of an order passed by the Commissioner of the Rohilkhand Division in a case for partition under section 108 of Act XIX of 1873. *Held* that an application for the partition of a *mahal* made by a mortgagor out of possession, against the wishes of the proprietors in possession, may properly be refused under section 112 of the Land Revenue Act. *JAUHARI MAL AND ANOTHER v. HABIB-UL-LAH KHAN*,

[XIII-15]

(3.) ———— *Separate mahal—Resumed muafi plot.* Reference from the Commissioner of the Rohilkhand Division in a case of partition under s. 108 of Act No. XIX of 1873. *Held* that a resumed *muafi* plot attached to a *mahal*, without a separate record-of-rights (though bearing revenue, assessed under an order distinct from that fixing the revenue of the parent *mahal*) and not registered as a separate *mahal*

ACT XIX OF 1873, s. 108.—(continued)

in the Government records, is not a separate *mahal*; and that the holders of such lands are entitled under the law to claim to have their lands partitioned from the rest of the *mahal*, and to have them constituted a separate *mahal*. Board's Selected Decisions in *re Ganga Din v. Ibrahim Khan* (L. R., vol. 1, page 139) and *Sahu Bithal Dass v. Birj Mohan Saran*, (L. R., vol. 1, page 140) considered. *GHULAM MAULA v. MUSAMMAT FARASAT-UL-NISSA*.

[XIV-144]

(1.) s. 111—115.—*Jurisdiction—Title—Appeal.* *G M* the recorded co-sharer of a *mahal*, applied under ss. 108 and 109 of Act XIX of 1873 for partition of his recorded share. *J M* and others objected to the partition on the ground that they and not *G M* were the owners in possession of such share. The Collector by an order, dated 12th December, 1879, directed a local enquiry to be made as to who was in possession of such share and what was the nature of his possession. The officer who made the enquiry reported that *G M* had never received any profits or exercised any proprietary right. On the 11th May, 1880, the Collector ordered a partition to proceed and referred *J M* to the Civil Courts on the ground that *G M* as a recorded co-sharer has a right to claim partition. On appeal to the District Judge the case was remanded for retrial. The Collector accordingly retried the case and holding that *G M* had a proprietary title to the share and was in possession rejected the objection of *J M*. This decision was affirmed in appeal by the District Judge. In second appeal *J M* contended, that the decision of the Collector of the 11th May, 1880, was not appealable as he had not decided a question of title and therefore the District Judge had no jurisdiction to entertain an appeal from that decision. *Held* that the contention had no force for although the proceedings of the Collector of the 12th December, 1879, and the 11th May, 1880, were defective and irregular they were nevertheless held in accordance with s. 113 of Act XIX of 1873 from which an appeal lay to the District Judge. *JAGESHAR MISR AND OTHERS v. GHANSHAM MISR*.

[I-130]

(2.) ———— *Res-judicata.* Where in proceedings for partition under Act XIX of 1873, a question of title to land is raised between the parties to the partition, and there is an adjudication of such question, such adjudication will operate as a bar to a suit between the same parties in the Civil Courts to contest the title to such land, notwithstanding that in some respects such adjudication may have been irregular or defective. *Har Sahai Mal v. Maharaj Singh* (I. L. R., 2 All. 294.) *Jageshar Misr and others v. Ghansham Misr* (W. N. 1881 p. 130) followed. *Held* in this case, on consideration of the partition proceedings, that the question of the title raised therein had been adjudicated on and therefore the rule mentioned

ACT XIX OF 1873, ss. 111-115.—(continued.)

above applied. **BATESAR NATH v. FAIZ-UL-HASAN.**

[III-20]

(8.) ————— *Held* that the order of a Revenue Court, declining to give partition, on the ground that the village was impartible was not a bar to a subsequent suit in the Civil Court to have it declared that the plaintiff had equal rights with the defendants in the village, as the Revenue Court was not competent to determine rights of the parties. **JAGAT SINGH v. DURJAN LAL.**

[IV-2]

(4.) ————— A Revenue Court acting under the provisions of ss. 112 and 113 of the N.-W. P. Land Revenue Act (XIX of 1873) recorded a proceeding declaring the nature and extent of the respective rights of the parties before the Court, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding. *Held*, that the proceeding of the Revenue Court was a decision by a Court of competent jurisdiction and could not be interfered with by a suit in the Civil Court disputing its correctness. **BIHOLA AND OTHERS v. RAMDHIN AND OTHERS.**

[V-283]

(5.) ————— *Held* that the result, so far as ss. 111-115 are concerned, is that a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right either in an original action in cases in which the Assistant Collector or Collector does not proceed to inquire into the merits of such an objection under s. 113, or on appeal in those cases in which the Assistant Collector or Collector does decide upon questions of title or proprietary right raised by an objection under ss. 112. **MUHAMMAD ABDUL KARIM v. MUHAMMAD SHADI KHAN AND OTHERS.**

[VII-81]

(6.) ————— *Held* that a Revenue Court acting under s. 113 of Act No. XIX of 1873, was not precluded from dealing with an objection brought before it merely by reason of such objection not having been filed within the time limited by the Court for filing objections, the Court not having up to that time taken any action under s. 113 of the said Act. **Muhammad Abdul Karim v. Muhammad Shadi Khan** (*W. N.*, 1887, p. 81) distinguished. **TULSI PRASAD v. MATRU MAL AND ANOTHER.**

[XVI-30]

(7.) ————— On the partition of certain common land the question arose as to how the common land should be allotted. The present plaintiff said that it should be allotted in proportion to the size of the *pattis*; the owners of the other *pattis* said that it should

ACT XIX OF 1873, ss. 111-115.—(continued.)

be partitioned in proportion to the number of the *pattis*. The question was raised and decided by the Revenue Court. *Held* that the proceedings in the Revenue Courts came within the meaning of s. 113 of Land Revenue Act and that the decision of the Revenue Court was a decision within the meaning of s. 114 of the same Act; consequently the present action in the Civil Court is barred by s. 13 of the Code of Civil Procedure. **AMIR SINGH AND OTHERS v. NAIMATI PRASAD.**

[VII-53]

(8.) ————— *Held* by Tyrrell, J., that, the Court of Revenue acting under ss. 113 and 114 of Act XIX of 1873, being incompetent to determine a suit in which an issue whether mortgages had been foreclosed or not was subsequently raised, s. 13 of Act No. XIV of 1882 did not apply, and no plea of *res judicata* outside s. 13 could be entertained if no such plea had been put forward in the Court below or in the High Court. **Misir Raghobar Dial v. Sheo Baksh Singh** (*J. L. R.*, 9 *Calc.*, 439) referred to. *Per* Burdett, J., *contra*. The provisions of s. 13 of Act No. XIV of 1882 are not exhaustive, and the decision of Court of Revenue must be held, upon the principle of *res judicata* to be a bar to a suit brought in the Civil Court. **Ram Lal v. Chhab Nath** (*W. N.*, 1890, p. 183) and **Ram Kirpal v. Rup Kuari**, (*J. L. R.*, 6 *All.*, 269) referred to. **HAR CHARAN SINGH v. HAR SHANKAR SINGH AND OTHERS.**

[XIV-137]

(9.) ————— Where a Court of Revenue, acting under s. 113 of Act No. XIX of 1873, has decided a question of title or of proprietary right, such decision, being the decision of a "Court of Civil Judicature of first instance," will operate as *res judicata* in a subsequent civil suit in which the same question is being litigated. **HAR CHARAN SINGH v. HAR SHANKAR SINGH AND OTHERS.**

[XV-164]

(10.) ————— *Non compliance with the provisions of s. 113.* Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforceable, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. Such a suit will not be barred by reason of the former decree for partition, though that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been, raised in the suit in which it was passed. If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of s. 113 of Act XIX of 1873. If it disposes of the application otherwise than in

ACT XIX OF 1873, ss. 111-115.—(continued)

the manner contemplated by s. 113 its proceedings are *ultra vires* and will not debar the parties from suing in a Civil Court for a declaration of their right to partition. **NASRATULLAH v. MUBULLAH AND OTHERS.**

[XI-117]

(11).—*Objection under s. 111.* The procedure provided by s. 113 of Act No. XIX of 1873 does not become obligatory on a Collector in partition proceedings unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound to issue under s. 111, and not even then unless such objection raises a question of title. Unless, therefore, such objection has been made, a Civil Court is not empowered to exercise any jurisdiction in the matter of the distribution of the land or the allotment of the *mahal* by partition. **HARDEO SINGH AND OTHERS v. NARPAT SINGH AND OTHERS.**

[XVII-197]

(12).—*Decision under s. 113, (part 1)—Appeal.* No appeal lies to the High Court from a decision of a Collector or Assistant Collector under the first part of s. 113 of the N.-W. P. Land Revenue Act (XIX of 1873) declining to grant an application for partition until the question in dispute has been determined by a competent Court. Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection. *Ex parte Brooks (L. R., 13 Q.B.D. 42)* and *ex parte Blease (L. R., 14 Q.B.D. 123)* referred to. **IMTIAZ BANO v. LATAFAT-UN-NISSA AND OTHERS.**

[IX-108]

(13).—*Omission to frame a decree—Necessity of a decree—Second appeal.* When a Collector or Assistant Collector has determined to inquire into objections raising questions of title preferred under s. 113, of the N.-W. P. L and Revenue Act, his proceeding thereupon must be conducted as an original suit in a Civil Court. It is essential that in a suit under the Civil Procedure Code a decree should be drawn up. *Held*, therefore, that in a proceeding under s. 113 of the N.-W. P. Land Revenue Act, where the rights of the parties are decided, a decree should be drawn up giving effect to the decision. An Assistant Collector passed a decision under s. 113 declaring the rights of the parties, but did not draw up a decree giving effect to such decision. There was an appeal from such decision, which made a decree affirming it.

Held by Stuart, C. J., on second appeal, that the defect arising from the want of a decree on

ACT XIX OF 1873, ss. 111-115.—(continued)

the record of the Court of first instance was a bar to the hearing of the second appeal, and the proceedings of the District Court should be set aside, and the case should be sent back to the Assistant Collector in order that he might frame a decree.

Held by Straight, J., that the decree of the District Court was appealable such defect notwithstanding and the appeal should be decreed and the decree of the District Court reversed, and the case be sent back to the Assistant Collector for the purpose aforesaid.

Observations by Stuart, C. J., on the absence in the Code of Civil Procedure of any mandatory provisions in reference to the framing of decrees. **RANJIT SINGH AND OTHERS v. ILAHI BAKHSI AND OTHERS.**

[III-151]

(14).—*Formal notice—Appeal* A Collector or Assistant Collector trying a question of title raised in the course of the hearing of an application for partition under the N.-W. P. Revenue Act (Act XIX of 1873) is not bound to cause a formal decree to be drawn up embodying the result of his order or decision on such point. An appeal will lie from the "order" or "decision" of such Collector or Assistant Collector. **NIJAZ BEGAM v. ABDUL KARIM KHAN AND ANOTHER.**

[XII-62]

s. 124.—On partition of a certain *mahal* between A and B a certain plot having a *chabutra* belonging to A fell to the share of B without any condition or reservation. *Held* that B was entitled to bring a suit for removal of the *chabutra*. **MUL CHAND v. BHOLA NATH.**

[III-136]

(1.) s. 125—*Sir land—Partition* *Held* that where the co-sharers of a *mahal* referred to arbitration the matter of its partition and the award provided that where *sir* land belonging to one co-sharer fell into the lot of another, the latter should be entitled to possession, and a partition was effected and formal possession given under such award no co-sharer could claim a right of occupancy in respect of his *sir* land included in the *mahal* assigned to another co-sharer. S. 125 of Act XIX of 1873, must not be regarded as empowering a co-sharer, who had once given his consent to surrender his *sir* land, to continue to cultivate it against the will of the co-sharer who had become its owner by partition. **TULSHI PANDAY AND OTHERS v. BHAGWAN PANDAY AND OTHERS.**

[I-81]

(2).—*Held* that *sir* land of one sharer included on partition in the *mahal* assigned to another sharer is to be treated in the same way as *sir* land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of expropriatory tenancy comes by force of law into existence and the co-sharer, in whose *mahal* such *sir* land

ACT XIX OF 1873, s. 125 —(continued.)

is included, cannot sue in the Civil Court for damages without obtaining a lease or having the rent fixed. *Petition of RAJ PRASAD AND OTHERS v. DINA KUAR.*

[II-121]

PHULAHRA v. JEOLAL SINGH.

[III-203]

(3.) ————— *Held* that a contract, that if any sharer's *sir* fell on partition in another *mahal* or portion, the former *sir* holder should give up both the *sir* and its cultivation, was void under s. 125 of Act XIX of 1873 and s. 23 of the Contract Act. *INDAR v. KRUSHHI.*

[VI-88]

HANUMAN RAI AND OTHERS v. KARIMAN KHAN.

[VIII-185]

s. 130—Partition—Stay of.] Reference from the Commissioner of the Rohilkhand Division, in a case of partition, under s. 108, Act XIX of 1873. *Held* that the terms of s. 130 of the Land Revenue Act are general, and that where a Collector is satisfied that the circumstances of the *mahal* are such, and the shares of land to be allotted are so petty and divided, that administratively it is not desirable that partition into *mahals* should be made, he may legally stay the partition. *Raghunath Bhat v. Chimman Lall*, (L. R., Vol. I, p. 206) modified. *BHIKAM SINGH AND OTHERS v. CHIMMAN SINGH AND OTHERS.*

[XIII-195]

s. 132.—The co-sharers of a certain *mahal* started a partition. The partition proceedings had reached all but the final stage. Notices had been issued to the co-sharers to lay their objections before the Court (Deputy Collector) on the 10th July. No objector however appeared and the Court made an order in the matter. On the 11th some of the co-sharers appeared and asked for two weeks time which was allowed and a memorandum of objections was filed. The objections related exclusively to the allotment and distribution of the co-sharer's interest in the *zamindari*. On the 3rd April, the Deputy Collector made an order upon that petition of objections. The disappointed parties brought a regular appeal to the District Judge. The Judge remanded the case for retrial under s. 562. *Held* that an appeal lay from this order of remand to the High Court. That the District Judge in an appeal had no jurisdiction in the matter. That the remedy open to the objectors was that provided by ss. 131 and 132 of the Revenue Act and not, by an appeal. *AJUDHIA RAI AND OTHERS v. NAWAL RAI AND OTHERS*

[VII-185]

s. 135.—This was a suit for possession of a certain plot of land on the allegation that in

ACT XIX OF 1873, s. 135.—(continued.)

1871, it was held by the plaintiff as his *sir* land; that in the partition which took place in that year it was actually allotted to him; that he remained in possession until ousted by the defendant and that he was ousted because the partition Ameen made an error in describing the plot as No. 250 instead of 254 (the real number of the plot). *Held* that s. 135 of Act XIX of 1873 did not debar the Civil Courts from taking cognizance of the suit. *TIKAM SINGH v. JUALA KUAR.*

[II-129]

(1). **s. 146.—Arrears of revenue for period prior to sale—Realization—Liability.]** A share of a *mahal*, arrears of Government revenue being due in respect of the whole *mahal*, was sold in execution of a decree. The existence of the arrears was notified at the time of sale. The title of the purchaser to the share vested from the date of the sale, Act X of 1877, s. 316, being in force at that date. The Collector attached and realized the amount of the arrears out of the surplus sale-proceeds. *Held* that, inasmuch as at the date of the realization of the arrears out of the surplus sale-proceeds, the purchaser was the proprietor of the share, and it and he were responsible under s. 146 of Act XIX of 1873 for the arrears. *RAM CHAND AND ANOTHER v. FATEH CHAND AND OTHERS.*

[III-240]

(2). ————— *Maritime Civil salvage.] Held* by the Full Bench (Mahmood, J., dissenting) that the principle of maritime Civil Salvage had no application to the case, and that no analogy could exist between the case of a salvor in maritime Civil Salvage and the case of a co-sharer in a *mahal* to whom s. 146 or s. 148 of the N.-W. P. Land Revenue Act (XIX of 1873) applied. *Leslei v. French* (L. R., 23 Ch. D., 552) and *Falcke v. Scottish Imperial Insurance Company* (L. R., 34 Ch D., 234) referred to. *SETH CHITOR MAL v. SHIB LAL.*

[XII-117]

(3). ————— *Suit by lambaridars for arrears of revenue against cosharers and outsiders.]* Where a *lambaridar* brought a suit for arrears of land revenue payable by the proprietors against several defendants of whom some were co-sharers and others mortgagees in possession: — *Held* that such suit was one of the nature contemplated by s. 93 (g) of the N.-W. P. Rent Act, 1881, and was cognizable by a Court of Revenue as against all the defendants. *LACHMAN SINGH v. GHASI AND OTHERS.*

[XIII-63]

s. 167.—Muafidars or assignees of Government revenue are not in precisely the same position as Government itself would have been, and possessed of identical rights and powers, in respect of the recovery of arrears of revenue due to them. An arrear of assigned revenue

ACT XIX OF 1873, s. 167.—(continued.)

is not a prior charge on the property in respect of which it is payable, against all the world. The effect of the provisions of ss. 93 (i), 171, and 177 of the N.-W. P. Rent Act of 1881 is to show that what the Legislature contemplated was to place the revenue assigned to a *muafidar* upon the same footing as rent; that therefore, in order to recover an arrear of revenue, a *muafidar* must bring a suit in the Revenue Court; that, upon obtaining a decree, he may apply for execution against the immoveable property of the judgment-debtor; that, where such property is a *mahal*, the Collector may make certain arrangements for discharge of the debt; and that, failing such arrangements such immoveable property may be sold, subject to any incumbrances there may be upon it. **BITHAL DAS AND OTHERS v. HARPHUL.**

[IV-176]

s. 188.—*Held* by Edge, C. J., that the expression "*patti* of a *mahal*" as used in s. 188 of Act XIX of 1873 means a division of a *mahal* distinct from the share of an individual co-sharer. The right of pre-emption, therefore, which is given by the above-named section is not exercisable on the sale merely of the share of an individual co-sharer not amounting to such a division of a *mahal*. Moreover the provisions of s. 188 of Act XIX of 1873 do not apply to a sale under s. 168 of the same Act of land other than that in respect of which the arrears which it is sold to satisfy accrued. Hence where the share of a co-sharer in an imperfect *pattidari* village, not being the land in respect of which the arrears of rent, for the satisfaction of which the said share is sold, are due, is sold under the provisions of s. 177 of Act XII of 1881, no right of pre-emption can be claimed in respect of such sale.

Mahmood, J. *per contra*. There being no statutory definition of the word "*patti*" it must be taken in its ordinary acceptation, and in that acceptation it means the share of a *pattidar*, whether such share amounts to a definite division of a *mahal* or not. The exigencies of the law of pre-emption require that in s. 188 of Act XIX of 1873, the word "*patti*" should be construed in its broader signification as equivalent to any share of a *pattidar*. The words s. 168 which provide that land sold under that section is to be proceeded against "as if it were the land on account of which the revenue is due under the provisions of this act" render the incidents of sales under s. 166, including pre-emption, applicable to sales under s. 168, with the exception that in such case only the defaulter's interest in the land sold passes by the sale. Hence a right of pre-emption would accrue under s. 188 in respect of the compulsory sale of any share of a co-share though such share did not amount to a "*patti*" in the sense of a definite division of a *mahal*. **BAIJNATH v. SITAL SINGH.**

[XI-68]

ACT XIX OF 1873 s. 188.—(continued.)

ss. 194 & 195.—*Disqualified proprietor—Court of Wards—Sanction of Local Government.* *M*, a female proprietor, brought a suit to recover possession of certain lands which were in the hands of the Collector, as Manager of the Court of Wards, on the allegations that she had placed the property in the hands of the Court some years previously because she was not at that time in a position to manage it herself, but that she was now capable of managing it, and desired to get it back. The suit was dismissed, and the plaintiff appealed on the ground, *inter alia*, that inasmuch as she was not a "disqualified proprietor" within the meaning of Act XIX of 1873, the Court of Wards had no jurisdiction to take the property, and that its possession was merely the result of an arrangement to which she was a consenting party, and which she now desired to terminate. *Held* that, with reference to the provisions of Act XIX of 1873, and Act VIII of 1879 (N.-W. P. Land Revenue Acts), the suit as brought was not maintainable, inasmuch as there was no evidence that the plaintiff had obtained the previous sanction of the Local Government to the release of the property from the superintendence of the Court of Wards, as required by s. 20 of the latter Act. *Held* also that the plaintiff could not be allowed in appeal entirely to change the nature of the grounds upon which she alleged herself to be entitled to claim relief, and that hence she could not now raise the plea that the Court of Wards, in taking the property under its management, had acted without jurisdiction. The expression "Local Government" in ss. 194 and 195 of Act XIX of 1873, and s. 20 of Act VIII of 1879, means the Lieutenant-Governor of the North-Western Provinces. **MASUMA BIBI AND ANOTHER v. THE COLLECTOR OF BALLIA ON BEHALF OF THE COURT OF WARDS.**

[V-227]

ss. 202 & 203.—*Power of Collector to represent the Board of Revenue.* Certain *mauza* belonging to *G.P.* were sold in execution of decrees against him and purchased by the Collector of Mirzapur, on behalf of the Court of Wards, in charge of the estate of the minor Raja of Kantit. On the application of the judgment-debtor the sale of some of the *mauzas* was set aside by the Judge on the ground of irregularity. In respect of the villages the sale of which was confirmed, the judgment-debtor applied to the Collector to restore the same to him on payment of the sale price, stating that there was every probability of the sale being set aside by the High Court if he were to appeal to it. On this the Collector of Mirzapur recorded a proceeding, that as the judgment-debtor had agreed that on receiving back the said villages he would mortgage the same to the Raja only, he (the Collector) had consented to restore them on being paid the sale price and the cost that had been incurred. The

ACT XIX OF 1873, ss. 202 & 203.—(contd.)

Court of Wards did not approve of the arrangement made by the Collector, and the judgment-debtor ultimately brought this suit to enforce it. *Held* that there was no such agreement as that in consideration of the plaintiff's not appealing from the Judge's order confirming the sale, the Collector would re-sell the *mauzas* to plaintiff, and that the Collector was not competent to enter into such agreement without the authority of the Court of Wards. **GIRDHAR PRASAD SINGH DEO v. THE COLLECTOR OF MIRZAPUR.**

[I-34]

(1.)—**s. 205 (A) Suit by and against wards.** Under s. 205 of Act XIX of 1873, as amended by s. 23 of Act VIII of 1879, a disqualified proprietor, whose property is in charge of the Court of Wards must sue and be sued in the Civil Courts by and in the name of his guardian, where a guardian has been appointed, or by and in the name of the Collector of the district in which the suit is brought, where a guardian has not been appointed, whether or not the suit has for its object to set aside an act done by the ward before the date when his property came under the charge of the Court of Wards. **SHEO DIAL CHAUBEY AND ANOTHER v. THE COLLECTOR OF GORAKHPUR AS MANAGER OF THE ESTATE OF NANDAN CHAUBEY AND ANOTHER.**

[III-17]

(2) **s. 205—(B).—Disqualified proprietor—Power to enter into contract.** A suit was brought against a disqualified proprietor for money due on a bond, given while her property was under the superintendence of the Court of Wards. The Collector was made a defendant to this suit "because the property of the defendant obligor had come under the superintendence of the Court of Wards before the execution of the bond." *Held* that the Collector's status in the suit, namely, as representative *ad litem* of the defendant, was sufficiently described to entitle him to raise the question of the legal capacity of the defendant to enter into the bond. The mere disqualification of a proprietor to manage his estate does not carry with it a general and absolute disqualification to enter into any contracts at all. *Held*, therefore, where a person whose property was under the superintendence of the Court of Wards, borrowed money, and gave a bond for the payment of the same, and was sued on the bond in the name of the Collector, that the Court was competent to make a decree against such disqualified proprietor. **THE COLLECTOR OF BENARES AS MANAGER ON BEHALF OF THE COURT OF WARDS OF THE ESTATE OF MASUMA BIBI v. SHEO PRASAD AND ANOTHER.**

[III-63]

ss. 214 & 219. *Held* that the provisions of ss. 214 & 219 of Act No. XIX of 1873 do not apply to an *ex parte* decision of a question of title by a Court of Revenue acting under s. 113

ACT XIX OF 1873, ss. 214 & 215.—(contd.)

of the said Act. **TULSI PRASAD v. MATRU MAL AND ANOTHER.**

[XVI-30]

ss. 220–231.] The provisions of the Civil Procedure Code relating to awards are not applicable to suits under the N.-W. P. Rent Act, 1881, the matters in dispute in which have been referred to arbitration as, s. 96 (a) of that Act specifically imports into it, the procedure of the N.-W. P. Land Revenue Act with regard to arbitration. Where the Court trying a suit under the Rent Act, the matters in dispute in which have been referred to arbitration, has refused an application to set aside the award, and has decided the case in accordance with the award of the majority of the arbitrators, no appeal lies from its decision. **FAHIM-UN-NISSA AND ANOTHER v. AJODHA PRASAD.**

[IV-15]

s. 221.—Arbitration.] The principle of the ruling of the Privy Council, in *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* is applicable also to arbitrations under s. 221 of Act No. XIX of 1873. **GAURI SHANKAR v. BABBAN LAL AND ANOTHER.**

[XII-20]

s. 222.—Number of arbitrators—Three arbitrators appointed by Court.] A Revenue Court referred a dispute before it under s. 220 of Act XIX of 1873 to arbitration. The parties each nominated an arbitrator but the Court appointed three thus making the total number five. This was opposed to s. 222 of the Act but neither of the parties objected to it. The Court made a decree according to the award of the majority. This suit was brought by the party dissatisfied for virtually setting aside the award and the decree on the ground that the award was illegal. *Held* that the decree being neither in excess of, nor out of accordance with the award, it became final, and could not be objected to on any other ground, specially when the plaintiff had submitted to the irregularity complained of. **INTIZAM-UN-NISSA BEGAM v. JAGAN-NATH.**

[II-82]

(2).—**Arbitrators appointed by parties.]** *Held* that an award otherwise good does not become invalid simply because one arbitrator only was appointed by the parties instead of 3 or 5 (s. 222, Revenue Act) or because it was dictated to and taken by the settlement officer and is not in the hand-writing of the arbitrator himself **JATAN SINGH v. MAHADEO SINGH.**

[VI-180]

(3).—**The provisions of ss. 222 to 231 of Act No. XIX of 1873, contemplate that the award therein dealt**

ACT XIX OF 1873, s. 222.—(continued.)

with should be an award made by more arbitrators than one. When therefore a Settlement Officer had delivered a decision under s. 230 upon what purported to be an award by one arbitrator only, it was held that such so-called award and the decision thereon of the Settlement Officer would not prevent the matters dealt with therein being re-opened in a Civil suit. *Jatan Singh v. Mahadeo Singh* (W. N., 1886, p. 180) distinguished. **PARSIDH RAI AND OTHERS v. RAJNAIN RAI AND OTHERS.**

[XVI-14]

(1) **ss. 231 & 241.—Award—Appeal—Jurisdiction.** This was a suit brought by the plaintiff-respondent for a declaration of his right to certain land in a *mahal* on the basis of an award said to have been made under the provisions of Act XIX of 1873, ss. 220 to 230. It appears that an appeal was preferred by the defendants, impugning this award, to the Commissioner who, setting aside the Deputy Collector's order and affirming the award put the parties back in their original position before the arbitration. It is contended on behalf of the plaintiff-respondent, and has been so held by the Courts below that looking to the terms of s. 231 of Act XIX of 1873, the Commissioner had no power to entertain an appeal from the Deputy Collector. His order in appeal was therefore *ultra vires* and the award must be held to be subsisting. Held that the contention was sound but the High Court, as a Civil Court, was prohibited by s. 241, cl. (f) from interfering with the Commissioner's order. The appeal must be decreed, the decree below set aside, and the plaintiff's suit dismissed. **SIRAJ-UD-DULA ALI MUHAMMAD KHAN v. MUHAMMAD ABBAS ALI.**

[VI-77]

(2). ————— **Finality of Jurisdiction.** This was a suit instituted on the 12th March, 1880, by some co-sharers of a village, against the other co-sharers and certain tenants for the possession of certain trees. The plaintiffs alleged that the trees belonged to all the co-sharers; that the defendants fraudulently got these trees recorded in their name, made a fraudulent objection before the Settlement Officer, and obtained the appointment of nominal arbitrators who made an award in their favor; that when the plaintiffs became aware of these proceedings they preferred an objection in the settlement department which was disallowed on the 23rd May, 1877. Held that, it having been found that the plaintiffs were no parties to the proceedings before the Settlement Officer which terminated in the award and the order of the 23rd May, 1877, the suit was not barred either by s. 231 or 241 of Act No. XIX of 1873. *Komul Kishen Surkhal v. Bissonauth Chuckerbutty* (Sevestre's Rep., 831, note) followed. **SHEO DAS AND ANOTHER v. BANDHU AND OTHERS.**

I-91**ACT XIX OF 1873, ss. 231 & 241.—(continued.)**

(1). **s. 241.—Muafidars and zamindars—Suit to enforce custom.** The plaint in this suit stated that the plaintiffs were hereditary *muafidars* of *mauzah X* and the defendants, the *zamindars*; that on the 17th February, 1848, defendants agreed that whether the village was settled with them or not they should only receive according to the old custom of the village, their *malikana* and would not interfere with the *zamindari* rights; that after the village was settled with them defendants began to interfere with the *zamindari* rights in contravention to the old custom and the agreement. The plaintiffs accordingly claimed the following reliefs:—That the defendants be compelled to adhere to the contract and custom; that they be prohibited from interfering with the *zamindari* rights and that the plaintiffs be put in possession of those rights. Defendants contended that the suit was not cognizable by the Civil Courts as it effected a change in the settlement that the contract had no effect after the settlement was over. Held that the objection had no force and the suit must be decreed. **GOPAL SINGH AND OTHERS v. BINDA PRASAD AND OTHERS.**

[IV-74]

(2). **s. 241 (b).—Assessment of revenue—Suit to contest liability.** The Civil Courts are not debarred by section 241 of Act XIX of 1873 from taking cognizance of a suit for a declaration that land which the revenue officers seek, under the provisions of that Act to assess to revenue, is included in an area which has already been permanently settled, and is therefore not liable to further assessment. A title to hold land free from assessment to revenue cannot be acquired by any length of possession revenue free. *Government v. Rajah Raj Kishen Singh* (9 W. R., 427); *Collector of Fatehpore v. Mangli Pershad* (N. W. P. S. D. A. Rep., 1854, p. 167); *Rajah Raghonath Sahai v. Bishan Singh* (N. W. P. S. D. A. Rep., 1855 p. 302); *Sheikh Zulficar Ali v. Ghansham Ram* (N. W. P. S. D. A. Rep., 1865 p. 92); and *Sri Uppu Lakshmi Bhayamma Garu v. Purvis* (2 Mad., H. C. Rep., 167); referred to. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. RAM UGRAH SINGH AND OTHERS.**

[IV-297](3). ————— **Malikana revenue.****See s. 55.**

(4). ————— **Kharbandi.** At settlement under Regulation IX of 1833, the "*kharbandis*" of the village of *L* and three other villages were separated from those *mahals* and formed into a separate *mahal* of which the Government took possession. At the recent settlement the Government gave back the land, broke up the "*kharbandi*" *mahal*, and incorporated it with the four villages to which it had previously belonged and settled it along with

ACT XIX OF 1873, s. 241 (b).—(continued.)

the land of those villages with the *zamindar* of those villages. Before the first settlement one *M K* mortgaged all his rights and interests in *L* to *S K*. Such rights and interests included the mortgagor's rights and interests in the "*kharbandi*" of *L*. After the first settlement but before the second, *S K* sued on his mortgage bond and obtained a money decree in execution of which the rights and interests of *M K* in *L* were put up for sale and were purchased by *S K*. After the second settlement the present suit was brought by the representatives of *M K* against the representatives of *S K*, who had become possessed of the rights and interests of *M K* in the "*kharbandi*" of *L*, for possession of the same on the ground (i) that the Government intended to settle the "*kharbandi*" land with the original *zamindars* or their descendants—(ii) that the sale to *S K* only passed the rights and interests of *M K* in *L* and not in the "*kharbandi*" of that village as it belonged at the time of sale to the Government and not to *M K*. Held that the plaintiff's contention was right and the suit must be decreed. **SHAMSHER KHAN AND OTHERS v. TAJ KHAN AND OTHERS.**

[I-130]

(5).—s. 241 (d).—*Suit for declaration that land is rent free.* Held that a suit for a declaration that certain land is held as a rent free grant without any condition of service was one cognizable by the Civil Courts. **HAMANDAN v. CHAND MAL AND OTHERS.**

[VI-23]

(6).—s. 241 (e).—*Zamindari muafi—Muafi Hakimi—Decision of Settlement Officer.* Held that an order of the Settlement Officer by which it was decided that the land in suit was *zamindari muafi* and not *Muafi Hakimi* was not final and that the Court could go behind it as it was recorded by the Settlement Officer without having the parties before him. **MURAD ALI AND ANOTHER v. RAM DIAL AND ANOTHER.**

[III-201]

(7).—*Lessee—Inferior proprietor—Decision of Settlement Officer.* Held that determination by a Settlement Officer of a dispute as to whether certain lands were held by *B* as inferior proprietor at a fixed rent or as lessees operated as *res judicata* to the same question being raised in the Civil Courts. **RUP SINGH AND OTHERS v. SUKHDEO AND OTHERS.**

[II-111]

Per contra.

TOTA RAM AND OTHERS v. HAR KISHAN AND OTHERS.

[IV-347]

(8).—*Suit for declaration that plaintiffs were inferior proprietors.* Persons to whom s. 4 of Act No. XII of 1881 is applicable are not outside the provisions of that Act, but are tenants

ACT XIX OF 1873, s. 241 (e).—(continued.)

within the definition of the term contained in the Act. Held, therefore, that a suit brought by such persons against their *zamindars* for a declaration that they were *jarwadhdars* and for a declaration that an entry in the recent settlement that the plaintiffs were tenants at fixed rates instead of inferior proprietors would not lie in a Civil Court. **JAI GOPAL AND OTHERS v. RADHA PRASAD SINGH AND OTHERS.**

[XIV-81]

(9).—*Suit for declaration that certain land is plaintiff's sir.* The defendants were admittedly tenants of the plaintiffs. Before the present suit was brought a final decision of the Revenue Courts had been obtained to the effect that they were occupancy tenants of the plaintiffs. The prayer in the plaint in the suit was as follows:—"That a declaratory decree be passed in plaintiff's favour and against the defendants in respect of 17 *bighas* 1 *biswa* 13 *dhurs* of *sir* land as per numbers given below, situated in *taluka* Unjar, *pargana* Garh, valued at Rs. 2,135 and it be declared that the land claimed is the plaintiff's *sir*, that the defendant's allegation and adverse possession set up by them in respect of the said land be held as null and void, and that the whole of the Court costs be allowed. That the judgment of the Revenue Court, so far as it is injurious to the plaintiff's rights, be declared as set aside and of no effect. That it should also be decided, that the defendant's possession is as sub-tenants (*asami shikmis*) under a settlement for a short period which in no way injuriously affects our *sir* land." Held by Straight, J., that the suit might be considered as one to set aside orders passed by a Settlement Officer, and as such, the cognizance thereof by a Civil Court was barred by s. 241 of Act XIX of 1873. **MAHESH RAI AND OTHERS v. CHANDER RAI AND OTHERS.**

[X-235]

(10).—*Suit for maintenance of possession as tenants at fixed rates.* The plaintiffs sued in a Civil Court alleging that they were tenants at fixed rates of a cultivatory holding and that at the settlement the Settlement Officer had entered the defendants in the village papers as the tenants at fixed rates and the plaintiffs merely as mortgages, and they asked for a decree for maintenance of possession "invalidating the proceeding of filling up the columns at the recent settlement". Held by the Full Bench (Banerji, J., *dubitante*) that the suit so framed was not within the cognizance of a Civil Court. **AJUDHIA RAI AND ANOTHER v. PARMESWAR RAI AND OTHERS.**

[XVI-95]

(11).—s. 241 (f).—*Mode of partition—Jurisdiction.* Held that when the question is as to the mode of partition, (i. e., not being a question of title) no appeal lies to the District Judge from the decision of the Revenue Court and

ACT XIX OF 1873, s. 241 (f) —(continued.)
consequently no second appeal to this Court.
TOTA RAM AND ANOTHER *v.* ISHUR DAS AND
OTHERS.

[VII-76]

Per contra.

JWALA PRASAD *v.* SALIG RAM.

[XI-158]

(12). ———— *Objection to partition jurisdiction.* The procedure provided by s. 113 of Act No. XIX of 1873, does not become obligatory on a Collector or an Assistant Collector or in partition proceedings unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound to issue under s. 111, and not even then unless such objection raises a question of title. Unless, therefore, such objection has been made, a Civil Court is not empowered to exercise any jurisdiction in the matter of the distribution of the land or the allotment of the *mahal* by partition. HARDEO SINGH AND ANOTHER *v.* NARFAT SINGH AND OTHERS.

[XVII-197]

(13). ———— *Suit for land allotted in partition to defendant.* This was a suit for recovery of possession of certain land on the ground that it had been allotted to the plaintiff under a partition under Act XIX of 1873, and the defendants had ejected him from it. The lower Courts found that the land had been allotted to the defendant and not to the plaintiff. *Held* that the suit was not cognizable by the Civil Courts under s. 241 of Act XIX of 1873. NANKU SINGH AND OTHERS *v.* MARJAD SINGH.

[III-165]

(14). ———— *B.*, the recorded proprietor of a 7 *biswas* 10 *biswansis* share in a village, the recorded area 5 which was 476 *bighas* and 5 *biswas* purchased a 16 *biswansis* and 3½ *kachwansis* share in the same village. In 1872, at the time of settlement, *B* was recorded as the proprietor of 8 *biswas* 6 *biswansis* and, 3½ *kachwansis* share, and the area of this was recorded as 479 *bighas* and 5 *biswas*, that is to say, the same area as was recorded before the purchase. In 1876, *H* purchased *B*'s rights and interests in the village, and in 1877 applied for partition of the share of which he had been recorded proprietor, and the same was partitioned, an area of 476 *bighas* and 5 *biswas* being allotted to him, subsequently he brought a suit against the proprietors of the other estates into which the village had been divided for 61 *bighas* 4 *biswas* and 8 *biswansis* of land, alleging that, at the settlement of 1872, the area of *B*'s rights and interests had been erroneously recorded as only 476 *bighas* and 5 *biswas*. *Held* that the suit would not lie in the Civil Court, being barred by the provisions of

ACT XIX OF 1873, s. 241 (f) —(continued.)
s. 241 (f) of the N.-W. P. Land Revenue Act
(XIX of 1873). HABIBULLAH *v.* KUNJI MAL.

[V-71]

(15). ———— *Settlement of mahal — Suit to contest legality.* A settlement of land belonging to *G* and which he had mortgaged, having been annulled under s. 158 of Act XIX of 1873 the land was farmed by the Collector of the district under s. 159. The revenue having fallen into arrears, the Collector, under the same section took the land under his own management. Subsequently under ss. 165 and 43 of the Act, the land was settled with *G*'s wife. *Held* that the Court was precluded by the terms of s. 241 (f) of the Revenue Act from entering into the question whether the settlement was legally made by the Collector with the wife of the mortgagor; that she must therefore be taken to represent such rights and interests as the mortgagor possessed; and that consequently the estate was liable in her hands for the mortgage, and the mortgagee was entitled to claim foreclosure against her. BARI BAHU AND ANOTHER *v.* GULAB CHAND.

[V-72]

(16). ———— *Suit for partition of zilla house.* This was a suit for the partition of a *zilla* house (the *zamindar's* office) and the land thereto appertaining. *Held* that the suit was cognizable by the Civil Courts, s. 241, Act XIX of 1873 having no application to such lands. SHEODEVI AND OTHERS *v.* HARBANS NARAIN.

[II-80]

(17). ———— *Suit for partition of trees on joint land.* Parties to this suit are joint owners of a *mahal*. The suit was brought for partition of a number of trees on certain plots of joint land. *Held* that the suit was essentially one for partition of the trees and therefore not cognizable by Civil Courts. MOGHUL BEG *v.* GUNGA RAM.

[II-3]

(18). ———— *Suit for partition of particular plots in a patti.* *Held* that a suit for the partition of particular plots in a *patti* does not lie in the Civil Courts. *Ramdayal v. Megulal* (J. L. R., 6 All., 452) distinguished. IJRAEL *v.* KANHAI AND ANOTHER.

[VII-218]

(19). ———— *Suit for partition of occupancy holding.* There is nothing to prevent the members of a joint Hindu family in possession as such joint family of an occupancy-holding from obtaining partition of their shares in such holding *inter se* from a Civil Court; though if the *zamindar* be not made a party to such suit for partition the decree therein will not affect the joint liability to him of the occupancy-tenants. BHAGI AND ANOTHER *v.* GIRDHARI AND OTHERS.

[XV-143]

(20). —s. 241 (h). — *Suit for possession of land held in lieu of rendering services.* A *zamindar*

ACT XIX OF 1873, s. 241 (h).—(continued.)

brought a suit to recover possession of certain land in the village which was held by the defendant's rent-free, in consideration of rendering services as *khera-patis*, on the ground that he was entitled, as *zamindar*, to dispense with their services and that therefore they no longer possessed any right to hold the land. The claim was resisted by the *khera-patis* on the ground that for many years they had been in possession of the land as *muafi* holders. *Held* that the dispute so raised was a matter which could form the subject of an application to resume a rent free grant within the meaning of s. 30 of the N.-W. P. Rent Act (XII of 1861) and that the cognizance of the suit by the Civil Court was therefore barred by cl. (h) of s. 241 of Act XIX of 1873. **TIKA RAM AND OTHERS v. KHUDA YAR KHAN.**

[IV-331]

(21). **s. 241 (j).**—*Cattle sold for arrears of revenue.* Where in satisfaction of an arrear of revenue due by a defaulter certain cattle belonging to another person not a defaulter were sold, it was *held* that the remedy of the owner of the cattle lay entirely in the Courts of Revenue and that no suit would lie in a Civil Court respecting such sale. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MAHADEI AND SHIAM LAL AND OTHERS.**

[XVI-199]

s. 243.—*Held* that section 243 of Act XIX of 1873 does not apply to orders passed by the Collector in cases transferred to him under s. 320, C. P. C. **TAKADDUS FATIMA AND ANOTHER v. BALDEO DAS AND OTHERS.**

[X-185]**ACT XIV OF 1874 (Scheduled Districts.)**

(21). **s. 6.**—The High Court for the N.-W. P. has no jurisdiction to revise an order of the Commissioner of Kumaun refusing a certificate to practice as a *mukhtar* in the Criminal Courts subordinate to the Court of the Commissioner. **IN THE MATTER OF THE PETITION OF HAR-CHANDRA LAL.**

[XII-236]**ACT IX OF 1875 (Majority).**

s. 2. (c).—*Held* that under s. 2 (c) of Act IX of 1875, the Muhammadan Law and not the rule contained in s. 26 of Act XL of 1858 was the law applicable to a Muhammadan before Act IX of 1875 came into force. **DAMODAR DAS v. WILAYAT HUSAIN.**

[V-214]

(1). **s. 3.**—*Appointment of guardian—Subsequent removal—Age of majority.* *Held* that the fact that a guardian is appointed under Act XL of 1858 brings the minor under the operation of s. 3 of Act IX of 1875, and such minor must be deemed to attain his majority when he completes the age of twenty-one years

ACT IX OF 1875, s. 3.—(continued.)

and not before. The removal of such guardian on such minor attaining the age of eighteen years does not take such minor out of the operation of s. 3 of Act IX of 1875, for it is sufficient to give effect to the provisions of that section as to the age of majority that a guardian has been appointed for the person or property of a minor by a Court of Justice. A person therefore for whom a guardian has been appointed under Act XL of 1858 cannot maintain a suit until he attains the age of twenty-one years. **KHWAHISH ALI v. SARJU PRASAD.**

[I-30]

(2). ————— *The mere fact of a guardian whose certificate is afterwards revoked having been appointed to a minor will not operate to postpone the attainment of majority by the minor till he reaches the age of twenty-one.* **Rudra Prokash Misser v. Bhola Nath Mukerjee, (I. L. R., 12 Calc., 612)** dissented from:—**Birmohun Lal v. Rudra Perakash Misser (I. L. R., 17 Calc., 944)** referred to. **PATESRI PARTAP NARAIN SINGH v. CHAMPA LAL.**

[XI-118]

(3). ————— *Hindu.* *Held* that in the case of a Hindu (Muhammadans are also governed by the same rule) the age of majority within the meaning of s. 11 of Act IX of 1872 is that fixed by s. 3 of Act IX of 1875 and not that of Hindu Law. **MAMMI MAL v. JAGAN NATH.**

[VII-71]

(4). ————— *Held* that under s. 3 of Act IX of 1875, a person under the age of eighteen is a minor within the meaning of Act IX of 1861. **SARAT CHANDRA CHAKRABATI v. FORMAN AND ANOTHER.**

[X-80]

(5). ————— *European British subject not domiciled in India.* *Held* that Act IX of 1875 was intended by the Legislature to be applicable and in fact was applicable only to European British subjects domiciled in those parts of British India referred to in s. 1 and that to any other European British subject whose domicile was in England but who was temporarily residing in any part of India above alluded to the privileges and disabilities of minority attached until he had attained the age of twenty-one years. **ROHILKHAND AND KUMAUN BANK, LIMITED v. ROW.**

[V-101]**ACT V OF 1876 (The Reformatory School).**

(1).—**s. 7.**—Where it is thought necessary that a person found guilty of an offence should be detained in a reformatory, the proper procedure is to impose a substantive sentence for the offence of which such person has been convicted.

ACT V OF 1876, s. 7.—(continued.)

ed and then to order that in lieu thereof the convict should be detained in a reformatory. **QUEEN EMPRESS v. BABU RAM.**

[XVI-27]

(2).—*Detention in Reformatory School—Procedure.* Held that the High Court had no power to interfere with an order under s. 7 of Act No. V of 1876, substituting a term of detention in a reformatory for a sentence passed under the Indian Penal Code. **QUEEN EMPRESS v. ANRUDH SINGH.**

[XVI-43]

s. 8.—A Magistrate, acting apparently with reference to s. 399 of the *Cr. P. C.*, sentenced a boy under sixteen years of age to imprisonment and confinement thereafter in a reformatory for one year. At that time the Local Government had not under s. 2 of the Reformatory Schools Act (V of 1876) brought the provisions of that act into force in the N.-W. P. Held that the sentence was illegal, and that it was also open to objection on the ground that, by order of the Government of India No. 173 dated the 14th March, 1889, a Magistrate administering the Reformatory Schools Act shall not send a boy to a Reformatory School, if under ten for a less period than seven years, and if over ten for less than four years or until he should have attained the age of eighteen. **QUEEN EMPRESS v. HIRA.**

[IX-131]

s. 22.—*Government notification (India) No. 173 of the 14th March, 1889.* Where a boy over fourteen, but otherwise of uncertain age, was ordered, upon conviction by a Magistrate, to be detained in a Reformatory School for two years. Held that such sentence, having regard to the rules made by the Governor-General in Council under s. 22 of Act No. V of 1876, was illegal. The proper course for the Magistrate to have adopted with reference to the above-mentioned rules was to have ascertained as near as might be the exact age of the offender and sentenced him to a specified period of detention which should be that elapsing between his conviction and the attainment by him of the age of eighteen years. **QUEEN EMPRESS v. NARAIN.**

[XIII-107]

ACT X VII OF 1876 (Oudh Land Revenue Act).

s. 40.—Held that a rent fixed under s. 40 of the Oudh Revenue Act cannot be enhanced in a suit brought under s. 33 of the Oudh Rent Act. Held also, that the use of the word *kabzadari* in a decree made at last settlement is not to be invariably construed to mean right of occupancy. The meaning to be attached to the term must be ascertained from a careful consideration of the claim made before, and the judgment recorded by, the Settlement Court **BINDHA SINGH AND ANOTHER v. ILAHI KHANAM.**

[XIII-75]

ACT I OF 1877 (Specific reliefs.)

(1). s. 9.—*Possession—Title.* Held that a suit to establish title to immoveable property and to recover possession was not one under section 9 of the Specific Relief Act and the Court must decide it with reference to the title of the plaintiff and not on the basis of mere possession. **WAJID ALI v. RAM SARAN SAHAJ AND ANOTHER.**

[IV-39]

(2).—A plaintiff, alleging that upon the death of a Hindu widow, he had obtained possession of certain immoveable property as heir of her husband, but had been wrongfully dispossessed by the defendants, sued for a declaration of his title as such heir, and to have the defendants ejected as trespassers, and for recovery of possession. The lower appellate Court treated the case as falling within s. 9 of the Specific Relief Act (I of 1877), and directed the Court of first instance, which had dismissed the suit on the ground that the plaintiff had failed to prove his title, to deal with it as a summary suit under that section. Held that this view was erroneous, as s. 9 of the Specific Relief Act referred only to cases in which no title was set up, but only the fact of dispossession established, and the plaintiff in this case sought a declaration of his title. **CHUTHAN RAI AND OTHERS v. SHEO GHULAM RAI.**

[IX-89]

(3).—Held by the Full Bench (Mahmood, J. dissenting) that section 9 of Act I of 1877, is intended to provide a special summary remedy for a person who being, whatever his title, in possession of immoveable property, is ousted therefrom. That section does not debar a person who has been ousted from the possession of immoveable property to which he has merely a possessory title, by a mere trespasser from bringing a suit in ejectment on his possessory title. **WALI AHMAD KHAN AND OTHERS v. AJUDHIA KANDU.**

[XI-196]

(4).—A Court should in all cases where it applies give effect to the first paragraph of s. 9 of the Specific Relief Act 1877, although that section may not have been relied on by the party in whose favour it is applicable, but he may have brought a suit for possession based on a plea of title. *Ram Harakh Rai v. Sheodihal Joti* (W. N. 1893, p. 163) followed. **MOUSI AND OTHERS v. KASHI AND OTHERS.**

[XVII-145]

(5).—*Damages.* There is nothing to prevent a claim for damages and a claim for establishment of title being joined with a claim for the relief provided for by s. 9 of Act I of 1877. **RAM HARAKH RAI v. SHEODIHAI JATI.**

[XIII-163]

s. 19.—The respondent mortgaged certain land to the appellant for Rs. 25 on the understanding

ACT I OF 1877, s. 19.—(continued).

that, if he failed to repay that amount by a certain date, he should give appellant possession of such land. The respondent did not repay the mortgage-money as agreed, whereupon the appellant sued him for it in the Small Cause Court. That Court refused to interfere on the ground that according to the terms of the mortgage the appellant was entitled to possession of such land and referred him to the Civil Court. The appellant accordingly brought the present suit in which he asked for possession of the land or re-payment of the mortgage-money. The Court of first instance refused to give the appellant possession of the land on the ground that the mortgage was invalid, the land being the joint and undivided property of the respondent and his brother and uncle, but gave him a decree for Rs. 25 by way of compensation, having regard to the provisions of s. 19 of Act I of 1877. The lower appellate Court reversed this decree on the ground that the appellant should have not been granted a relief for which he did not ask. The Court observed that the decision of the Small Cause Court was no bar to the suit. The lower appellate Court had erroneously held that the appellant had not asked for the money. The plaint might not be altogether in accordance with the requirements of s. 19, Act I of 1877, but the appellant did nevertheless ask that the money might be decreed to him. Although the appellant did not ask, in so many words, for compensation in substitution for the performance by the mortgagor of his part of the contract, *viz.* to give possession, all the circumstances of the case showed that the appellant really wanted possession or his money back. Under the circumstances, the decree of the Court of first instance was equitable and within its competence to make. **SHEO NIWAZ v. GOPAL.**

[I-22]

(1). s. 21.—Contract to refer to arbitration.] The last part of s. 21 of the Specific Relief Act not only makes a pre-existing reference to arbitration a bar to the institution of a suit, but, where subsequent to institution an agreement to refer is registered, bars the further prosecution of the suit. **SHIB LAL AND OTHERS v. HIRA LAL.**

[VIII-133]

(2) —————.] One of the parties to a contract to refer a controversy to arbitration brought a suit for part of the subject matter referred. The defendants pleaded the bar of s. 21 of the Specific Relief Act, but did not allege in their answer to the plaint that the plaintiff refused to perform his contract. *Held* that the mere act of filing the suit on the part of the plaintiff was not tantamount to a refusal to perform his contract, in the sense of s. 21 of the Specific Relief Act. The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act must be an operative

ACT I OF 1877, s. 21.—(continued).

contract, and not a contract broken up by the conduct of all the parties to it. **TAHAL v. BISHER AND ANOTHER.**

[V-331]

(3) —————.] The parties to a suit applied for an adjournment of it on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made thereon disallowing the plaintiff's claim. *Held* that, under these circumstances, the further hearing of such suit was barred. **SALIG RAM v. JHUNA KUAR.**

[II-135]

(4). —————.] *Held* that an agreement to refer a certain dispute to arbitration, could not under s. 21 of Act I of 1877 indefinitely bar the parties from asserting any rights they might have by suit. In the present suit the agreement had been executed on the 17th April, 1877, and it was admitted that at the time of the institution of the suit (8th November 1880) not only had nothing been done under it, but the arbitrators had never met. It had therefore lapsed, not having been acted upon within a reasonable time. **ATMA RAI, AND OTHERS v. SHEOBARAN RAI.**

[II-58]

s. 22 —Naubat Ram, a large landed proprietor, died without issue in 1867. His widow Ganesh Kuar, held possession of the estates down to her death in 1878. Then after some disputes as to the succession, one Naraini Kuar, claiming as widow of an alleged adopted son of Naubat Ram, was put into possession by the Revenue authorities. Against Naraini Kuar, two suits were brought for the property left by Naubat Ram. The first suit was brought in April 1879, by one Chandi Din claiming as sister's son of Naubat Ram. Chandi Din being a pauper sold a portion of the property in suit to one Nawab *Mashuq Mahal* for Rs. 20,000 and made *Mashuq Mahal* a co-plaintiff in the suit. The second suit against Naraini Kuar was instituted in May 1879, by Shib Lal and others, the defendants-appellants in this present suit, who claimed title as the nearest *sapindas* of the deceased Naubat Ram. In each of these two suits the plaintiff or plaintiffs were successful. In each the defendant appealed. In the case of Chandi Din, the defendant was successful and the plaintiff's suit was dismissed by the High Court on the 7th of December, 1886, in the other case the parties on the 25th of July, 1885, settled their dispute by a compromise. While the two suits, above-mentioned were pending, Shib Lal, his co-plaintiff instituted a suit on the 2nd of July, 1883, against Chandi Din and *Mashuq Mahal* asking for a declaration that they were entitled to succeed to the property of the deceased Naubat Ram. In January 1884,

ACT I OF 1877, s. 22.—(continued.)

the female defendant having died, the Collector of Bareilly was brought on to the record of this suit as guardian of his minor children; and on the 19th of January, 1885, a compromise was entered into between the Collector, on behalf of the minor children of Mashuq Mahal and one adult daughter of Mashuq Mahal on the one hand, and the plaintiffs on the other, whereby the representatives of Mashuq Mahal relinquished the suit and consented to a decree being passed in favour of the plaintiffs and the plaintiffs agreed that when they got possession of the property they would make over certain villages and a certain sum of money to the representatives of Mashuq Mahal. As has been mentioned, Chandi Din's claim to the property was finally disallowed by the High Court in December 1886. On the 6th of January, 1888, the Collector of Bareilly instituted a suit for specific performance on the compromise of the 19th of January, 1885. The Court of first instance decreed the plaintiff's claim. On appeal by the defendants to the High Court it was held that there was nothing in s. 22 of the Specific Relief Act which would stand in the way of a decree for specific performance of the compromise. The compromise when entered into in 1885, was not without consideration and the subsequent course of litigation could not affect the position of the parties as regards the present suit based thereon. **SHIB LAL AND OTHERS v. THE COLLECTOR OF BAREILLY.**

[XIV-161]

(1). **s. 27 (b).—Specific performance—First and second mortgages—Transferee for value.]** On the 7th February, 1873, *F* mortgaged the equity of redemption of a certain estate to *B* and *G*. On the 7th August, 1877, he mortgaged such estate to *P* agreeing that, if he failed to pay the mortgage-money within the time fixed, he would convey such estate to *P*, and that, if he failed to execute such conveyance, *P* should be competent to bring a suit "to get a sale effected and a deed of absolute sale executed". On the 6th October, 1877, *F* mortgaged such estate to *B* and *D*. By this mortgage the lien created by the mortgage of the 7th February, 1873, was extinguished. In December, 1877, *B* and *D* obtained a decree against *F* on the mortgage of the 6th October, 1877, and in June, 1878, in execution of that decree, such estate was put up for sale and was purchased by *D*. In February, 1880, *P* sued *F* and *D* for the execution of a conveyance of such estate to him in accordance with *F*'s agreement of the 7th August, 1877. Held that the mortgage of 7th August, 1877, was not in the nature of a mortgage by conditional sale and there was no necessity for *P* to take proceedings to foreclose the mortgage, and the suit was maintainable. Also that, assuming that *D* had no notice of the agreement of the 7th August, 1877, it was very doubtful whether under s. 27 (b) of Act I of 1877, *D* could claim that specific performance of that agreement should not be granted, inas-

ACT I OF 1877, s. 27 (b).—(continued.)

much as the contest lay between a prior and subsequent lien created upon the same property, which had passed to the transferee under a sale in execution of a decree for the enforcement of the subsequent lien. **BADRI PRASAD v. DAULAT RAM.**

[I-61]

(2).—**[Mortgage—Redemption.]** This was a suit for redemption of certain occupancy holding at fixed rates which the plaintiff had usufructually mortgaged to one *X*. The rent payable by *X* to the zamindar had fallen into arrears and the holding had been put up for sale in execution of a decree for rent and had been purchased by the defendant. The defendant set up as a defence that he had purchased the land for value in good faith and was therefore protected under s. 27 (b) of the Specific Relief Act. Held that the section had no application to this case and it was no part of plaintiff's duty to notify the mortgage to the defendant, auction-purchaser. **SAMPAT v. BANARSIDAS AND OTHERS.**

[III-159]

s 30.—Suit for specific performance of contract.] A suit for money, based on an award, which directs its payment by the defendant to the plaintiff, is virtually a suit to have the award specifically enforced; and, as by s. 30 of the Specific Relief Act, 1877, awards are placed on the same footing as contracts, No. 113, sch. ii. of the Limitation Act, 1877, is applicable to such a suit. **SUKHO BIBI AND OTHERS v. RAM SUKH**

[III-16]

RAGHUBAR DIAL v. MADAN MOHAN LAL.

[XIII-179]

(1). **s. 39.—Sale of immoveable property—Covenant of good title.]** *B R* sold a shop to *R C* and *R D* and covenanted with them that he had a good title. Subsequently *I* brought a suit to enforce his mortgage against *R C* and *R D* and the shop, and obtained a decree. *B R* thereupon brought the present suit against *I* to have the mortgage, and the decree obtained thereupon set aside, on the ground that the mortgage was fraudulent. The plaintiff claimed to have a right to maintain the action on the ground that he was liable on his covenant. The lower appellate Court decreed the claim holding that the suit was maintainable under s. 39 of the Specific Relief Act. Held that as the plaintiff had parted with all his interest in the property in question before the present suit was instituted and as the hypothecation bond could not be enforced against the plaintiff himself the suit was not maintainable. **JHUNA v. BENI RAM.**

[VII-75]

(2).—**[]** This was a suit, brought by the vendor of a shop who

ACT I OF 1877, s. 39.—(continued.)

had covenanted with his vendee to return the purchase-money with compensation should there be any flaw in the title to the property, for a declaration that certain decree enforcing a mortgage of the shop obtained by the defendant subsequent to the sale was fraudulent. The first Court held that the shop having been sold by the plaintiff he had no interest to maintain the suit. The lower appellate Court holding that the suit was maintainable under s. 39 Specific Relief Act remanded the case under s. 562, C P C. *Held*, on appeal by the defendant, that the suit was maintainable, but that as all the evidence was on the record the lower appellate Court should have itself tried the case and should not have remanded it to the first Court. **JHUNA v. BENI RAM.**

[V-192]

(3).—*Apprehension of injury—Discretion of Court.* In a suit under s. 39 of Act I of 1877, the plaintiff, in the lower appellate Court, receded from the position taken up by him in the first Court to the effect that the instrument in suit was a forgery, and only contended that it was of no avail, for non-compliance with s. 17 of Act III of 1877. The lower appellate Court dismissed the suit. *Held* that the exercise of the discretion of the Court under s. 39 of Act I of 1877 ought not to be interfered with except on strong grounds, that the plaintiff had failed to show grounds for any reasonable apprehension of serious injury within the meaning of the section, and that it was not for a Court acting under the section to go into the question whether the instrument required registration, or would be admissible in evidence. *Shib Lal v. Hira Lal (J. L. R., 1 All., 622)* referred to. **BHAWAR RAI AND ANOTHER v. JAHANDAR KHAN.**

[IX-147]

(1). s. 42.—*“Entitled to any legal character.”* On the 3rd June, 1884, a Collector, in partition proceedings under the N.-W. P. Land Revenue Act (XIX of 1873) included a temple within the defendants *mahal*, but ordered the plaintiff to contribute a certain sum yearly towards its expenses. On the 2nd June, 1887, the plaintiff instituted a suit for a declaration that this order was *ultra vires*, and passed without jurisdiction. *Held* that the suit must be dismissed, as the case was not within s. 42 of the Specific Relief Act (I of 1877), since the Collector's order did not impugn in any way the title of the plaintiff to any property. **BIJAI MISR AND OTHERS v. GOBIND GIR AND OTHERS.**

[X-195]

(2).—*Suit for a declaration under s. 148 of Act XII of 1881.* One *B D* sued certain cultivators of *muafi* holding and one *S A*, praying for a declaration of her right to recover from the said cultivators her proportion of rent and for setting aside an order of the Revenue Court, alleging that the *muafi* land belonged to *S A*; that in consequence of some dispute the said

ACT I OF 1877, s. 42.—(continued.)

muafi was detached by the Settlement Officer and given to the plaintiff's husband who sold it to her; that she remained in possession without interference; that she sued the said cultivators for arrears of rent; that *S A* intervened under s. 148 of Act XII of 1881; and that the Revenue Court decided adversely to the plaintiff. *Held* by the Full Bench that upon the facts alleged there was a cause of action and that the plaintiff had a right within the meaning of s. 42 (Specific Relief Act). **SABT ALI AND OTHERS v. BASHIR DAULAT.**

[V-194]

(3).—*Cause of action.* One *J* was sued by his son *B* for the partition of the ancestral estate who got a decree. Subsequently *B* was sued by his wife for her share in the estate and got a decree for a $\frac{1}{3}$ th share of the estate. From the time *B* sued his father for partition he commenced to borrow money from the plaintiffs. Plaintiffs brought a suit for the money and got a decree. They (the plaintiffs) then brought this suit against *B* and his wife for a declaration that the decree obtained by her was collusive. *Held* that the plaintiffs had no cause of action. **RAM SARUP AND BEHARI LAL v. RUKMIN KUAR AND OTHERS.**

[V-281]

(4).—*Suit for declaration that property was not liable to be sold.* *M*, in whose name property had been purchased at an execution sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale. *Held* that such a suit could only be maintained under s. 42 of the Specific Relief Act. **MAN KUAR v. TARA SINGH AND OTHERS.**

[V-124]

(5).—*Inconvenient and extreme kind of relief.* The plaintiffs claiming to be the proprietors of a mango grove, sued for a declaration that a custom did not prevail entitling the *samin-dars* to take half the produce of the grove and also for recovery of the money value of the produce for a particular year, which they alleged had been taken by the defendants. They stated that the defendants had in collusion with the *patwari*, caused the words *samin-dar's* half share to be recorded in the settlement *khasra*. *Held* that the suit was rightly dismissed because it was a most inconvenient and extreme kind of relief for the plaintiffs to seek, more convenient and regular mode of redress being open to them. *Held* further that there was no cause of action for the declaration. **CHANDAN SAHU AND OTHERS v. RAM PARSHAD HND OTHERS**

[V-293]

ACT I OF 1877, s. 42.—(continued.)

(6).———*Suit for establishment of custom.*] The *zamindars* of a village sued an occupancy tenant for a declaration of their right to maintain a custom which was thus recorded in the *wajib-ul-arz*:—"When necessary, one or two *bighas* out of the tenant's lands are taken with their consent (*ba khushi*) for sowing indigo." Upon the basis of this entry, they claimed to be entitled to take a portion of the occupancy holding at a certain period of the year, for the purpose of cultivating indigo. *Held* by the Full Bench that the word "*khushi*" used in the *wajib-ul-arz* indicated that the land was only to be taken with the occupancy tenant's consent, and the document created no right of the nature alleged, namely to take the land despite the tenant.

Per Tyrrell, J.:—That the suit was not maintainable under the special provisions of the Specific Relief Act (I of 1877). *SHEOBARAN v. BHAIRO PRASAD SINGH AND OTHERS.*

[V-275]

(7).———*Discretion—Declaration not the only remedy available.*] The plaintiffs (*zamindars*, took possession of a piece of land after the trees upon it were removed by the defendant (tenant). Thereupon the defendant claiming to be the tenant of the land made an application under s. 95 (v) Rent Act for recovery of possession. It was resisted by the plaintiffs, in the Revenue Court, on the ground that the land having been granted for planting trees and the trees having been removed the land reverted to the *zamindars*. The Revenue Court decided against the plaintiff. Thereupon the plaintiffs have brought this suit for a declaration of their right. *Held* that a declaratory suit would not lie. *RAMDIHAL AND ANOTHER v. UDASI.*

[V-176]

(8).———.] *A* died leaving some property burdened with a mortgage, a widow and some reversioners. *B* the widow's brother-in-law alleging that he had bought the decree obtained by the mortgagee on his mortgage-bond, attached the property left by *A* in execution of his decree. The reversioners thereupon alleging that the mortgage debt had been paid by the widow who was in collusion with her brother-in-law brought this suit to have it declared that the mortgage-debt had been paid and the property therefore could not be attached. *Held* that as they can set up this plea in the execution department they can not sue for a declaratory decree under s. 42. *JHARI SINGH AND OTHERS v. GANGA KUMAR AND ANOTHER.*

[V-215]

(9).———*Held* that an improper exercise of the discretionary power (*e. g.* giving a decree though there does not appear to be a sufficient cause of action.) conferred by s. 42 of the Specific Relief Act, by a Court of

ACT I OF 1877, s. 42.—(continued.)

first instance does not in itself constitute a sufficient ground for the reversal of a decree which is not open to any objection upon the ground of jurisdiction or of the merits of the rights of the parties. *MOHAMMAD MASHOOK ALI KHAN AND OTHERS v. KHUDA BUX.*

[VII-226]

(10).———.] *Held* that, where an appellate Court in a suit brought by a minor for a declaration that a sale made by the minor's mother of property which had come to her from her father was void as against the minor, dismissed the suit without going into the merits thereof solely on the ground that it appeared to be collusive, this was not a judicial exercise of the discretion given to the Court by s. 42 of Act No. I of 1877, but that the Court ought to have heard the appeal on the merits. *JHANDU AND ANOTHER v. RAMJI LAL AND ANOTHER.*

[XV-148]

(11).———*Suit to set aside alienation by mortgagor.*] *A* executed a usufructuary mortgage-deed in favour of *B* and put *B* in possession. He subsequently mortgaged the same property to *C*. Later on *A* sold those properties absolutely to *B*. *C* brought this suit under s. 42, Specific Relief Act, to have it declared that the sale-deed was void being contrary to a stipulation in the mortgage-deed in his favour. *Held* that the only declaration to which *C* was entitled was that the subsequent sale did not affect his rights as a mortgagee. *POHKAR DAS v. RAM PRASAD.*

[VII-231]

(12).———*Reversioner—Suit to have will set aside.*] A sonless Hindu widow, in possession of her deceased husband's estate as such, made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that *S*, the person entitled to succeed her, had no right to the property. *Held* that such statement, as it was intended to operate, and would have operated, as a will in respect of the property, gave *S* a right to sue for a declaration that it should not have any effect as against him. *KALIAN SINGH AND ANOTHER v. SANWAL SINGH.*

[IV-337]

(13).———*Suit to set aside decree.*] *Held* that a suit by daughter's son, to set aside certain collusive decrees obtained against his mother and maternal aunt and for a declaration of his right during the life-time of his mother or maternal aunt, in respect of his maternal grand-father's property, to the full ownership of which he had a reversionary right, was maintainable. Also that the awarding of declaratory relief, as regulated by s. 42 of the Specific Relief Act, is a discretionary power which Courts of equity are empowered to exercise with reference to the circumstances of each case and the nature of the facts stated in the plaint, and the prayer of the plaintiff; that so long as a Court of first in-

ACT I OF 1877, s. 42.—(continued.)

stance possesses jurisdiction to entertain a declaratory suit, and entering into the merits of the case arrives at right conclusions and awards a declaratory decree, such a decree can not be reversed in appeal simply because the discretion has been improperly exercised; and that such improper exercise of discretion under s. 42 of the Specific Relief Act has no higher footing than that of an error, defect or irregularity, not affecting the merits of the case or the jurisdiction of the Court, within the meaning of s. 578 of the Civil Procedure Code. This does not imply that, even in cases where the discretionary power to award declaratory relief has been exercised wholly arbitrarily, and in a manner grossly inconsistent with judicial principles, the Court of appeal would have no power to interfere. *Ram Kanaye Chuckerbutty v. Prosunno Coomar Sein* (13 W. R., 175), *Sadul Ali Khan v. Khajeh Abdool Gunnee* (11 B. L. R., 203), *Sheo Singh Rai v. Dakho* (I. L. R., 1 All., 688) and *Damoodur Surmah v. Mohes Kant Surmah* (21 W. R., 54) referred to. SANT KUMAR, v. DEO SARAN AND OTHERS.

[VI-129]

(14).—[*Suit by daughter's son in life-time of daughters.*] On the death of P, a Hindu widow, who had been in possession of the estates, of her deceased husband, D's daughter B was entitled to succeed to the estate, if it were D's separate property. S, however, alleging that the estate was ancestral property, to which he was entitled to succeed, took possession of it. Thereupon the sons of another daughter of D, alleging that the estate of D was his separate property, that B was entitled to succeed to it, that they were the next reversioners, and that B was acquiescing in a possession on the part of S which was adverse to her and to them as next reversioners, sued B and S for a declaration of their reversionary right, and for possession of D's estate or such relief in this respect as the Court might think fit to give. Held that the plaintiff disclosed a right to sue on the part of the plaintiffs and a cause of action. *Nobin Chunder Chuckerbutty v. Gurn Persad Dass* (B. L. R., F. B. R., 1008). *Radha Mohan Dhar v. Ram Das Dey* (3 B. L. R., 362), *Gunesh Dutt v. Lall Muttee Koor* (17 W. R., 11) and s. 42 of the Specific Relief Act referred to. ADIDEO NARAIN SINGH AND ANOTHER v. DUKHARAN SINGH AND OTHERS.

[III-117]

(15).—[*Separated Hindu, left at his death 5 daughters.*] One of these had a son who is the plaintiff in this case. Under the Hindu law all the daughters took the property left by their father jointly with the right of survivorship amongst themselves. The son sought to set aside certain alienations made by the daughters. Held that his interest in the property was so remote that he was not entitled to a decree. MANIK RAM v. GAUPTA MISR.

[VI-22]

ACT I OF 1877, s. 42.—(continued.)

(16).—[*Suit by.*] K (a Hindu widow) executed a deed of gift in favour of one M (her husband's brother). Thereupon P and B brought a suit against K and M to have it declared that they were entitled to succeed her. This suit was compromised and P, B and K were all declared as entitled to succeed. The present suit was brought by G and Z for the same relief as P and B had asked for in the previous suit. The lower Court without going into the matter, decided that the suit was not maintainable. Held that the suit was maintainable and the lower Court should decide it upon the merits. GULAB SINGH AND ANOTHER v. KHUSHAL KUAR AND OTHERS.

[VI-307]

(17).—[*Gift by Hindu widow to her daughter.*] The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter, is merely to accelerate the latter's succession and put her by anticipation in possession of her life-estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift. *Per Mahmood, J.*, that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son who would be the next reversioner to the full ownership of the estate of the donor's deceased husband. *Indar Kuar v. Lalla Prasad Singh* (I. L. R., 4 All., 532) and *Udhar Singh v. Ranee Koonwur* (1 Agra, 234) referred to. BHUPAL RAM v. LACHMA KUAR AND OTHERS.

[IX-22]

(18).—[*Hindu widow who had succeeded to the separate landed estate of her deceased husband made a gift of such estate to her daughter M.*] Thereupon the reversionary heirs to the deceased brought the present suit claiming a declaration that M was not the daughter of the deceased and that they were the reversionary heirs. Held that the suit was maintainable under s. 42 of Act I of 1877. SHEORATAN RAI AND OTHERS v. LAPPU KUAR AND ANOTHER.

[I-160]

(19).—[*Remote and speculative title.*] One B, a Hindu widow, made a statement in the Settlement Department to the effect that one A was in cultivatory possession along with her of certain occupancy holding. A was the nephew and the plaintiffs were the grand nephews of B. The plaintiff thereupon brought the present suit for a declaration that the statement was not binding as against the rights of the plaintiffs as a reversioner to an interest in the holding. It was found that neither the plaintiffs nor their father were ever associated with B's husband in the cultivation of the holding and that A was so associated with B. Held that the plaintiff's

ACT I OF 1877, s. 42.—(continued.)

right was of so remote and speculative a nature that the legislature could not possibly have intended s. 42 to apply such to a case. *NAIPAL AND OTHERS v. BACHANI AND ANOTHER.*

[VI-140]

(20).—*Further relief—Discretion of Court—mere apprehension of injury.*] The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her life-time. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond. *Held* that if the widow's possession were only a possession by the plaintiff's consent entitling her merely to receive the profits for her maintenance the plaintiffs might eject her from the property, and that before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate. *Held* also that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate. *BHOLAI PANDE AND ANOTHER v. KALI PADAIN AND ANOTHER.*

[V-324]

(21).—*Suit for declaration of title to house—Omission to sue for rent.*] *S* sued *B* in a Court of Small Causes for arrears of ground rent of a house. The latter denied *S*'s proprietary right to the land and his liability to pay ground rent, and *S*'s suit was in consequence dismissed. Thereupon *S* sued *B* in the Civil Court for a declaration of proprietary right to the land and of his right to receive ground rent. *Held* that the suit was not barred by the proviso to s. 42 of the Specific Relief Act because it did not include a claim for arrears of ground rent; and that the suit was one in which the

ACT I OF 1877, s. 42.—(continued.)

specific relief claimed might properly be granted. The principle laid down in *Sadut Ali Khan v. Khajeh Abdol Gunnee* (19 *W. R.*, 171) applied. *SOM KALI v. BHAIRO.*

[II-152]

(22).—*Suit for a declaration—Omission to sue for maintenance of possession.*] *Held* that a suit for a declaration of the plaintiff's right to certain shares and the cancellation of certain hypothecations affecting the said shares, where the plaintiff alleged himself to be in possession was not barred by the provisions of s. 42 Specific Relief Act, because plaintiff had not asked for maintenance of possession. *BHOLAI PANDAY AND OTHERS v. RAGHUBANS PANDEY AND OTHERS.*

[I-60]

(23).—*Declaration—Omission to sue for partition.*] On the application of one *A* his name and that of one *B*, his cousin, was recorded in the revenue papers in respect of an 8 annas share. Shortly after *A* applied for a separate record of his name in respect of 4 annas which was refused to him until partition was made. *A* thereupon brought this suit. *Held* that there was no cause of action and in addition the relief asked for should not be granted because further relief might be sought namely partition of the property. *BAIJ NATH AND OTHERS v. DUDH NATH.*

[VI-93]

(24).—*Suit by mortgagor for declaration of his title—Omission to sue for redemption.*] *Held* that a mortgagor whose right as such was denied by the mortgagee in possession was not bound, under s. 42 of the Specific Relief Act, in a suit for declaration of his title as a mortgagor to join a further relief for redemption of the property, though he may be entitled to redemption. *BUJHAWAN v. NANHA AND ANOTHER.*

[II-73]

RAMCHARAN AND OTHERS v. DURGA PRASAD AND OTHERS.

[IV-78]

(25).—*This was a suit by the purchasers of the equity of redemption against the heirs of the vendor and one D for a declaration of their title. The defence of the heirs was adverse possession over twelve years. The property was admittedly in the possession of the mortgagees. Held that the suit was maintainable as the plaintiff could claim no other relief.* *BRANGI AND OTHERS v. RAM SARAN AND ANOTHER.*

[VII-103]

(26).—*The plaintiffs were purchasers at a sale held in execution of a decree for money, and had obtained possession. Before that decree had been executed the pro-*

ACT I OF 1877, s. 42.—(continued.)

perty in question was mortgaged to two other persons. After the purchase by the plaintiffs the mortgagees, with knowledge of the auction purchaser's rights, brought a suit for sale upon their mortgage without making the former auction purchaser's parties. They obtained a decree, and brought the mortgaged property to sale, and it was purchased by *VS* and another. The former auction purchasers thereupon sued the purchasers under the decree upon the mortgage for a declaration that they and their interests were not affected by the suit for sale and by the decree for sale and the sale in execution of that decree. *Held* that the plaintiffs in that suit were not bound either to tender the mortgage money, or to offer to redeem, or to frame their suit as a suit for redemption, and that their not having done so did not deprive them of their right to a declaration. *Bhawani Pershad v. Kallu*, (I. L. R. 17 All., 537) referred to. *NATHU SINGH AND ANOTHER v. GUMANI SINGH AND ANOTHER*

[XVI-86]

(27).—*Suit by mortgagee for declaration—Reversioner to sue for sale.* *Held* that where a plaintiff is entitled to a declaration that he is a mortgagee in respect of certain property and entitled to bring the property to sale but does not seek for such sale he is not entitled to obtain a declaratory decree alone. *LEKHRAJ v. ABDUL GHAFUR KHAN*.

[XIV-205]

(28).—*Declaration—Possession.* The principles of the ruling in *Khiali Ram v. Nathu Lal* (I. L. R., 15 All., 219) apply equally to the case of a usufructuary mortgage made by a *zamindar*. Hence where a *zamindar* made a usufructuary mortgage of certain land in the occupation of tenants. *Held* that the making of such mortgage was not *ultra vires* of the *zamindar*, and that the mortgagee was competent to sue in a Civil Court for a declaration of his rights under the mortgage. *JARAO BAI v. KIFAYAT ALI KHAN AND ANOTHER*.

[XIII-177]

ss. 42 & 54.—*Abstract right.* A Hindu brought a suit in which he alleged that the Hindu community had acquired by long established custom an exclusive right to use for religious purposes a *Ghat* situate on the river Ganges, but that the Mohamedans were in the habit of interfering with the exercise of such right by bathing at the *Ghat*. He prayed for a declaration of the right, and for a perpetual injunction to be issued to the Mohamedans generally forbidding them to resort to the *Ghat*. No act of trespass was charged against any of the defendants. The defence was that the Mohamedans were entitled to use the place, and that their use of it did not cause any inconvenience to the plaintiff. *Held* that the suit was not maintainable, since the Court had no

ACT I OF 1877, ss. 42 & 54.—(continued.)

power to pass a decree against persons who had never interfered with the property in dispute, or to issue an injunction against the whole Mohamedan world; but that, inasmuch as the defendants had fought the case all along as if the suit were maintainable, and upon a false issue, both sides must pay their own costs. *MIRZA SHAH MUHAMMAD AND OTHERS v. KASHI DAS*.

[IV-338]

(1). s. 54.—It was not intended by s. 54 of I of 1877 that a man should not have an injunction granted to him unless his property would otherwise be practically destroyed if the injunction were not granted. Where the plaintiff had for over twenty years carried the business of manufacturing a particular kind of cloth in a certain house, and the defendant built in the neighbourhood of that house in such a manner as to render the plaintiff's house practically useless for the purposes of his manufacture; it was *held* that the plaintiff was entitled to injunction and not merely to damages. *Aynsley v. Glover*, (L. R., 18 Eq. 544) and *Holland v. Worley* (L. R., 26 Ch. D., 585) followed. *Dhanjibhoj Cowasji Umrigar v. Lisboa* (I. L. R., 13 Bom., 252) and *Ghanasham Nilkant Nadkarri v. Moroba Ram Chandra Rai* (I. L. R., 18 Bom., 474) referred to. *YARO v. SANAULLAH*.

[XVII-43]

(2).—One of several co-sharers having begun to erect certain *kachcha* buildings upon the common land, another co-sharer, three or four days after the building had commenced, brought a suit for an injunction to restrain the continuance thereof, on the ground that the defendant was ousting the plaintiff as a co-sharer from a portion of the common land. It was found that the defendant was building upon land which was in excess of the share which would come to him, on partition, and that on partition the plaintiff could not be adequately compensated. *Held* by the Full Bench that the plaintiff was entitled to a perpetual injunction restraining the defendant from proceeding further with the building, and directing that the building so far as it had proceeded be pulled down, and prohibiting the defendant from building on the land as exclusive owner at any future time. *Paras Ram v. Sherjit* (I. L. R., 9 All., 661) referred to. *Per* Straight, J. That it was for the defendant-appellant to show that the lower appellate Court had exercised a wrong discretion in granting the injunction, and that, this not having been shown, the High Court ought not to interfere. *SHADI AND ANOTHER v. ANUP SINGH*.

[X-95]

(3).—One of two joint owners of immovable property having been forcibly ejected by the other from some land of which he was in possession through a tenant, brought a suit upon title to recover exclusive possession. *Held* that in such a suit, not being a suit under s. 9 of the Specific Relief Act, the plaintiff was not

ACT I OF 1877, s. 54.—(continued.)

entitled to more than a declaration of his title to possession jointly with the defendant, and an injunction was also issued to the defendant prohibiting him from dealing with the land of which he was in possession to the prejudice of the plaintiff without the plaintiff's consent. **RAM JATAN SHUKUL v. JAISAR SHUKUL.**

[XIV-166]

(1). **s. 55.—***Suit to have an instrument executed and registered.*] The plaintiffs, alleging that the defendants, having executed in their favour and delivered to them a bond, the consideration for which was money due to them for rent of land and on a former bond, had received it back for registration, and, refusing to register it, had retained it, sued the defendants to have a similar bond executed and registered.

Per Mahmood, J. :—That it was doubtful whether the suit could be regarded as a suit for specific performance of a contract, and whether the only remedy open to the plaintiffs was not a suit for the money. It was only on the hypothesis that the mere writing of the original bond, in the absence of registration and final delivery, did not amount to a performance of the contract, that the suit was entertainable at all. That, assuming the suit to be one for specific performance of a contract, the plaintiffs were not entitled to the specific relief which they sought, since they could obtain their full remedy by suing for the money in respect of which the fresh bond was sought to be executed; and they had failed to prove the exact terms of the original bond. Observations on the nature of the evidence required to prove a contract of which specific performance is sought.

Per Stuart, C. J. :—That the suit was bad in form and substance, and there was no ground for the remedy by specific performance of a contract. If the alleged bond were in existence, a suit simply and directly for the recovery of the money claimed by the plaintiffs would have sufficed, for in such a suit facts relating to the loss or concealment of the bond might have been proved, and under the circumstances secondary evidence at least of the terms of the bond might have been admissible, or the plaintiffs might have found themselves in a position to make out their claim by other evidence; but if the plaintiffs considered it material to their case to have their claim on the bond, the loss or destruction of which could not be doubted, their proper course of proceeding was by a suit to restore the terms of the lost bond, or as it was said in Courts of Equity in England, by a suit to obtain the benefit of the lost deed or instrument; and that, if the suit could be taken to be one affording such a remedy, it contained no sufficient materials to warrant it being held that the bond was of the tenor and in the terms alleged by the plaintiffs. **MAYA RAM AND OTHERS v. PARAG DAT AND ANOTHER.**

[II-154]

ACT I OF 1877, s. 55.—(continued.)

(2).—*Suit to have an instrument executed and registered—No stipulation as to good title of vendor.*] This was a suit for the specific performance of a contract of sale. It appeared that defendant agreed to sell certain villages to the plaintiff for Rs. 10,095, and executed a *satta* which acknowledged the receipt of the earnest money and recited that the balance should be paid within 15 days when the sale-deed would be executed and registered. No stipulation as to the good title of the vendor was then agreed to. When called upon to execute the document defendant refused to guarantee his good title. *Held* that the defendant could not be compelled to guarantee what was not stipulated for before. **BINDESHRI PRASAD v. JAIRAM.**

[IV-169]

(3).—*Suit for removal of boundary marks.*] This was a suit for the removal of certain boundary marks whereby the plaintiff alleged "hundreds of bighas of land owned and possessed by him and included in his *samindari* land passed into the village of the defendant." *Held* that the suit as brought was unsustainable, seeing that the plaintiff cannot sue for the removal of the pillars without asking for a declaration of right and for maintenance of possession. **THAKURI RAI AND OTHERS v. MUHAMMAD SAYYID AND OTHERS.**

[IV-4]

(1). **s. 56. (b)**—The respondent sued for, amongst, other reliefs, "the staying the proceedings for partition taken by the appellant in the Revenue Court." The Subordinate Judge gave him a decree for this relief. *Held* that the Subordinate Judge had no power to give a relief which virtually amounted to a prohibition to a Court over which he had no jurisdiction to stay its proceedings, in a case of which it had exclusive cognizance. The decree was "*ultra vires*" and could not be upheld. **RADHA KISHEN v. RANI KISHORI.**

[I-29]

(2).—*B* executed a deed of gift in favor of *A*, his wife in April 1874. In September 1874, *C* obtained a decree for arrears of rent against *B*. This decree being appealable to the High Court under the provisions of Act XVIII of 1873 (the Rent Act then in force) was appealed from and affirmed. *C* then caused the property conveyed by the deed of gift to *A*, to be attached. *A* objected but his objection was disallowed, by the Collector under s. 179 of Act XII of 1881 (Rent Act). *A* thereupon instituted a suit in the Court of the Subordinate Judge under s. 181 of the said Act to establish his right to the property. The Subordinate Judge dismissed the suit and *A* preferred an appeal to the High Court. After disposal of the suit by the Subordinate Judge *C* applied to the Revenue Court for the sale of the property in execution of the decree. *A* thereupon has preferred this appli-

ACT I OF 1877, s. 56 (b).—(continued.)

cation under s. 492 of the Code of Civil Procedure for a temporary injunction to restrain the sale. *Held* (1) that the High Court had jurisdiction to grant the injunction to stay the proceedings of the Revenue Court, s. 56 (b) Specific Relief Act, notwithstanding, as the particular decree was appealable to the High Court (2) that under the circumstances an injunction should issue. **BAHURIA KOERI v. MAHARAJA RADHA PERASAD SINGH.**

[IV-352]

(3). ———— A tenant on whom a notice of ejectment had been served under Act XII of 1881 and whose suit to contest his liability to ejectment brought under that Act had failed sued in the Civil Court for a perpetual injunction to prevent his ejectment basing his suit on an agreement that he should not be ejected so long as he paid a certain rent. *Held* that the suit was not maintainable, the jurisdiction of the Civil Court being excluded by s. 95 of Act XII of 1881 and by s. 56 (b) and (f) of the Specific Relief Act. **MAHIP SINGH AND ANOTHER v. CHOTU.**

[III-67]

ACT III-1877 (Registration).

(1) s. 3.—*Immoveable property.—Hypothecation-decree.* *Held* that a decree, which by being put into execution, may affect immoveable property can not be considered as itself immoveable property. **ABDUL MAJID v. MUHAMMAD FAZL-ULLAH AND ANOTHER.**

[X-186]

(2). ———— *Khet-Naishakar.* One B executed a bond in lieu of Rs. 100 in favor of one C and as a collateral security hypothecated his "*khet naishakar*." *Held* that the property hypothecated was *naishakar*, the word *khet* indicating only a measure, which is moveable property and consequently no registration of the document was necessary. **KALKA PRASAD v. CHANDAN SINGH AND OTHERS.**

[VII-270]

(1). s. 17.—*Document—Petition for mutation of names.* The parties to this suit who were disputing as to the right of succession to the estate of two deceased persons came to an arrangement amongst themselves by which they divided the property. They then presented a petition in the Revenue department for mutation of names according to such agreement. This petition recited the dispute and the terms of the agreement in full. *Held* that this petition was not such an instrument as is contemplated by s. 17 of the Registration Act and that therefore its registration was not compulsory. **NUR ALI AND OTHERS v. IMAMAN.**

[IV-40]

(2). s. 17 cl. (b) *Mortgage—Agreement with a third person to release part of mortgaged*

ACT III OF 1877, s. 17 cl. (b).—(continued.)

property. The mortgagee of immoveable property under a hypothecation bond, entered into an agreement with one who was not a party to his mortgage, to release part of the property from liability under his mortgage. This agreement was not in writing and registered. The mortgagee subsequently sought to enforce the hypothecation against the whole of the mortgaged property. *Held* that the agreement, being a new contract for a fresh consideration between persons who were not parties to the mortgage, was not, as between the parties to the mortgage, a release which the law required to be in writing and registered. *Held* also that the party to the agreement with the mortgagee might have come into Court as a plaintiff to enforce the same, and that it was equally competent for him to plead it in avoidance of the mortgagee's claim to bring to sale the property referred to therein. **NASH v. ARMSTRONG** (30 L. J. C. P., 286) referred to. **GURDIAL MAL v. JAUHRI MAL AND OTHERS.**

[V-279]

(3). ———— *Of the value of Rs. 100 or upwards—Mortgage—Interest Act (VIII of 1871.)* *Held* that a mortgage bond which secured the repayment of Rs. 50 on demand and *not on any fixed date*, with interest at 9 per cent. was not compulsorily registrable under s. 17, clause 2 of Act VIII of 1871. **KHUDA BAKHSH AND OTHERS v. KANIZAN.**

[II-209]

(4). ———— *Held* by the majority of the Full Bench that the principal sum secured by a mortgage of immoveable property is alone to be considered for the purpose of deciding whether the registration of the instrument of mortgage is optional or compulsory under the Registration Act, 1877. The ruling of the Full Bench in *Himmat Singh v. Sewa Ram* (I. L. R., 3 All., 157) overruled. *Held*, therefore, where an instrument of mortgage by way of conditional sale, dated the 2nd July, 1871, secured the payment of a principal sum of Rs. 72, with interest at Rs. 2 per cent. *per mensem*, on the 12th May, 1873, the whole amount thus secured exceeding Rs. 100, that the registration of such instrument was optional and not compulsory. **HABIBULLAH v. NAKCHED RAI AND OTHERS.**

[III-87]

*Per contra.***MAHIP SINGH v. SUMAT KUAR.**

[I-27]

(5).—s. 17 cl. (b) & (c).—*Receipt—Acknowledgment.* The question in this case was whether certain entries which appeared on the mortgage bonds in suit came within the provisions of clauses (b) and (c) of s. 17 of Act III of 1877 and were documents which affected immoveable property comprised in the bonds, within the meaning of s. 49 of that Act. The endorse-

ACT III OF 1877, s. 17 cl. (b) & (c).—(continued.)

ments on the bonds were in these terms:—"Paid on the . . . , Rs. . . ." *Held* that the entries, assuming them to be receipts, do not "purport or operate to create, declare, assign, limit or extinguish . . . property," as a receipt is but an acknowledgment of a payment. It is not the payment. The endorsements therefore do not come within sub-section (b) of s. 17. *Held* further that sub-section (c) was also in applicable. **JIWAN ALI BEG v. BASA MAL AND OTHERS.**

[VI-310]

NABI BAKHSH v. MEWA RAM AND ANOTHER.

[VII-188]

(6) s. 17 cl. (c) *Receipt.* The payment of money by a mortgagor to a mortgagee in satisfaction of the mortgage debt is a payment of consideration on account of the extinction of the mortgagee's right within the meaning of cl. (c), s. 17 of Act VIII of 1871 (Registration Act). A receipt for such payment is therefore a document of which the registration is compulsory, and which if unregistered is inadmissible in evidence under s. 49. *Dalip, Singh v. Durga Prasad*, (I. L. R., 4 All., 442); *Basawa v. Kalkapa*, (I. L. R., 2 Bom., 489); *Mahadaji v. Vykankeyi Gobind*, (I. L. R., 1 Bom., 197); and *Ramapa v. Umana*, (I. L. R., 7 Bom., 123), followed. *Shidlingapa v. Chenbasapa*, (I. L. R., 4 Bom., 235), dissented from. *Mattongney Dossee v. Ram Narain Sadkhan* (I. L. R., 4 Calc., 83), referred to. **IMDAD HUSAIN AND OTHERS v. TASSADUK HUSAIN.**

[IV-107]

(7).—[] In a suit to enforce a right of pre-emption the defendants produced a receipt to show that the full amount of consideration money recited in the deed of sale had been paid by the vendee to the vendor. The lower appellate Court refused to admit such receipt in evidence on the ground that it was unregistered. *Held* that the instrument creating the right, title, and interest of the vendee was the deed of sale and the receipt was merely a subordinate and subsidiary document, which of itself created no such interest. The lower appellate Court should have taken the receipt into consideration and determined its genuineness and validity one way or the other. **ISHRI DAS AND ANOTHER v. RAM LAL.**

[I-2]

(8).—[] *Held* that cl. (c) of s. 17 of the Registration Act has no application to a receipt given by a *pattidar* to a *lambaradar* as an acknowledgment for profits paid to him. **BHAGWAN DAS v. ALLADEVI.**

[III-49]

(9).—[] *Held* that an entry in the judgment-debtor's *bahi* recording the receipt of the money alleged to be paid, and signed by the decree-holder, was not a "receipt" within the meaning of s. 17 of the

ACT III OF 1877, s. 17 cl. (c).—(continued.)

Registration Act, and as such inadmissible in evidence for want of registration. **TIRA RAM v. RAM CHAND.**

[VIII-82]

(10).—s. 17 cl. (d).—*Lease for one year.* A *kabuliyat*, dated the 6th May, 1880, and executed by the lessee of a house in favour of the lessors set forth that the house was let to the former at an annual rent of Rs. 3 for a term of one year. It also contained this stipulation:—"I (the lessee) do declare that I shall continue to pay the annual rent every year, and that if I should fail to pay the rent in any year, the owners of the house shall be at liberty to recover the rent through the Court." The lease was not registered. In a suit by the lessors against the lessee for possession of the house and for Rs. 7-8 arrears of rent, the defendant pleaded that, according to the right construction of the lease, he was entitled to occupy the house and the lessors were not entitled to eject him therefrom, so long as he paid the annual rent of Rs. 3; that he had duly paid rent at the agreed rate from the 6th May, 1880, to the 6th May, 1884; and that, under these circumstances, the plaintiffs were not entitled to either of the reliefs claimed. *Held* that the lease was for one year only, and, thus falling under s. 18 of the Registration Act (III of 1877), it was admissible in evidence without registration; that the defendant had been a mere tenant-at-will since the expiry of the year 1880-81; and that the plaintiffs were therefore entitled to possession of the house. *Hand v. Hall* (I. L. R., 2 Ex. D. 355), referred to. **KHAYALI v. HUSAIN BAKHSH AND ANOTHER.**

[VI-56]

(11).—[] *Lease for a term exceeding one year.* The *zamindar* of a village, in consideration of Rs. 61 executed an instrument in favour of E. Martin, the material portion of which was as follows:—"I have given to . . . 13 *Big.* 10 *Bis.* of land at the rent of Rs. 4 or 5 per *bigha*, for a period from 1282 to 1284 *Fasli*, namely for a term within 3 years. At the time of sowing indigo I will give the land for sowing indigo from 15th *Jaith* or 15th *Chait*, should I fail . . . I shall pay damages at the rate of Rs. 40 per *bigha* . . . ; Mrs. Martin alleging that only *Big.* 4-9-1 of the land contracted for had been given to her sued to recover Rs. 361-14-6 as damages and Rs. 38-12-4 balance of the Rs. 61 unpaid. *Held* that the instrument was a lease for a term exceeding one year and not having been registered was not admissible in evidence under s. 49 of Act III of 1877. *Sheo Dial v. Prag Dat Misr* (I. L. R., 3 All., 83) distinguished. **ELIZABETH MARTIN v. RAM LAL.**

[II-18]

(12).—[] The terms of the lease in question in this case were:—"I, Pancham having taken (premises described) on a monthly rent of one and a

ACT III OF 1877, s. 17 cl. (d).—(continued.)

half annas for my personal use as a dwelling, it is agreed that I shall pay the aforesaid rent month by month, and if I find it necessary to erect any fresh buildings on the aforesaid premises, I shall do so from materials found on the spot at my own expense; the owner of the premises shall have nothing to do therewith; should I neglect to pay the aforesaid rent, the owner shall be at liberty to realize the same and have the premises vacated, and at such time I shall have no claim as regards the buildings erected as aforesaid by me, nor shall I raise any objection or excuse thereabout; and if the landlord finds it necessary to have the premises (buildings and land) vacated he shall give me 15 days prior notice. I shall thereupon vacate the premises immediately and pay all such arrears of rent as may then be due without any objection or excuse." *Held* (by a majority of the Full Bench) that the lease was not a lease for a period exceeding a year, and therefore did not require registration. **HANSO v. HAR NARAIN.**

[VI-115]

(13.)—*Lease from year to year or reserving a yearly rent—Covenant to quit on 15 days' notice.* In a suit for possession of a piece of land, and for rent of the same, the plaintiff produced in support of his claim two *sarkhats* or *kabuliyats* purporting to be executed in his favor by the defendants, and dated respectively in January, 1875, and June, 1876. These documents were not registered. The first after reciting that the executant had taken the land from the plaintiff, on a specified yearly rent, and promised to pay the same yearly, proceeded as follows:—"If the owner of the land wishes to have it vacated, he shall give me fifteen days' notice, and I will vacate without making objection: if I delay in vacating the land, the owner can realize, by recourse to law, rent from me at the rate of Rs. 8 *per annum*." The second *sarkhat*, after reciting that the executants had taken the land from the plaintiff on a yearly rent specified, for six years, and promised to pay the same year by year, proceeded thus:—"And if the said Sheikh wishes to have the land vacated within the said term, he shall first give us fifteen days' notice, and we will vacate it without objection." The lower Courts held that the *sarkhats* were not admissible in evidence, as they required registration under s. 17 (4) of the Registration Act VIII of 1871, being leases of immoveable property from year to year or reserving a yearly rent. *Held* that the two *sarkhats* created no rights except those of tenants-at-will, inasmuch as the clause common to both, to the effect that at any time, at the will of the lessor, the lessees were to give up the land at fifteen days' notice, governed all the previous clauses, and the defendants could be asked to quit at any time before the lapse of the term at fifteen days' notice. *Held* therefore that the leases did not fall under s. 17 (4) of Act VIII of 1871; that their registration was not compulsory; and that they could not be

ACT III OF 1877, s. 17 cl. (d).—(continued.) excluded from evidence under s. 49 of Act III of 1877, which governed the question of admissibility, while Act VIII of 1871 governed the question whether registration was or was not compulsory. **KHUDA BAKSH v. SHEO DIN AND ANOTHER.**

[VI-170]

(14) s. 17 cl. (i)—*Immoveable property—Decree enforcing lien on immoveable property.* A decree, which, by being put into execution, may affect immoveable property cannot be considered as itself immoveable property. Consequently, though an assignment of such a decree requires to be registered, yet the want of registration does not affect the title to the decree, it merely precludes of the giving evidence of that title. **ABDUL MAJID v. MUHAMMAD FAZLUL-LAH AND ANOTHER.**

[X-186]

(15) s. 17. cl. (n)—*Receipt.* The provisions of s. 17 cl. (n) of Act No. III of 1877 do not apply to a receipt which purports to extinguish not the entire mortgage but only the rights under the mortgage of one of the co-mortgagees. **SRI RAM AND OTHERS v. KESRI MAL.**

[XVI-92]

(16).—s. 17 cl. (o)—*Sale certificate.* *Held* that a sale certificate granted under s. 316 C. P. C. is not a document the registration of which is compulsory under the Registration Act, 1877, s. 17 (d). **MASARAT-UN-NISSA v. ADIT RAM.**

[III-159]

HUSAINI BEGUM v. MULO.

[II-183]

s. 18 cl. (c)—*Lease.*

See s. 17, Nos. 10, 11, 12, and 13.

s. 23.—Although s. 316, C. P. C. says that a certificate granted thereunder shall bear "the date of the confirmation of the sale," that provision cannot alter the fact of execution or the time when execution does take place, which is the starting point from which the four months mentioned in s. 23 of the Registration Act begin to run. *Held*, therefore, that a certificate granted under that section in respect of a sale which was confirmed on the 7th April, 1880, which was registered within four months from the 10th May, 1882, when it was executed, was registered within the time allowed by law. **HUSAINI BEGUM v. MULO.**

[II-183]

(1).—s. 28.—*"Some portion"*. *Held* that in Act VIII of 1871, s. 28, of the words "The whole or some portion of the property," means some substantial portion of the property and that in a case where a large and valuable property is situate in one district and another small piece of land in another the document

ACT III OF 1877, s. 28.—(continued.)

should be presented in the district in which the larger portion is situate. *HARI RAM AND ANOTHER v. SHEO DAYAL MAL AND ANOTHER.*

[V-146]

(2)———*Held* that the words of s. 28, Act III of 1877 "some portion of the property" should not be read as meaning some substantial portion. *Sheodayal Mal v. Hari Ram* (I. L. R., 7 All., 590) dissented from. *GULZARI LAL v. DAYA RAM.*

[VI-287]

s. 33 cl. (a)—"Reside".] The meaning of the word "reside" in s. 33 cl. (a) of Act No. III of 1877 may be taken to be similar to the meaning given to the same word in s. 17. Explanation I, of the Code of Civil Procedure and must be distinguished from the meaning of the words "domicile" or "domicil." *Abdul Rahman v. Ajudhia* (W. N. 1892, P. 155) referred to. *RAM KUBER AND ANOTHER v. HAR CHARAN*

[XVI-170]

(1.) s. 49.—*Admissibility—Document registered in contravention of s. 35.*] S, on the 23rd September, 1874, executed an instrument of gift in favor of his two daughters and his adopted son, whereby he gave them "his houses and shops, and other moveable and immoveable property, and his loan transactions" in equal one-third shares. At this time he was possessed of a one-third share in a certain partnership business. As S was unable to appear at the registration office, by reason of sickness, N, his adopted son, on the same day presented such instrument for registration, and applied for the issue of a commission for his examination, which the registering officer issued. The Commissioner went to S's house on the next day, but before he arrived S had died. He examined the attesting witnesses to such instrument, who stated that it had been executed by S, and he was informed by N that it had been so executed. On the next day N and the attesting witnesses and the writer of such instrument appeared before the registering officer, and the witnesses and the writer were examined by him. Being satisfied that S had executed such instrument, the registering officer admitted registration, recording that the execution was admitted by N. N's signature was not endorsed on such instrument. M, one of S's daughters, subsequently sued N for one-third of her father's property, including his share in such partnership business, basing her suit on such instrument. *Held* that, inasmuch as N had admitted at the time of registration of such instrument that it had been executed by S, its registration was not invalidated by the mere fact that N's signature had not been endorsed thereon. Also that, inasmuch as the donor had relinquished the subject of the gift, so far as he could, and had vested it in the donee's, possession under the gift had passed to M. Also on the construction of such instrument, that it did not give

ACT III OF 1877, s. 49.—(continued.)

M a share in her father's partnership business" *MANBHARI v. NONIDH.*

[I-78]

(2).———] At the registration of a bond executed by H and B, and by H on behalf of J, a minor, the minor was not represented for the purpose of registration by any one. *Held* that the bond should not affect any immoveable property comprised therein in so far as J was interested in the same. *Muhammad Ewaz v. Brij Lal*, (I. L. R., 1 All., 465) and s. 35 of the Registration Act, 1877, referred to. *SHANKER DAS v. JOGRAJ SINGH AND OTHERS.*

[III-155]

(3).———*Document registered in contravention of ss. 33 and 34.*] A document bearing the certificate required by law showing that it has been registered must be treated as a registered document, notwithstanding the registration procedure may have been defective. *Held*, therefore, where a document bore the certificate required by s. 68 of Act XX of 1866, showing that it had been registered, that, notwithstanding that it had been presented for registration by the agent or the person executing it under a power of attorney not recognizable under that Act for the purposes of s. 34, it must be treated as a registered document. *Sah Mukhu Lal Panday v. Sah Koondan Lal* (15 B. L. R., 228; S. C. L. R. 21. Ap., 210; 24 W. R., 75) and *Muhammad Ewaz v. Brij Lal* (I. L. R., 1 All., 465) referred to. A document was presented for registration by the agent of the person executing it authorized by a power of attorney not recognizable under the registration law, and was admitted to registration. *Held* that the person executing such document could not be allowed to object to the validity of its registration by reason of its having been registered under a power of attorney not recognizable under the registration law, such person being herself responsible for the defect in registration. *Har Sahai v. Chuni Kuar* (I. L. R., 4 All., 14) followed. *AKBAL BEGAN v. SHAM SUNDAR.*

[II-81]

(4).———*Document registered in contravention of ss. 32 and 35.*† The word "registered" as used in s. 49 of the Registration Act (III of 1877) refers to the act of registration by the registering officer, and not to matters of procedure or conduct of the parties seeking registration, which are governed by special provisions of the Act. S. 49, read with s. 60, only means that a document, to be admissible in evidence for the purposes of the former section, must be registered, i. e., the officer must, under s. 60, have put upon it the certificate required by that provision. If he has done so, the document bearing such certificate becomes admissible in evidence if he has not, or there has been no registration of the

ACT III OF 1877, s. 49.—(continued.)

document, then such document is inadmissible. Where the document bears such a certificate, it is registered within the meaning of s. 60, and becomes under the second paragraph thereof admissible in evidence, and the operation of the second paragraph is not interfered with by s. 49. Where therefore, the lower appellate Court rejected as in-admissible in evidence under s. 49 a deed of gift of immoveable property upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not qualified to do so under ss. 32 and 35, and the registration was consequently void and the document not registered under s. 17 (a). *Held* that the Court was wrong in so doing, and ought to have looked at and dealt with the document. *Har Sahai v. Chunni Kuar* (I. L. R., 4 All., 14), *Ikkal Begam v. Sham Sundar* (I. L. R., 4 All., 384), *Bishunath Naik v. Kalliani Bai* (W. N. 1882, p. 175), *Husaini Begam v. Mulo W. N. 1882, p. 183*), *Sheo Shunkar Sahoy v. Hirdey Narain Sahu* (I. L. R., 6 Calc., 25), *Muhammad Ewaz v. Birj Lal*, (L. R., 4 I. A. 166), *Sah Makhun Lal Panday v. Sah Koondun Lal* (L. R., 2 I. A. 210) and *Majid Hosain v. Fazl-un-nissa* (L. R., 16 I. A. 19), referred to. *HARDEI v. RAM LAL*.

[IX-101]

(5). ————— Document registered in contravention of s. 28.] In this case a lease of immoveable property situate in the Jaunpur district had been registered by the Registrar of Benares. *Held* that the lease having been registered, no matter in the wrong registry could not be rejected when tendered in evidence as it bore upon it the Registrar's certificate (4 All., 14 and W. N., 82, p. 81) followed. *BISHUNATH NAIK v. KALLIANI BAI*.

[II-175]

(6). —————.] An instrument of mortgage on land, which required to be registered, was presented for registration to a Registrar within whose district no portion of the land was situate, and was registered by such Registrar. In a suit to enforce such mortgage it was objected that such instrument, not having been properly registered, could not be received in evidence. *Held*, following the opinion of Broughton, J., in *Sheo Shunkur Sahoy v. Hirdey Narain Sahu* (I. L. R., 6 Calc., 29), that, when a document which purports to have been registered is tendered in evidence, the Court can not reject it for non-compliance with the Registration Law, moreover, that the mortgagor could not be allowed to take advantage of an objection which would not have been available but for his own wrongful act. *HAR SAHAI AND ANOTHER v. CHUNNI KUAR AND ANOTHER*.

[I-105]

(6). ————— Personal covenant—Unregistered mortgage.] On the 3rd February, 1871, the defendants, having borrowed Rs. 1,000 from the plaintiffs, executed in favor of the latter

ACT III OF 1877, s. 49.—(continued.)

an instrument in which they mortgaged, by way of conditional sale, certain immoveable property as security for the loan, and in which it was provided that they should pay certain interest on such sum annually and should pay such sum on the expiration of five years from the date of such instrument, and in the event of failure in these respects that the plaintiffs might apply for foreclosure. On the 18th January, 1879, the plaintiffs sued the defendants for the balance of such sum and interest, waiving their claim on such property, and suing for such balance as a simple debt, as such instrument was not registered. *Held*, following *Sheodial v. Prag Dat Misr* (I. L. R., 3 All., 229), that, inasmuch as such instrument involved a personal obligation of the defendants distinct and severable from the obligation in respect of such property, such instrument, notwithstanding it was not registered, was admissible in evidence in support of the claim to enforce the money-obligation; and it was also admissible in proof of the fact that the debt was not exigible from the defendants until on and after the expiration of five years from the date of the loan. *Held* also that the limitation period in No. 66, sch. ii of Act XV of 1877, was not applicable, as the claim of the plaintiffs was not based on a single bond, that is to say a bill or written engagement for the payment of money, without a penalty. *LACHMAN SINGH AND ANOTHER v. KESRI AND OTHERS*.

[I-93]

(7). ————— Admissibility of unregistered document in a suit for its cancellation.] *D D* sued *G R* and others to have a "kabuliat" which purported to be executed by him to be declared null and void on the ground that it was a forgery. This document required to be, but was not registered or stamped. The Munsif held that the document was a genuine one and dismissed the suit. The Subordinate Judge held that with reference to the provisions of the Stamp and Registration Laws, the document must be treated as non-existent, and that secondary evidence in any form regarding it must be put out of consideration and on this ground decreed *DD's* suit. *Held* that the provisions of s. 49 of Act III of 1877 do not affect the existence of an unregistered document, nor do they absolutely prevent the document from being received in evidence (In the matter of *Sheodial v. Prag Dat Misr* (I. L. R., 3 All., 229). In a case like the present they merely barred the Court from receiving the document in evidence of the transaction referred to in it. The suit must therefore be determined by the Court below on its merits. *GOBIND RAI AND OTHERS v. DHARAM DAS*.

[I-138]

(8). ————— Admissibility of unregistered lease in suit for damages.] *Held* that an unregistered lease for a term exceeding one year was not admissible in evidence under s. 49 of Act III of 1877 in a suit for damages based

ACT III OF 1877, s. 49—(continued.)

on that lease. *Sheo Dial v. Prag Dat Misr* (I. L. R., 3 All., 229) distinguished *ELIZABETH MARTIN v. RAM LAL*.

[II-18]

(9).—*Mortgage in lieu of dower.* Held that an agreement by which a Muhammadan husband hypothecated his property for the payment of the dower due to his wife, if unregistered, was inoperative under s. of Act VIII of 1871. *BUNYADI BEGAM v. MUHAMMAD ASHGHAH ALI AND OTHERS*.

[V-19]

(1). s. 50.—*Priority—Registered and unregistered document—Sale certificate.* Held that a sale certificate granted by a Court under s. 316 C. P. C. of which a copy has been forwarded to the registering officer under s. 89 of Act III of 1877 is not a registered document within the meaning of s. 50 of such last-mentioned Act. *SIRAJ-NUNISSA v. JAN MUHAMMAD*.

[II-51]

(2).—*Registered document executed pendente lite.* Held that section 50 of Act III of 1877 was not applicable to and gave no priority to a deed executed *pendente lite*, though registered, over a prior unregistered deed not compulsorily registrable. *BHAGWAN DAS v. NATHU SINGH AND OTHERS*.

[IV-158]

(3).—*Oral agreement—Registered document.* Held that an oral agreement of hypothecation of immoveable property, entered into in August, 1869, and which was not accompanied nor followed by possession of the property charged, could not avail against a registered sale certificate obtained in respect of the same property and dated in August, 1876, whether s. 48 of Act XX 1866 or s. 48 of Act VIII of 1871 were looked to. *NATHU RAM AND OTHERS v. PHUL CHAND AND OTHERS*.

[IV-183]

(4).—*Registered and unregistered documents—Possession.* Held that a purchaser under a registered sale-deed had priority over a prior purchaser under an unregistered sale-deed who had obtained possession over the property but had lost it long before the second sale-deed was executed. *GHSU v. AMIR-ULLA AND OTHERS*.

[I-33]

(5).—*Notice.* Held that a registered document had no priority over an earlier but unregistered document under s. 50 of Act III of 1877 where the holder of the latter had notice of the prior document. *KODU v. RAMAPAT AND ANOTHER*.

[V-57]

PANCHAM LAL v. KISHORE.

[VII-15]

ACT III OF 1877, s. 50.—(continued.)

RAM AUTAR v. DHANAURI AND OTHERS.

[VI-174]

(6).—*Held* that s. 50 of Act III of 1877 will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed, not being a compulsorily registrable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed. *Abool Hossein v. Raghunath Sahu* (I. L. R., 13 Calc., 70); *Hathising Sobha v. Kuvarji Javher* (I. L. R., 10 Bom., 106); and *Krishnumma v. Suranna* (I. L. R., 16 Mad., 148) followed. *The Agra Bank v. Barry* (7 E. and I. A. 135) and *Ram Autar v. Chanauri* (I. L. R., 8 All., 40) referred to. *DIWAN SINGH AND OTHERS v. JADHO SINGH*.

[XVII-19]

GOVIND PRASAD v. NASRULLA.

[XVII-90]

(7).—*Decree.* Held that a decree obtained upon a subsequent registered hypothecation bond had no priority over a prior decree obtained upon an unregistered hypothecation bond. *PARSHADI LAL v. KHUSHAL RAI AND ANOTHER*.

[II-15]

(8).—*Held* that a mortgagee under a registered deed was not entitled to priority over the holder of a decree on a prior unregistered deed; the words "not being a decree or order" in s. 50 of Act III of 1877 being clear. *BAIJNATH v. LACHMAN DAS AND ANOTHER*.

[V-270]

(9).—*Under* s. 50 of the Registration Act the decree or order which is not to be affected by a registered document must be a decree or order made prior to the execution and registration of the registered document. Therefore where the plaintiffs, who were mortgagees under a registered document, sued to set aside a sale to the defendants under a decree on an unregistered mortgage, the plaintiff's registered mortgaged being subsequent to the unregistered mortgage, on which the defendants relied, but prior to the decree thereon. Held that the defendants, auction-purchasers, must take subject to the rights of the plaintiffs as mortgagees. *The Himalaya Bank Limited v. The Simla Bank, Limited* (I. L. R., 8 All., 23) *Madar Sahab v. Subbarayalu Nayudu* (I. L. R., 6 Mad., 88); *Kanhaiya Lal v. Bansidhar* (W. N., 1884, p. 136); and *Shahi Ram v. Shib Lal* (W. N., 1885, p. 63) referred to. *JAGRUP RAI AND OTHERS v. RADHEY SINGH AND OTHERS*.

[XI-63]

(10).—*The* appellants sued the respondents to enforce a

ACT III OF 1877, s. 50.—(continued.)

lien created by a registered bond, dated the 21st May, 1872. The respondents became in 1877, the auction-purchasers of the hypothecated property in execution of a decree passed on the 8th July, 1873, on the basis of an unregistered bond, dated the 20th April, 1872. *Held* that, if the respondents relied on the priority in date of the lien in satisfaction of which the property in question was sold to them, the appellants were entitled to plead the provisions of s. 50 of Act III of 1877, and the case could not be excluded from the operation of that enactment, on the other hand, if, on the contention that the bond of the 20th April, 1872 merged in the decree of the 8th July, 1873, the respondents relied on the lien granted by the decree as apart from that created by the bond, it was obvious that, the decree being subsequent in date to the bond in favour of the appellants, the respondent, purchased the property subject to the lien of the appellants. **BALDEO PRASAD AND OTHERS v. GANGA PRASAD AND ANOTHER.**

[I-80]

(11).—[] This was a suit for possession of a house purchased by the plaintiff at a sale in execution of a hypothecation decree which he had obtained against the owner of such house on two unregistered mortgage bonds. The suit was resisted by the defendant who was in possession of the house as a mortgagee under a registered mortgage-deed later in date than the bonds of the plaintiffs but prior to the decree obtained on those bonds. *Held* that the defendants registered mortgage-deed gave him a superior title to the possession of the house to the title of the plaintiffs under his bonds and decree. **RAM SAHAI v. GAUNA LAL.**

[I-161]

(12).—[] On the 7th July, 1871, one *P* gave *G* an unregistered hypothecation bond for Rs. 98. The bond not having been paid when due *G* put it into suit and obtained a money decree on the 14th June, 1872. In the meantime on the 6th of May, 1872, *P* gave a usufructuary mortgage of the same estate to *B* for Rs. 200 under a registered mortgage bond. *G* took out execution of his decree and caused the estate to be sold. It was purchased by *Ganga* but subsequently came into the possession of *G*. The present suit was brought by *B* the usufructuary mortgagee for possession of such estate. *G* pleaded the priority of lien. *Held* that if *G* pleaded priority of lieu under his bond of 1871, he was estopped by the provisions of s. 50 of Act III of 1877. If he pleaded the decree of 1872 it was obvious that it was subsequent in date to the mortgage of *B* and was a simple money decree. *Rhub Chand v. Kalian Das* (I. L. R., 1 All., 240) followed. *Held* further that although the two documents were executed before Act III of 1877 came into force that did not affect the question as s. 50 of Act III of 1877 had a retrospective

ACT III OF 1877, s. 50.—(continued.)

effect, *Lachman Das v. Dip Chand*, (I. L. R., 2 All., 851) followed. **GOKUL v. BASAHU.**

[I-127]

(13).—[] The words in s. 50 of the Registration Act (III of 1877) "not being a decree or order, whether such unregistered document be of the same nature as the registered document or not," mean that, if a decree has been obtained to bring property to sale under a hypothecation bond, or under a money bond, and under that decree the property has been attached, that decree cannot be ousted by a subsequent registered instrument. The section cannot in any way make a decree affect a transfer of more than the interest which the judgment-debtor possessed. *Held* that a mortgage-deed registered under Act III of 1877 was entitled to priority over a decree obtained subsequently to the registration of such deed upon a prior unregistered deed of mortgage. *Kanhaiya Lal v. Bansidhar*, (W. N., 1884, p. 136), *Shahi Ram v. Shib Lal*, (W. N., 1885, p. 63); and *Madar v. Subbarayalu*, (I. L. R., 6 Mad., 88) referred to. **THE HIMALAYA BANK LIMITED v. THE SIMLA BANK LIMITED AND ANOTHER.**

[V-310]

(14).—[] *A* held an unregistered mortgage-deed, dated in 1869. He obtained a decree on the mortgage and bought in the property himself in 1875. In obtaining possession of the property he was resisted by *B*, who had a registered mortgage of the same property, dated in 1873. *A* brought this suit to have it declared that *B*'s mortgage has no priority as he had obtained a decree on his previous mortgage bond before the defendant *B*. *Held* that the plaintiff's suit must fail as his obtaining a decree could not take away the priority which the other had. **RAGHUBANS KUAR v. GANGA PHUL.**

[VI-133]

(15).—[] *Option as to registration.* [] At a sale in execution of a decree *J*, purchased certain property which was at that time subject to two mortgages, the first under an unregistered deed in favour of *M* and dated in 1872, and the second under a registered deed in favour of *L* and dated in 1880. The registration of the latter both deeds was optional, the former under Act VIII of 1871, and the latter under Act III of 1877. *J* subsequently satisfied the mortgage under the registered deed of 1880, which was delivered to him. *M* then brought a suit to recover the money due to him under the mortgage-deed of 1872 by sale of the mortgaged property. *Held* by Oldfield, J., that applying the rule laid down by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premsukhdas*, (I. L. R., 10 Calc., 1035, L. R., 11 I. A., 126), *J* having paid off the mortgage under the registered deed of 1880, should have the benefits of that mortgage, and was entitled to set up the deed which he held against

ACT III OF 1877, s. 50.—(continued.)

the unregistered deed of 1872, against which, under s. 50 of the Registration Act (III of 1877) it would take effect, as regards the property comprised in it. *Lachman Das v. Dip Chand*, (I. L. R., 2 All., 851), referred to.

Per Mahmood, J. that the word "unregistered" in s. 50 of the Registration Act, must, in reference to the circumstances of the present case, be read, as "not registered under Act VIII of 1871," and that, so reading the section, the registered mortgage-deed of 1880 was entitled to priority over the unregistered mortgage-deed of 1872. *Lachman Das v. Dip Chand* (I. L. R., 2 All., 851) and *Sri Ram v. Bhagirath Lal* (I. L. R., 4 All., 227) distinguished. Also *per* Mahmood J., that the position of J, by reason of his having paid off the registered mortgage of 1880, could at best be that of an assignee of that mortgage having priority over the mortgage-deed on which the plaintiff was suing; that such priority could not enable him to place the equity of redemption upon a higher footing than it would have been had he not paid off the registered mortgage of 1880; and that, as a consequence, the sale of the property in enforcement of the mortgage of 1872 should be allowed to take place, but subject to the rights of priority which J, had acquired by reason of his having paid off the registered mortgage of 1880; *Sirboddh Rai v. Raghunath Prasad*, (I. L. R., 7 All., p. 568) and *Gokal Das Gopal Das v. Puranmal Premsookh Das*, (I. L. R., 10 Cal., 1035); (L. R. 11 I. A., 126) referred to. *JANKI PRASAD v. SRI MATRA MAUTANGUI DEBIA*.

[V-115]

(16). —————.] *Held* that a subsequent registered bond of which registration was compulsory had no priority over an unregistered prior bond of which registration was optional. *KANHAIYA LAL AND ANOTHER v. BANSIDHAR*.

[IV-136]

Per contra.

SHAHI RAM v. SHIBLAL.

[V-63]

(17). —————.] *Held* that a document which was registered under the Registration Act, 1877, took effect, as regards the property comprised therein, as against a document relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered thereunder. *Lachman Das v. Dip Chand*, (I. L. R., 2 All., 851) followed. *ABDUL RAHIM v. ZIBAN BIBI*.

[III-136]

(18). —————.] *Held* that a document whose registration was compulsory under Act III of 1877 and which had been registered thereunder, had priority over another relating to the same property, the registration

ACT III OF 1877, s. 50.—(continued.)

of which was under Act VIII of 1871, optional and which had not been registered under that Act. *GOBIND RAM AND ANOTHER v. BATASO*.

[III-104]

KALIAN v. SHANKAR LAL,

[I-76]

(19). —————.] *Held* that, under s. 50 of the Registration Act, 1877, an instrument the registration of which under the Registration Act, 1871, was compulsory and which was registered under that Act took effect, as regards the property comprised therein, as against an instrument relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered under that Act. *HABIB-ULLAH v. NAKCHED RAI AND OTHERS*.

[III-87]

(20). —————.] *Held* that s. 50 of the Registration Act gives preference to registered documents of which the registration is *optional* over unregistered documents and not to registered documents of which the registration is compulsory. *KARAMAT ALI v. MUHAMMAD MOHSIN AND OTHERS*.

[VI-15]

(21). —————.] *Held* by Stuart, C. J., that under the *explanation* to s. 50 of the Registration Act, 1877, a sale-deed, the registration of which under the Registration Act, 1871, was compulsory, and which was duly registered thereunder, took effect, as regards the property comprised therein, against a deed of simple mortgage of a prior date, relating to the same property, the registration of which under the Registration Act, 1871, was optional and which was not registered thereunder. *Ganga Ram v. Bansri* (I. L. R., 2 All., 431) and *Lachman Das v. Dip Chand* (I. L. R., 2 All., 851) observed on. *Siri Ram v. Bhagirath Lal* (I. L. R., 4 All., 227) dissented from.

Held by Straight, J., that the former document had no preference over the latter under s. 50 of the Registration Act. *Siri Ram v. Bhagirath Lal* (I. L. R., 4 All., 227) followed. *DORI LAL v. UMED SINGH*.

[IV-29]

(22). —————.] *Document executed while Act XIX of 1843 was in force—Document registered under Act VIII of 1871.* A document executed while Act XIX of 1843 was in force and not registered thereunder cannot be postponed to a document executed in 1873 and registered under Act VIII of 1871. *CHATTUR SINGH v. RAMLAL AND ANOTHER*.

[I-3]

(23). —————.] *Document executed before Act XVI of 1864—Document registered under Act IX of 1871.* An unregistered document, executed before Act XVI of 1864 came into force, is not invalidated or post-

ACT III OF 1877, s. 50.—(continued.)

poned to a document registered under Act IX of 1871 under the *explanation* given in s. 50 of Act III of 1877. *RAM BARAN RAI v. MURLI PANDEY AND ANOTHER.*

[I-5]

SHEORAJ SINGH AND OTHERS v. LAUNGA KUARI.

[I-120]

(24). —————. —Document executed on 28th May, 1864.—Document registered under Act XX of 1866.] The appellant, to whom certain property had been mortgaged by conditional sale, under an unregistered instrument-bearing date the 28th May, 1864, sued, the mortgage having been foreclosed under Regulation XVII of 1866, for possession of the mortgaged property. Among the defendants were the respondents, to whom a part of the property had been mortgaged under a registered instrument, dated the 4th February, 1870, and who had sued the mortgagees for possession of such part by virtue of the mortgage, and had obtained a decree, under which they were in possession. The appellant was not a party to this suit. The deed of the appellant was one the registration of which was not compulsory by the law in force at its date. The deed of the respondent was one the registration of which was compulsory under Act XX of 1866. The lower appellate Court held that the deed of the respondents, being registered, took priority over the deed of the appellant, which was not registered. *Per* Oldfield and Duthoit, JJ.—That neither Act XX of 1866 nor any subsequent Registration Law gave the respondents' registered deed priority over the appellant's unregistered deed. Nor could the respondents take any advantage from the circumstance that they had sued the mortgagor on their deed and obtained a decree. The appellant was no party to the suit, and was unaffected by the decree. Whatever rights the respondents had under their deed and decree, were subject to the appellant's prior mortgage. *Kanhaya Lal v. Bansidhar (W. N., 1884, p. 136)* referred to. *KISHORI LAL v. SHAM KARAN AND ANOTHER.*

[IV-184]

(25). —————. —————.] Held (Stuart, C. J., doubting) that under the provisions of s. 50 of the Registration Act, 1877, documents registered under former Registration Acts do not take precedence over all unregistered documents, of which at the time of their execution registration was either optional or not required. *Lachman Das v. Dip Chand (I. L. R. 2 All., 851)* observed on. *SIRI RAM v. BHAGRATH LAL.*

[II-19]

(1). ss. 58-60.—Endorsement-certificate—*Prima facie* evidence.] Where in a suit by a mortgagee on his mortgage the defendant put

ACT III OF 1877 ss. 58-60.—(continued.)

the plaintiff to proof of the title under which he claimed: it was held that the mere production of the deed of mortgage which had been thus questioned and the fact that the deed of mortgage contained an endorsement certificate by the Registrar in the usual manner under sec. 59 of Act III of 1877, were not sufficient to shift the burden of proof on to the defendants. *MANOHAR SINGH v. SUMIRTA KUAR.*

[XV-93]

(2). —————.] A decree-holder, sued to establish that certain property was the property of *W* his judgment-debtor, such property being claimed by *A* as his. He proved that for five years and more *W* had been in possession of such property as ostensible owner. Held that, this being so, it rested with *A* to prove his title. A deed of sale, which required to be registered, not having been registered, and the time for presenting it for registration having expired, the vendor, in order to avoid the effect of the deed of sale being unregistered, gave the purchaser a bond confirming such deed. The bond, with the deed of sale annexed thereto, was presented for registration. By mistake or for some other reason the particulars to be endorsed on a document admitted to registration, and the certificate showing that a document has been registered, were endorsed on the deed of sale and not on the bond. Held that, assuming that the bond had been registered, it was doubtful whether such an obvious attempt to defeat the provision of the Registration Law should be permitted to succeed; that, whether there had been a mistake and the certificate of registration really applied to the bond or not, the provisions of ss. 58, 59 and 60 of the Registration Act had not been complied with, and the bond was to all intents and purposes unregistered; and that the defect was not a "defect of procedure," within the meaning of s. 87, and which could be passed over. *MATHRA DAS AND OTHERS v. W. MITCHELL AND A. MITCHELL.*

[II-17]

s. 60.—A document bearing the certificate required by law showing that it has been registered, must be treated as a registered document notwithstanding the registration procedure may have been defective. *Har Sahai v. Chuni Kuar (I. L. R., 4 All., 14)* followed. *AKBAL BEGAM v. SHAM SUNDAR.*

[II-81]

HUSAINI BEGUM v. MULO.

[II-183]

BISHUNATH NAIK v. KALLIANI BAI.

[II-175]

MANBHARI v. NONIDH.

[I-78]

HARDAI v. RAMLAL.

[IX-101]

Per contra.

SHANKAR DAS v. JOGRAJ SINGH AND OTHERS

[III-155]

ACT III OF 1877.—(continued.)

ss. 74 & 77.—Where an application for registration of a sale-deed had been presented after the expiry of the period prescribed by law for registration, and had been dealt with under s. 24 of the Registration Act, and the Registrar had passed an order under that section directing that the document should be registered on payment of the prescribed fine, and such fine had been paid. *Held* that the requirements of the law had been complied with, and that it was not competent for the successor in office of the Registrar, dealing with the document under s. 74 of the Registration Act, to go behind the order of his predecessor, nor was it for the Court, in a suit instituted under s. 77, to question the propriety of that order, which was given in pursuance of a discretionary power allowed to a Registrar to accept documents for registration after the time prescribed. *DURGA SINGH v. MATHURA DAS.*

[IV-173]

s. 77.—*Suit before exhausting the remedies provided by the Act.* A Sub-Registrar refused to register a bond as the obligor denied the execution of it. The obligee, instead of applying to the Registrar under s. 73 of the Registration Act, in order to establish his right to have such bond registered, sued the obligor claiming a decree directing the registration of such bond. *Held* that such suit was not maintainable. *Ram Ghulam v. Chotey Lal (I. L. R., 2 All., 46)* observed upon. *BHAGWAN SINGH AND ANOTHER v. KHODA BAKHSH AND ANOTHER.*

[I-3]

(2). —————] This is a suit to enforce a contract of lease, by obliging the lessors to have the instrument registered and that the plaintiff's possession under it be maintained against them. *Held* that there was nothing in the law which prevented the institution of such a suit until proceedings had been taken under the Registration Act. *Bhagwan Das v. Khuda Baksh (I. L. R., 3 All., 397)* was a case in which proceedings to register had been taken and registration refused by a Registrar and it was only to such cases that the procedure provided in the Act applied. They had no application to a case like this where no steps had been taken before the Registrar and no refusal by him to register. *Held* further that as the instrument was not put in as evidence of the transaction affecting property but was itself the subject-matter of the suit it was admissible in evidence. *SIBBA KHAN AND OTHERS v. AJUDHIA SINGH AND ANOTHER.*

[V-329]

(3). —————] Certain lessees, whose lessor had refused to be a party to registering the lease, without applying for registration to the Sub-Registrar or Registrar, brought a suit within four months of the execution of the lease claiming that the lessor might be ordered to cause the lease to be registered. *Held* that such a suit would lie independently

ACT III OF 1877, s. 77.—(continued.)

of the Registration Act (Act No. III of 1877) and that s. 77 of the said act would not apply so as to render the suit barred by limitation. *Ram Ghulam v. Chotey Lal (I. L. R., 2 All., 46)* approved; *Bhagwan Singh v. Khuda Baksh (I. L. R., 3 All., 397)* and *Edun v. Mahomed Siddiq, (I. L. R., 9 Calc., 151)* distinguished. *ABDULLAH KHAN AND ANOTHER v. JANKI.*

[XIV-94]

s. 87.—*Endorsement certificate—Prima facie evidence.*

See ss. 58 and 60. Nos. (1) and (2).

ACT XV OF 1877 (Limitation).

(1). s. 2.—*Revival—Right barred by Act XIV of 1859.* This suit for redemption of property mortgaged in 1812 would clearly be barred by time but for a petition signed and filed by the pleader of the mortgagee and dated 18th February, 1826. It was pleaded that the petition was an acknowledgment and had the effect of extending the period of limitation. *Held* that as the admission of 18th February, 1836 was made by the agent, the mortgagor's right to redeem had become barred by s. 15 of Act XIV of 1859 which was repealed by Act IX of 1871, and no provisions of Act XV of 1877 could revive it. *KIDAR NATH AND ANOTHER v. ULFAT RAI AND OTHERS.*

[III-202]

(2). —————] *Foreclosure of mortgage executed while Act XIV of 1859 was in force.* A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years of that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*baibat*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceedings or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor. *Held* that, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within which he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863. *Held* also that, even if foreclosure proceedings under Regulation XVII of 1806 had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. *Denomath Gangooly v. Nursingh Proshad Dass (14 B. L. R., 87)* referred to. *MURLIDHAR AND OTHERS v. KANCHAN SINGH AND OTHERS.*

[IX-41]

(3). —————] *Right barred by art. 15 of Act IX of 1871.* The plaintiff in this suit objected to the attachment of certain immoveable property in execution of a decree under s. 246, C. P. C. The objection was disallowed in

ACT XV OF 1877, s. 2.—(continued.)

1876. In 1881 he brought the present suit to establish his right to the property and for possession of the same. *Held* that the suit was barred by art. 15, sch. II of Act IX of 1871 which was the Act in force when the proceeding under s. 246 of Act No. VIII of 1859 was taken. *Krishnaji Vithal v. Bhaskar Raghunath*, (I. L. R., 4 Bom., 611.) **GOKAL DAS v. DEBI PRASAD.**

[V-305]

HIMAYAT ALI v. MANSUKH.

[III-19]

RAMDAYAL v. DURGA DAI.

[IV 25]

(4). ———— *Judgment-debtor not made party.* *Held* that where a judgment-debtor is not made a party to a claim under s. 246, Act X of 1872 (s. 278 of Act XIV of 1882) set up by a third person and allowed the judgment-debtor is not bound to sue within one year from the date of the order allowing the objection for a declaration that the property belonged to him and not to the claimant **HUSAIN KHAN v. UMAR KHAN, AND OTHERS.**

[I-24]

(1). s. 4.—*Duty of Court to consider the plea of limitation.* *Held* that a question of limitation, when it arises upon the facts before a Court, must be heard and determined, whether or not it is directly raised in the pleadings or in the grounds of appeal. **BECHI v. AHSANULLAH KHAN AND OTHERS.**

[X-149]

RAMU RAI AND OTHERS v. DAYAL SINGH.

[XIV-131]

*Per contra.***AHMAD ALI v. WARIS HUSAIN AND ANOTHER.**

[XIII-47]

(3). ———— *Court cannot extend limitation prescribed.* When a Court fixes a time under cl. (a) or cl. (b) of s. 54 of Act XIV of 1882, it must be a time within limitation. Section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. **JANTI PRASAD v. BACHU SINGH AND OTHERS.**

[XIII-29]

(4). ———— *Consent of parties cannot save limitation.* The consent of parties that a so-called appeal should be heard cannot give a Court jurisdiction to hear such appeal when the same is invalid or has been presented beyond the time prescribed by the Indian Limitation Act, 1877. **DEBI AND OTHERS v. MULHU DUBE.**

[XIV-79]

ACT XV OF 1877, s. 4.—(continued.)

(5). ———— *Plea of limitation taken after award.* This suit, which was for money lent, was referred to arbitration by the Court of first instance, and judgment in accordance with the award was given by that Court. The lower appellate Court set aside the award, and remanded the case for re-trial. The case was re-tried, and the Court of first instance gave the plaintiffs a decree. The defendant appealed, and the case was referred to arbitration by the lower appellate Court. The award was in the favor of the plaintiffs, and the lower appellate Court gave judgment in accordance with the award. On appeal by the defendant to the High Court it was contended that the suit was barred by limitation. This defence to the suit had not been set up in the lower Court. The Court observed that the judgment of the lower appellate Court was not appealable, being in accordance with the award. It was doubtful whether the plea of limitation could be raised at this stage of the case. All questions of limitation must be presumed to have been disposed of prior to the first reference to arbitration. Moreover the award itself recognized the claim of the plaintiffs. **JAGMANDAR DAS v. PIARI LAL AND ANOTHER.**

[I-17]

(6). ———— [After a suit has been referred for decision to arbitrators with the consent of parties and of the Court and an award has been delivered it is not competent to the Court to dismiss the suit on a point of limitation. *Beharee Lall v. Unoop Singh* (S. D. A., N.-W. P., 1864, p. 472). **RAM JATAN RAI AND OTHERS v. SHEO BALAK RAI AND ANOTHER.**

[XVII-162]

(7). ———— *Presentation — Memorandum of appeal — Insufficiently stamped.* A memorandum of appeal, if it is not, when tendered, properly stamped, it is not at that time a memorandum of appeal within the meaning of s. 541 of Act XIV of 1882 and the appeal cannot be regarded as having been at that time presented within the meaning of s. 4 of Act XV of 1877 or as valid for any other purposes except in the event, specified in s. 28 of Act VII of 1870. Where a memorandum of appeal which, when tendered was insufficiently stamped, has subsequently been sufficiently stamped, the affixing of the full stamps cannot have a retrospective effect so as to validate the original presentation, unless it has been done by order made under the second paragraph of s. 28 of Act VII of 1870. **BALKARAN RAI AND OTHERS v. GOBIND NATH TIWARI AND ANOTHER.**

[X-39]

(8). ———— *Unaccompanied with copy of decree.* An appeal under the Code of Civil Procedure is not presented within the meaning of s. 4 of Act XV of 1877 unless it is accompanied by the copies required by the

ACT XV OF 1877, s. 4—(continued.)

Code. BALKARAN RAI AND OTHERS *v.* GOBIND NATH TIWARI AND ANOTHER.

[X-39]

(9). **s. 4.—Explanation—Date of institution.** The plaint, in this suit for pre-emption, was presented to the proper officer on the 1st of June, 1880, but the application for the appointment of certain persons as guardians for the defendants, who were minors, was made on the 14th June and granted by the Court on the 15th June. It was contended on behalf of the defendants that the suit must be regarded as having been instituted on the 15th June and therefore beyond time. *Held* that it was too late to consider any question of that kind for the first time in second appeal as it really affected the validity or otherwise of the plaint as was not a question of limitation. If the objection had been taken at the proper time the plaint would have been amended and limitation would have been counted from the date of the amendment. *Ram Lal v. Harrison* (I. L. R., 2 All., 832) *Stuart Skinner v. William Order* (I. L. R., 2 All., 241) and *S. C. L. R.*, (6 Ind. App., 126) followed. GANESH RAI AND ANOTHER *v.* HAR DIAL.

[I-129]

(1). **s. 5.—Court closed—Application of section to Act XII of 1881.** *Held* that s. 5 of the Limitation Act applies to applications under the Rent Act, and that therefore when the period prescribed for an application expires on a day when the Court is closed, the application may be presented when the Court reopens. PEM KUNWAR *v.* IMRAT KUNWAR.

[XIII-117]

(2). ————] A decree in a suit to enforce a right of pre-emption directed that the purchase-money should be paid within a certain period from the date the decree became 'final'. The period of limitation prescribed for an appeal from this decree expired on a day when the Court was closed. *Held* that the decree did not become "final" before the day the Court re-opened. *Shaikh Ewaz v. Mokima Bibi* (I. L. R., 1 All., 132) followed. RAM SAHAI *v.* GAYA AND OTHERS

[IV-224]

(3). ———— *Admission of appeal—Power of Bench hearing appeal.* *Held* that the Bench before which an appeal came for final hearing was competent to determine whether the order admitting the appeal should stand or be set aside. *Dubey Sahai v. Ganesh Lal* (I. L. R., 1 All., 34) referred to. HASNI BEGAM *v.* THE COLLECTOR OF MUZAFFAR NAGAR AND OTHERS.

[VI-245]

ACT XV OF 1877, s. 5—(continued.)

(4). ———— *Sufficient cause—Determination by Court below.* *Held* that the fact that a subordinate Court has decided that the suit or appeal before it was brought within time, or that there was sufficient cause, within the meaning of s. 5 of Act XV of 1877, for the appellant in that Court not presenting the appeal within the period of limitation prescribed, does not preclude the High Court from considering that decision in appeal. BECHI *v.* AHSANULLAH KHAN AND OTHERS.

[X-149]

*Per contra.*FATIMA BEGAM *v.* HANSI.

[VII-29]

(5). ———— *Applicability of section—To applications for leave to appeal to Her Majesty in Council.* S. 599 of Act No. XIV of 1882 was not inconsistent with article 177 of the second schedule of Act No. XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to Art. 177. The limitation therefore for an application for leave to appeal to Her Majesty in Council is six months from the date of the decree to appeal from which leave is sought. The provisions of the second paragraph of s. 5 of Act No. XV of 1877 do not extend to applications for leave to appeal to Her Majesty in Council. *Fazal-un-nissa Begam v. Mulo* (I. L. R., 6 All., 250), *Burjore and Bhawani v. Bhagana* (L. R. 11 I. A., 7 S. C. I. L. R., 10 Calc., 557), *Lakshmi v. Ananta Shanbaga* (I. L. R., 2 Mad., 230) and *Ganga Gir v. Balwant Gir* (W. N. 1881, p. 130) referred to. IN THE MATTER OF THE PETITION OF SITA RAM KESHO AND OTHERS.

[XII-152]

(6). ———— *To pauper appeal.* *Held* that s. 5 of Act XV of 1877 does not apply to an application for leave to appeal as a pauper. PARBATI *v.* BHOLA.

[X-25]

GANGA GIR *v.* BALWANT GIR.

[I-130]

(7). ————] *A B applied for leave to sue as a pauper for the recovery of certain dower alleged to be due to her. Upon her right to sue as a pauper being disputed by the persons proposed by her in her application for leave to sue as a pauper as defendants to the suit, A B paid into Court the court-fee necessary for a regular suit to recover the amount claimed, and prayed that her original application might be treated as the plaint in the suit and the suit proceeded with in the ordinary manner. In the meantime however the period of limitation prescribed by Art. 104 of sch. ii of Act No. XV of 1877 for a suit to recover deferred dower had expired. Held that the suit was barred by limitation and that s. 5 of Act No. XV of 1877 could not be applied. Skinner v.*

ACT XV OF 1877, s. 5.—(continued.)

Orde (J. L. R., 2 All., 241; S. C., 4 C. L. R., 351) distinguished. *Balkaran Rai v. Gobind Nath Tiwari* (J. L. R., 12 All., 129), *Sainti Prasad v. Bachu Singh* (J. L. R., 15 All., 65), *Naraini Kuar v. Nakhani Lal* (J. L. R., 17 All., 526) referred to. *ABBASI BEGAM v. NANHI BEGAM AND OTHERS*.

[XVI-33]

(8).—*Sufficient cause—Ignorance of law.* Held that ignorance of law was not a sufficient cause within the meaning of s. 5 of Act XV of 1877. *JAG LAL v. HARNARAIN SINGH*.

[VIII-218]

RAMJAWAN MAL AND ANOTHER v. CHAND MAL AND OTHERS.

[VIII-258]

BECHI v. AHSAN-ULLAH KHAN AND OTHERS.

[X-149]

(9).—A criminal appeal was presented three days beyond time. On an explanation being called for, the convict stated that he did not know that he had a right of appeal and that he thought his relatives would prefer an appeal. On the return of the explanation the appeal was admitted. Held (on the hearing of the appeal) that this was not a "sufficient cause" within the meaning of s. 5 of Act XV of 1877. That the provisions of the Limitation Act are to be applied with as much strictness to criminal as they are to civil cases. *QUEEN EMPRESS v. BHONI RAM*.

[XI-10]

(10).—*Clerical error.* In a memorandum of appeal filed in the District Court within the period of limitation through some mistake the name of a wrong person was entered as that of the respondent. After the period of limitation had expired, the Court, on application by the appellant, rectified the memorandum and issued notice of the appeal to the proper respondent. At the hearing, the Judge overruled a preliminary objection that the appeal was out of time. Held that as the mistake was a mere clerical error and accident duly rectified before the hearing of the appeal, and such rectification was not equivalent to adding or substituting a new party within s. 32 of the Civil Procedure Code and s. 22 of the Limitation Act, and even if it were so, the Judge would have been justified in admitting the appeal under s. 5 of the Limitation Act the decision of the Judge ought not to be disturbed. *JAMNA v. IBRAHIM AND ANOTHER*.

[VIII-58]

(11).—*Appeal wrongly filed as from an order.* In this case, on appeal by the defendants from the decree of the first Court, the lower appellate Court holding that that Court had no jurisdiction to entertain the suit, made an order returning the plaint to

ACT XV OF 1877, s. 5.—(continued.)

the plaintiffs to be filed in a Court having jurisdiction in the case. The plaintiffs thereupon preferred an appeal to the High Court within the prescribed time in the form of an appeal from an order. That appeal was dismissed by the High Court on the 17th January, 1881, the plaintiffs being instructed that they should appeal as from an appellate decree. This the plaintiffs accordingly did by this second appeal which they preferred on the 23rd January, 1881. The defendants-respondents objected at the hearing of this appeal that it had been preferred beyond time. The Court (Straight and Tyrrell, J. J.) under the peculiar circumstances of the case, and looking to the doubt that for some time prevailed on the comprehension of the terms "decree" and "order" respectively, in the sense of the Civil Procedure Code, overruled the objection and admitted the appeal to a hearing. *MANORATH AND OTHERS v. BALAK AND OTHERS*.

[I-97]

(12).—Where an appellant persisted in appealing from a decree as if such decree were an order merely, in spite of his attention being drawn to the fact at the time of filing the appeal. Held that such appellant, when he subsequently filed the same appeal as an appeal from a decree, was not entitled to exclude from the period of limitation for his appeal from decree, the time lost by him in appealing as from an order. *RAJ KUMAR v. DEOKI NANDAN*.

[XV-242]

(13).—*Stamp.* An appeal was rejected by the District Judge as beyond time on the solitary ground that instead of affixing one label of the value of Rs. 3 he affixed two labels one of the value of Rs. 2 and the other of Re. 1, and the certificate of the treasurer showing that when he presented the appeal no such court-fee label was procurable was presented five days after the time allowed for appeal. Held that the circumstances of the case furnished ample ground for the exercise of the discretionary power conferred by s. 5 Limitation Act. *BANSI LAL v. RAGHUNATH SAHAI*.

[VII-212]

(14).—On the 26th January, 1889, an application was presented to the Munsarim of the District Judge's Court for review of a judgment passed on the 19th December, 1888. The application was insufficiently stamped and the Munsarim endorsed on it, "Stamp insufficient". On this a dispute ensued between the pleader for the applicant and the Munsarim as to the sufficiency of the stamp. On the 25th April, 1889, the deficiency pointed out by the Munsarim was made good. On the 26th May, the Judge admitted the application, on the applicant paying the Court-fee payable on an application presented on or after

ACT XV OF 1877, s. 5.—(continued.)

ninety days from the date of the decree. *Held* that no sufficient cause had been shown, within the meaning of s. 5 of the Limitation Act, for not making the application within ninety days: and that the application was consequently barred by limitation and ought to have been rejected. *MUNRO v. THE CAWNPORE MUNICIPAL BOARD.*

[IX-197]

(15). ————— *Misleading order of Court.* On the 24th July, 1888, a memorandum of appeal from a decree, dated the 31st March, 1888, was presented to the office of the High Court, and was endorsed with an office report, "in time up to 27th instant, stamp deficient by Rs. 110". On the 25th July, the memorandum of appeal was laid before Broadhurst, J., who made an order.—"Fourteen days are allowed to make good the deficiency". The deficiency was made good on the 30th July. On the 1st August, Tyrrell, J., made an order on the memorandum of appeal "admit." At the hearing of the appeal a preliminary objection was taken that the appeal had never been validly presented within time or admitted, and that it could not be heard. *Held* that the order of Tyrrell, J., must be taken to have been made for good cause, and with sufficient knowledge of all the circumstances and must be presumed to have been passed under section 5 of the Limitation Act (XV of 1877); and further that the order of Broadhurst, J., might fairly be considered as having misled the appellant into taking a longer time than he would otherwise have taken to make good the deficiency of Court-fee, and he was therefore entitled to say that he had "sufficient cause" for not presenting the memorandum within time. *Balkaran Rai v. Gobind Nath Tiwari (I. L. R., 12 All., 129)* distinguished. *BAKHSHI RAM NARAIN LAL v. BAKHSHI AVADH NARAIN LAL AND OTHERS.*

[X-122]

(16). ————— *Poverty—Misleading order of Court.* In February, 1884, the High Court dismissed an application by a Muhammadan *pardahnashin* lady, under s. 592 of the Civil Procedure Code, for leave to appeal as a pauper from a decree passed in September 1882, and on the ground that it was barred by limitation. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the said order to stand over pending the decision of a connected case which had been remanded for re-trial under s. 562 of the Code. On the 24th April, 1885, the connected case having been decided, the application for review was heard and dismissed. On the 18th June, 1885, an order was passed *ex-parte* by Petheram, C. J., allowing the applicant, under s. 5 of the Limitation Act (XV of 1877) to file an appeal on full stamp-paper and she thereupon, having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal which was admitted provisionally by a single Judge.

ACT XV OF 1877, s. 5.—(continued.)

Held by Tyrrell, J. (Mahmood, J. dissenting) that the appellant had made out a sufficient case for the exercise of the Court's discretion under s. 5 of the Limitation Act, and that the Court should proceed to the trial of her appeal.

Held by Mahmood, J. that the *ex-parte* order of the 18th June, 1885, was one which the Civil Procedure Code nowhere allowed and was *ultra vires*, and that the Bench before which the appeal came for hearing was competent to determine whether the order admitting the appeal should stand or be set aside. *Dubayy Sahai v. Ganeshi Lal (I. L. R., 1 All., 34)* referred to.

Held by Mahmood, J. (Tyrrell, J. dissenting) that the circumstances were such as to require the Court to set aside the order admitting the appeal and to dismiss the appeal as barred by limitation inasmuch as it was presented more than two years beyond time, and neither the facts that the main reason why it was presented so late was that the appellant was a pauper *pardahnashin* lady nor the orders of the 16th August, 1884, and the 18th June, 1885, constituted "sufficient cause" for an extension of the limitation period within the meaning of s. 5 of the Limitation Act. *Mosha-ul-lah v. Ahmed-ul-lah (I. L. R., 13 Calc. 78)* and *Mangu Lal v. Kandhai Lal, (I. L. R. 3 All., 475)* referred to. *HASNI BEGAM v. THE COLLECTOR OF MUZAFFERNAGAR AND OTHERS.*

[VI-245]

(17). ————— *Parda lady.* *Held* that the poverty of the appellant and the fact of her being a *parda* lady was not "sufficient cause" within the meaning of s. 5 of the Limitation Act. *HUSANI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR AND OTHERS.*

[VII-185]

(18). ————— *Review of judgment.* *A*, obtained a decree against *B*, father of *C* and in execution thereof attached certain property. *C* objected to the attachment on the ground that *B* had transferred the property to him under a sale-deed dated 15th December, 1877. (The decree was dated 4th August, 1878.) The objection was allowed, and the property released by an order dated 13th April, 1880. *A*, then brought a suit against *B* and *C* with the object of setting aside the order. This suit was dismissed on the 29th April, 1881 on the ground that the decree of 4th August, 1878 had already been satisfied by sale of the judgment-debtor's property other than that in dispute. That sale however which had satisfied the decree was set aside by the High Court on the 16th March, 1882, and the proceedings in connection of the refund of the purchase-money by the decree-holder terminated on the 29th May, 1883. On the 28th August, 1883, *A*, whose suit was dismissed on the 29th April, 1881, applied for a review of judgment under s. 623 of the Code of Civil Procedure. Both the lower Courts held that the period of limitation should begin to run from 29th May, 1883

ACT XV OF 1877, s. 5.—(continued.)

when *A* had to refund the purchase money. *Held* that the period of limitation began to run under art. 173, Limitation Act from the 29th April, 1881 "the date of the decree or order", but that it was to be seen whether there was sufficient cause within the meaning of s. 5, Limitation Act for not making the application within the prescribed period. On this point it was further held that there was no sufficient cause, as even after the refund of the purchase-money, the applicant allowed a long period to elapse (more than 3 months) before he filed the application. *KUBER SINGH v. FATEH SINGH.*

[IV-330]

(19).—*Analogy of s. 14.* *Held* that the circumstances contemplated in s. 14 of Act XV of 1877 will ordinarily constitute a "sufficient cause" in the sense of s. 5 for not presenting an appeal within the period of limitation. *BALWANT SINGH AND ANOTHER v. GUMANI RAM.*

[III-142]

JAGLAL v. HAR NARAIN SINGH.

[VIII-218]

RAMJIWAN MAL AND ANOTHER v. CHAND MAL AND OTHERS.

[VIII-258]

(20).—*Neglect of office in furnishing copy of judgment.* An application for a copy of the judgment under appeal was made on the 28th March 29th March was fixed as the date when the estimate of the costs of such copy was to be delivered by the office and it was delivered on that date. The estimate was not complied with until the 5th March. No intimation was made by the office to the appellant as to when the copy would be ready for delivery. It was delivered on the 10th April. *Held* that under s. 12 of Act XV of 1877, the appellants were entitled to a deduction of the whole period between the 28th March, and the 10th April, and that, if this were not so, the appeal should be admitted under s. 5 of the Act. *BACHI AND ANOTHER v. SHEO GOBIND AND ANOTHER.*

[X-10]

(21).—*Computation under.* *Held* that s. 5 of Act XV of 1877 can not be applied in making the computation of time provided for by s. 12 and does not become applicable until after such computation has been made. *Raj Coommar Roy v. Sheikh Mahomed Waris* (7 *W. R.*, p. 337) dissented from. *BECHI v. AHSAN-UL-LAH KHAN AND OTHERS.*

[X-149]

(22).—*Copy of decree Affidavit.* A memorandum of appeal was presented to the Court unaccompanied by a copy of the decree appealed against. After the period of limitation for the appeal had expired, a copy of the decree was presented, with an affidavit explaining the

ACT XV OF 1877, s. 5.—(continued.)

delay, and was accepted by the Court. *Held* that the Court must be taken to have exercised the discretion vested in it by s. 5 of Act XV of 1877. *Held* also that such discretion might be exercised by a Court to which an appeal had been transferred by the Court to which it was originally presented. *WAHID NUR KHAN v. HAQDAD KHAN.*

[XVII-15]

(23).—*s. 5 A.—Evidence of being misled.* When a party to an appeal in the High Court seeks to obtain the relief afforded by s. 1 of Act No. VI of 1892, it is incumbent on that party to place before the Court evidence, by affidavit or otherwise, sufficient to satisfy the Court that he is entitled to the relief sought. The Court will not conclude merely from the existence of facts showing that the applicant for relief might have been misled by some order, practice or judgment of the Court that the applicant was in reality so misled. *NURANI BIBI v. MUAZZAMA BIBI AND OTHERS.*

[XIII-26]

(24).—*Where* an appellant whose memorandum of appeal had been declared by the taxing officer of the Court to be insufficiently stamped applied for relief under s. 3 of Act VI of 1892, and it was found that the report of the taxing officer was erroneous and that the correct stamp had as a matter of fact been put on the memorandum of appeal. *Held* that the appellant was entitled to the relief sought notwithstanding the provisions of s. 5 of Act No. VII of 1870. *BADRI PRASAD v. KUNDAN LAL.*

[XIII-45]

(1).—*s. 7.—Legal disability—Continuous running of time.* *A* obtained a decree and for the twenty one months that he lived after the date of the decree he did not apply for its execution. On his death he left a minor son who on attaining the age of majority applied for execution. *Held* that the application was not in time, s. 7 of the Limitation Act not being applicable. *LACHMAN PRASAD v. BHAGWAN SINGH AND OTHERS.*

[VI-49]

(2).—*In execution* of a decree against *B* (a minor) his property was put up to sale and sold on the 20th September, 1885. Objections under s. 311 were filed on behalf of the minor through his mother (as guardian) but on the 11th January, 1886, the application was rejected on the ground that she did not legally represent the minor. On the 12th January, 1886, objections were filed on behalf of the minor by one *B*. On the 2nd August, 1886, this application was also rejected on the ground that the sale having been confirmed on the 11th January, 1886, the Court was precluded from entertaining the application. *Held* that the applicant (minor) should get the benefit of s. 7 of the Limitation Act under the circumstance and that

ACT XV OF 1877 s. 7.—(continued.)

the precipitated action of the Court could not deprive him of it. *BALDEO SINGH v. KISHEN LAL AND ANOTHER.*

[VII-53]

(3). ———— *Assignee of minor.* In this case the High Court followed—*Rudro Kant Surma Sirkar v. Nobo Kishan Surma Biswas* (I. L. R. 9 Calc., 663) in which case it was held that “under s. 7 of the Limitation Act, a minor has in respect of a cause of action accruing during his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his right and interests to a third party, who is *sue juris*, the other cannot claim the exemption accorded to the minor by s. 7 of the Limitation Act, but is subject to the ordinary law of limitation, governing suits in which relief of the same nature is claimed”. *KEDAR NATH v. LACHMAN DAS AND OTHERS.*

[VIII-183]

(4). ———— *Execution of decree.* On the 9th June, 1875, the surviving holder of a decree originally given to two persons applied for execution. At that time the representative of the other decree-holder was a minor. On the 26th March, 1881, the minor's guardian applied for execution. Held that the period of limitation must be reckoned from 9th June, 1875, and that as the minor could apply within 3 years of the removal of his disability the application by his guardian was not barred by limitation. *HAR GOBIND AND ANOTHER v. SRIKISHEN.*

[III-63]

(5). ———— *Minor—Guardian.* Section 7 of Act XV of 1877 will not apply to an application made by a guardian of minors who are parties to an appeal to bring on to the record of the appeal the representatives of a deceased respondent. *LACHMI PRASAD AND OTHERS v. RAGHU PRASAD AND OTHERS.*

[XVII-42]

(6). ———— *Application of section to appeals.* Section 7 of Act No. XV of 1877 will not apply to extend the time limited for filing an appeal, the right to appeal having accrued when the would-be-appellant was a minor, that section applying only to suits and applications. IN THE MATTER OF THE PETITION OF BRIJ MOHAN LAL.

[XVI-128]

(1).—s. 8.—*Legal disability—Of one member of a joint Hindu family.* The manager of a joint Hindu family, of which S was a minor member, lent money on behalf of the family to K. The time limited by law for a suit for such money was three years from the date of the loan. During that period there were several members of the family who were *sui juris*. After attaining his age of majority, S sued K for such

ACT XV OF 1877, s. 8.—(continued.)

money, and as the period limited by law for such suit had expired, relied on the saving provisions of s. 8 of the Limitation Act, 1877. Held that, although during such period S was one of several joint creditors who was under a disability, yet as more than one member of the family could have given a discharge to K, without S's concurrence, the provisions of s. 8 of the Limitation Act were not applicable, and S's suit was therefore barred by limitation. *SURJU PRASAD v. KHWAHISH ALI.*

[II-114]

(2). ———— *Of a partner in a firm.* A and B obtained a decree for money due to a firm of which they were partners. The decree was payable by instalments and in case of default of any one instalment the whole amount was recoverable at once. B died in February 1875, leaving a minor son S. In April 1875 default having occurred, A applied for execution of the whole decree. In May 1875 it was struck off for want of prosecution. Another application was made by A in July 1875. On the 26th November, 1875, he applied to have the case struck off as he had been paid his share of the amount of the decree. The case was accordingly struck off. In March 1881, the present application for execution of his part of the decree was made on behalf of the minor S by his guardian. The lower Court and the High Court in appeal held that it was within time. The judgment-debtor applied for review of the judgment on the ground that the High Court had failed to notice a ground of appeal in which it was urged that under s. 8 of the Limitation Act time ran against S notwithstanding his minority as A could have given a discharge of the decree without the consent of the other. Held that the ground was valid and the order of the Court must be set aside. *HARGOBIND AND OTHERS v. SRI KISHEN.*

[IV-58]

(1).—s. 9.—*Continuous running of time.*

* See s. 7 No. (1).

(2). ———— *Applicability of s. 9 to s. 13.* Held that s. 13 of the Limitation Act, 1877, is not in any way affected or qualified by s. 9 of the same Act. In computing, therefore, the periods of limitation prescribed for a suit, the time during which the defendant has been absent from British India, should be excluded, notwithstanding that such period had begun to run before the defendant left British India. *BEAKE & CO. v. DAVIS.*

[II-127]

(1).—s. 10.—*Trust—Fraud.* Certain of the grantees of lands, granted for the maintenance of the grantees and the support of a mosque and other religious purposes, sued for the removal of the superintendent of the property from his office. The parties to this suit entered into a compromise, which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties

ACT XV OF 1877, s. 10.—(continued.)

to this suit then sued the grantees, who were to set aside the compromise and decree on the ground of fraud. *Held* that the suit fell within the terms of No. 95, sch. ii of the Limitation Act, 1877, and there was nothing about it which made the exemption of s. 10 of that Act applicable to it. **MUHAMMAD BAKHSH AND OTHERS v. MOHAMMAD ALI AND ANOTHER.**

[III-40]

(2).—*Specific purpose.* *M* and *S* purchased certain property jointly in 1865, and had equal interests in it till 1868, when *M*'s interest was reduced to one-third. *S* paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property and for registration of the deed and ultimately obtained possession in 1869 or 1870 and took the profits from that date. *M* did not pay any part of the money up to 1870, and it was not till 1871 that the whole of his share of it was subscribed and he paid little or nothing towards the expenses. Subsequently he sued *S* for possession of his share, to have an account taken of the profits and to recover his share of them with future mesne profits and costs. *Held* that, under the above circumstances, there was a resulting trust in favor of the plaintiff and the defendant became liable to account to him for his share but inasmuch as there was no express trust and the property did not become vested in trust for a specific purpose within the meaning of s. 10 of the Limitation Act and the suit was not brought for the purpose of following such trust property in the hands of a trustee within the meaning of the section, such suit was not one which under s. 10 might not be barred by any length of time. *Bulwant Rao Bisharut Chor v. Puran Mal Chobey* (J. L. R., 6 All., 1) referred to. **MUHAMMAD HABIBULLAH KHAN v. SAFDAR HUSAIN KHAN.**

[IV-219]

(3).—*Resulting.* Section 10 of Act No. XV of 1877 does not apply to a suit brought on failure of the object of a trust to recover for the plaintiff's own use and not for the purposes of the trust, the trust money remaining in the hands of the trustee. *Bulwant Rao v. Puran Mal* (L. R., 10 J. A., 90 S. C. I. L. R., 6 All., 1) followed. **JASODA BIBI v. PARMANAND.**

[XIV-78]

(4).—*Express.* *Held* that the provisions mentioned in s. 10 of the Limitation Act refer to express trusts and not to a trust that has to be made out by circumstances. **BARKAT AND OTHERS v. DAULAT AND OTHERS.**

[II-3]

(1) s. 12 *Applicability of s. 12 to s. 214 of Act VI of 1882.* *Held* also that, whether or not the serving of notice of appeal within three weeks provided for by s. 214 of Act No. VI of

ACT XV OF 1877, s. 12.—(continued.)

1882 implies that all the formalities prescribed for the presentation and admission of an appeal by the Code of Civil Procedure must first be gone through before notice of appeal can be served, a person appealing under the said section cannot avail himself of the provisions of s. 12 of Act No. XV of 1877. **R. WALL AND ANOTHER v. J. E. HOWARD, AND OTHERS.**

XVI-39

(2).—*Day on which judgment pronounced.* The judgment in this case was pronounced on the 26th January, 1885. On the 20th February, the defendant applied and got a copy of the judgment. On the 26th February he presented his appeal. The lower Court held that it was time-barred. *Held* that the appellant was entitled to deduct the day on which judgment was pronounced and one day in obtaining the copy and that the appeal was in time. **DAMRU v. MURDAN.**

[V-257]

(3).—*Time requisite for obtaining a copy.* A decree of a lower appellate Court was passed on the 26th March, 1888, and an appeal therefrom was presented to the High Court on the 6th July, or 12 days beyond the time allowed by art 156, sch. ii of Act XV of 1877. An application for a copy of the judgment under appeal was made by the appellant on the 28th March, and 29th March, was fixed by the office as the date when the estimate of the costs of such copy was to be delivered, and it was delivered on that day. The estimate was not complied with until the 5th April, when the appellants put in the necessary stamp paper according to the estimate. Upon the entry of the stamp paper no intimation was made by the office to the appellants as to when the copy would be ready for delivery. The copy was delivered on the 10th April. *Held* that under section 12 of the Limitation Act the appellants were entitled to a deduction of the whole period between the 28th March, and the 10th April. The words in section 12 "the time requisite for obtaining a copy of the decree appealed against" imply that the appellant is not to lose his right of appeal by reason of the neglect of the officials who issue copies or who are required to give notice when such copies are ready. **BACHI AND ANOTHER v. SHEO GOBIND AND ANOTHER.**

[X-10]

(4).—*Judgment* was pronounced by the lower appellate Court, dismissing the appeal of the plaintiff, on the 29th March, 1887. The decree was signed by the Judge on the 1st April, but, in accordance with section 579, C. P. C., it bore date the day on which the judgment was pronounced. On the 15th April, the plaintiff applied for a copy of the decree; on the 16th she received notice that the estimate of the costs of preparing the copy was

ACT XV OF 1877, s. 12.—(continued.)

prepared; on the 19th she paid into Court the amount required by the estimate. She had notice to attend on the 23rd for delivery to her of the copy, and on the 25th she attended and received the copy. On the 12th May she presented in the High Court to the proper officer, an application, under s. 592, C. P. C., for leave to appeal as a pauper. *Held* that the application was barred by limitation under art 170, sch. ii, of Act XV of 1877.

Per EDGE, C. J.—In computing the period of limitation prescribed for an appeal or for an application for leave to appeal as a pauper, where the decree appealed against is not signed until a date subsequent to the date of delivery of judgment, the intermediate period should under section 12 of the Limitation Act, be excluded if the delay in signing the decree has delayed the appellant or applicant in obtaining a copy of the decree, and not otherwise. *Bani Madhub Mitter v. Matungini Dass* (I. L. R., 13 Calc., 104) referred to. A delay caused by the carelessness or negligence of a party applying for a copy of decree, such as negligence in coming forward to pay the money required, can not be taken into consideration or allowed for in computing the time requisite for obtaining the copy. The time requisite, within the meaning of s. 12 of the Limitation Act, does not mean requisite by reason of carelessness or negligence of the applicant: it means the time occupied by the officer who has got to provide the copy, in making the copy. The important date, with reference to s. 12 and art. 170, is not the date when the copy of the decree is delivered, but the date when it is ready for delivery to the applicant if the applicant chooses to apply, where he has had notice that the copy will be ready on that date. *PARBATI v. BHOLA*.

[X-25]

(5) ————— In computing the time to be excluded under s. 12 of the Limitation Act from a period of limitation, the "time requisite for obtaining a copy" does not begin until an application for copies has been made. If therefore, after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless, an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. *Bani Madhub Mitter v. Matungini Dass*, (I. L. R., 13 Calc., 104) dissented from.

Per EDGE, C. J., Brodhurst and Young, JJ. A Court in computing under s. 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation, the time occupied by the office, after application made, in preparing the estimate, and, after payment of the amount of the estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who has applied for them.

ACT XV OF 1877, s. 12.—(continued.)

Per EDGE C. J.—The only section in the Indian Limitation Act, 1877, which enables a Court to admit an appeal or an application which is presented beyond the period of limitation prescribed by that Act is s. 5.

Per MAHMOOD, J.—Where there is delay in compliance with the estimate which is unavoidable and due to causes beyond the control of the applicant, such delay may be included in "the time requisite for obtaining a copy." Whether or not such delay is unavoidable is a question of fact in each case. *BECHI v. AHSAN-UL-LAH KHAN AND OTHERS*.

[X-149]

(6) —————] If the period prescribed by the second schedule of the Indian Limitation Act, 1877, for the presentation of an appeal expires on a day on which the Court is closed, and if the appellant has not obtained copies of the decree and judgment before the closing of the Court and applies for such copies on the date of the reopening of the Court whilst his right of appeal is still alive, he is entitled to the benefit of the time requisite for obtaining the copies, and if his appeal be presented before the expiry of that time it is not barred by limitation. A decree was passed against a defendant on the 17th September, 1894. The appellate Court was closed from the 6th of October to the 4th of November. On the 5th of November, the defendant-appellant applied for copies of the decree and judgment. The copies were delivered to her on the 6th of November, and on the same day she presented her appeal to the appellate Court. *Held* that the appeal was within time. *SIYADAT-UN-NISA v. MUHAMMAD MAHMUD*.

[XVII-78]

(7) ————— *Decree,—Judgment.*] In computing the period of limitation for filing an appeal, where the copies of the decree and the judgment are applied for on the same day, the longer of the two periods requisite for obtaining the copies should be credited to the applicant, and he is not entitled to add on to the longer of the two periods any time within the *termini* of the longer period. *BATASI v. HARI DAS*.

[XV-101]

s. 13. Applicability of s. 9 to section 13.]

See s. 9 (2).

(1) s. 14.—*Due diligence.*] An appeal was preferred from an order, dated 15th March, 1880, directing the distribution of assets of a certain judgment-debtor between his creditors (decree-holders) in certain proportions by one of the decree-holders A which was rejected by the Commissioner on the ground that the order of the Assistant Commissioner was not appealable. He then applied for revision to the Chief Commissioner which was also refused. On the 4th April, 1881, A then brought this suit to have such order set aside. *Held* (on reference by the Commis-

ACT XV OF 1877, s. 14.—(continued.)

sioner) that the period during which *A* had been prosecuting the proceedings mentioned above should be excluded from computation under s. 14 of Act XV of 1877 and the suit was therefore within time. **SETH MULCHAND v. SETH SAMIR MAL AND OTHERS.**

[II-59]

(2). ————] This suit for pre-emption, notwithstanding that the purchase money mentioned in the sale-deed was Rs. 2,000, was a day or two before the lapse of the prescribed period of one year, instituted in the Court of the Munsif, on the allegation that the property was actually sold for a sum not exceeding Rs. 1,000. The vendee defendant took objection to the valuation of the suit upon the ground that the property was of a higher value than the sum, Rs. 1,000, and that the Munsif therefore had no jurisdiction to hear the suit. The suit was however decreed by the Munsif, but upon appeal the lower appellate Court on the 5th August, 1885, held that the subject matter of the suit was of a higher value than Rs. 1,000 and directed that the plaintiff must take back the plaint in order to have it filed in the proper Court, and on the 6th August, 1885, accordingly an endorsement was entered on the back of the plaint setting out the circumstances under which it was to be returned to the plaintiff. No action was taken by the plaintiff till the 11th August, on which date the plaint was returned to the plaintiff and she filed it in the Court of the Subordinate Judge. *Held* that considering that the price was mentioned in the sale-deed as Rs. 2,000 the plaintiff in going to the Court of the Munsif did not act with due care and caution. But even granting that the error in the first instance was of a *bona-fide* character, there is on sufficient justification for the delay which occurred between the 5th August, 1885 and the 11th August, 1885. The suit is therefore barred by time and s. 14 of Act XV of 1877 cannot help the plaintiff. **BANNI JAN v. MUNAWAR KHAN AND ANOTHER.**

[VII-168]

(3). ————*Mistake of law.*] Section 14 of the Indian Limitation Act, 1877, applies to a case where a plaintiff has been prosecuting his suit in a wrong Court in consequence of a *bona-fide* mistake of law. *Sita Ram Paragi v. Nanba* (I. L. R., 12 Bom., 320); *Huro Chunder Roy v. Surnamoyi* (I. L. R., 13 Calc., 266); *Krishna v. Chalthappan* (I. L. R., 13 Mad., 269) and *Ramjiwan Mal v. Chand Mal* (I. L. R., 10 All., 587) referred to. **BRIJ MOHAN DAS v. MANNU BIBI AND ANOTHER.**

[XVII-86]

(4). ————*Defect of jurisdiction—Other cause.*] In October, 1881, an account was struck between *K* and *M*, and a sum of Rs. 1,457 was agreed between them to be the correct balance then due by the latter to the former. Of this amount, a sum of Rs. 885 was paid. In March, 1885, *K* sued *M*, for the balance of Rs. 600 then due

ACT XV OF 1877, s. 14.—(continued.)

on the account stated. The plaintiff claimed the benefit of s. 14 of the Limitation Act (XV of 1877) as suspending the running of limitation during the pendency of a former suit which he had prosecuted against the defendant in 1884 and 1885, and which had been dismissed on the merits. That was a suit for the redemption of certain *zamindari* property on which the defendant held a mortgage, and the plaintiff claimed in that suit that the amount of the balance due by the defendant on the account stated should be deducted from the mortgage-money under an oral agreement entered into by the parties in October, 1881. *Held* that the plaintiff could not be said to have formerly prosecuted his remedy in respect of the items now claimed in a Court which, for want of jurisdiction or other cause of a like nature, was unable to entertain it; that the provisions of s. 14 of the Limitation Act therefore were not applicable; and that the suit was barred by limitation.

Per Straight, Officiating C. J.—The former suit was not founded upon the same cause of action as the present, inasmuch as it was founded upon the alleged oral agreement and not upon the account stated.

Per Mahmood, J.—The Courts of British India in applying Acts of Limitation are not bound by the rule established by a balance of authority in England, that statutes of this description must be construed strictly. On the contrary, such Acts where there language is ambiguous or indistinct, should receive a liberal interpretation, and be treated as “statutes of repose” and not as of a penal character or as imposing burdens. *Roddam v. Morley* (1 De, G. and J., 26 L. J., ch. 438); *Syed Ali Saib v. Sri Raja Sanyasiraz Peddabaliyra Simhulu Bahadur* (3 Mad. H. C. Rep. 5.); *Empress v. Kola Lalang* (I. L. R. 8 Calc., 214); *Bell v. Morrison* (7 Peters (U. S. R. 360); *Shah Karamut Hussain v. Golub Koonvour* (3 W. R. 101) and *Mohummud Bahadoor Khan v. The Collector of Bareilly* (L. R. 1 I. A., 167) referred to. **MANGU LAL AND OTHERS v. KANDHAI LAL AND AN OTHER.**

[VI-233]

(5). ————] The words “other cause of a like nature” in s. 14 of the Limitation Act (XV of 1877) mean some cause analogous to defect of jurisdiction. Where a suit was dismissed on the ground that the debt sued for was due not to the plaintiff alone, but to the plaintiff and his partner, the latter not having been joined in the suit; and where the plaintiff subsequently brought a fresh suit for the same debt, making his co-partner a party. *Held* that the case was not within s. 14 of the Limitation Act, and that the time during which the plaintiff had been prosecuting the former suit could not be excluded in computing the period of limitation prescribed for the second suit. *Ram Subhog Das v. Gabind Prasad* (I. L. R., 2 All., 622) and *Chunder Madhub Chuckerbutty v. Bissessuree Debia* (6 W. R., 184) referred to. **Deo Prasad**

ACT XV OF 1877, s. 14.—(continued.)

Singh v. Partab Kaur (I. L. R., 10 Calc. 86) not followed. JEMA AND OTHERS v. AHMAD ALI KHAN.

[X-76]

(6.) —————.] *A* and one *X* both held decrees against *B*. Both were put in execution and the same property was sold in execution of both, *X* purchasing in the sale in execution of his own decree and *G* in execution of *A*'s decree. *B* objected to both the sales, but his objections were disallowed and both the sales were confirmed. The Court, however, refused to grant a certificate to *G* on the ground that it had already granted one to *X*. *B* appealed from both the orders confirming the sale and his appeals were dismissed. *G* then brought a suit against *A* and *B* to recover the purchase money he had paid under the second sale and obtained a decree, and *A* was there-upon obliged to refund the purchase money. *A* then applied for the execution of his decree against *B*. Held that *A* was not entitled under s. 14, Limitation Act., to deduct the period during which the applications for the confirmation of the sales and the appeals from those orders were pending and the application for execution was barred. GIRDHAR PRASAD v. GAYA PRASAD AND ANOTHER.

[I-3]

(7.) ————— Institution of suit.] For the purposes of s. 14 of Act No. XV of 1877, a suit can not be said to have been commenced by the filing of a plaint in a Court which had not jurisdiction to hear the suit. *Khellat Chunder Ghose v. Keshub Chunder Paul Chowdhry* (16 W. R., C. R., 47) dissented from. PARAG DAS AND OTHERS v. KALLU MAL.

[XIV-159]

(8.) ————— Application—suit.] Held that in computing the period of limitation prescribed for a certain application, the time during which they had prosecuted a suit (not an application) for the same relief could not be deducted under paragraph 3 of s. 14 of Act XV of 1877. JADUNATH SAHAI v. PARTAP RAM AND ANOTHER.

[II-184]

(9.) —————.] On the 30th May, 1882, *A* obtained a decree against *B*. Instead of executing the decree, *A* brought a fresh suit upon the same cause of action which naturally failed. *A* then, on the 26th April, 1886, applied to execute his decree of the 30th May, 1882. Held that the application was time-barred and the applicant could not pray in his aid, s. 14 or 19 of the limitation Act. MADHO RAI AND OTHERS v. RAG KALI KUAR.

[VII-198]

(10.) ————— Period between order returning plaint and the actual return.] Held that "time of proceeding *bona fide* in Court without juris-

ACT XV OF 1877, s. 14.—(continued.)

diction" in s. 14, Limitation Act, includes the period between the order for returning the plaint and the actual return thereof to the plaintiff. BESHESHAR SINGH AND OTHERS v. RAM DAUR SINGH

VII-302

(1.) s. 15.—Injunction.—Suit by a third party.] The fact that a third party has been prosecuting an application to get the deed on which the decree was based set aside will not save limitation running against a decree-holder who has neglected to apply for execution of his decree within the prescribed period. GOKUL SINGH v. TIKA RAM AND ANOTHER.

[XI-128]

(2.) ————— Order of attachment under s. 268, C. P. C.] An order of attachment under s. 268, C. P. C. is not an injunction or order staying a suit within the meaning of s. 15 of Act XV of 1877. SHIB SINGH v. SITA RAM

[X-194]

s. 18.—Fraud.] In this suit for pre-emption which was admittedly brought beyond time plaintiff pleaded the special provisions of s. 18, Act XV of 1877, contending that by the fraud of one *P* who, colluding with the vendee, sued the vendee to enforce his right and having occupied a 12 month with the mock litigation fraudulently withdrew from his suit. Held that the proper issues in the suit were (i) was the suit of *P* collusive and sham in its inception? (ii) or did it become so in course of progress? (iii) had the plaintiff reason to believe that *P*'s suit was other than serious and *bona fide*. MAJINA BIBI v. MUHAMMAD AZIM AND OTHERS.

[II-7]

(1) s. 19.—Acknowledgment—Of liability as surety.] In a suit upon a bond brought against the defendant as a principal debtor, an acknowledgment of liability as a surety only is sufficient to save limitation, with reference to s. 19, explanation I, of the Limitation Act (XV of 1877.) THE UNCOVENANTED SERVICE BANK LIMITED v. GRANT.

[VIII-13]

(2.) ————— Unstamped — Admissibility in evidence.] The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of art. 1, *sch* i, of Act I of 1879, is a question in each case of the intention of the writer. Hence, where such a letter, written *ante litem motam*, before limitation in respect of the debt had expired and at a time when other evidence of the debt was subsisting was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation under the provisions of s. 19 of Act No. XV of 1877. Held that the said letter was not inadmissible in evidence by reason of its not having been stamped. BISHAMBAR NATH v. NAND KISHORE AND OTHERS.

[XII-234]

ACT XV OF 1877, s. 19.—(continued.)

(3).—*Contained in unregistered conveyance—Admissibility in evidence.* The nature of the pecuniary transactions between *B* and *G* were such that some times a balance was due to the one and some times to the other. On the 1st October, 1875, there was a balance due to *B*. During the ensuing year, as computed in the account, *G* made payments to *B* exceeding such balance. On the 19th November, 1876, a balance of Rs. 3,500 was found to be due from *G* to *B*. On the 11th December, 1876, *G* executed a conveyance of certain land to *B*, for which such debt was partly the consideration. In such conveyance *G* acknowledged his liability in respect of such debt. He died before such conveyance was registered and it did not operate. On the 18th November, 1879, *B* sued *G*'s widow for such debt. Held that such conveyance was admissible as evidence of the acknowledgment by *G* of his liability for such debt, notwithstanding such conveyance was not registered; that, applying art. 85, sch. ii, of Act XV of 1877, such debt was not barred by limitation when such acknowledgment was made; and that, if that article was not applicable, but the period of limitation began to run from the time each item composing such debt became a debt, still such debt would not have been barred when such acknowledgment was made, as the debt with which the year computed from the 1st October, 1875, opened was extinguished by payments made by *G* in the course of that year. *KHUSHALO v. BIHARI LAL AND ANOTHER.*

[I-19]

(4).—*After lapse of time.* The striking of a balance in an account the items of which are all on one side does not amount to an "account stated closed" in the proper sense of the term. Hence the signature of the debtor to such balance amounts to no more than an acknowledgment of a debt; and if the debt is barred at the time of signature will not give rise to any fresh period of limitation in favor of the creditor. *Nahani Bhai v. Nathu Bhanu* (I. L. R., 7 Bom., 414) followed. *JAMUN AND ANOTHER, v. NAND LAL.*

[XII-215]

(5).—*By advocate or vakil.* An admission made by an advocate or duly authorized vakil on behalf of his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree capable of execution will amount to an acknowledgment within the meaning of s. 19 of Act No. XV of 1877 so as to give a fresh starting point to limitation for execution of such decree, provided that such admission was necessary for the purposes of the pleadings in the former case. *Sed quare* whether such admission will have a similar effect if it was not necessary for the purposes of the suit in which it was made. *Ram Hit Rai v. Satgar Rai* (I. L. R., 3 All., 247) followed. *HINGAN LAL v. MANSA RAM.*

[XVI-101]

ACT XV OF 1877, s. 19.—(continued.)

(6).—*Signed by the party.* The plaintiff in this suit claimed the balance found to be due to him from the defendants on accounts stated between them. The entry of the balance found to be due in the plaintiff's account-book was neither written nor signed by, nor on behalf of the defendants. Held that the entry was not an acknowledgment of a liability so as to save limitation under s. 19 of Act XV of 1877. *MAHPAL SINGH v. MOHESH SINGH AND ANOTHER.*

[I-87]

(7).—*Of mortgage—By one of two mortgagees.* Held that an acknowledgment of the mortgage made by one only of two mortgagees would not avail to save the mortgagor's right of redemption being barred by limitation, where the mortgage was a joint mortgage and not capable of being redeemed piece-meal. *Bhogi Lal v. Amrit Lal* (I. L. R., 17 Bom., 173) referred to. *DHARMAN AND OTHERS v. BALMAKUND AND OTHERS.*

[XVI-147]

(8).—*Signed by vakil (Act XIV of 1859) (Act IX 1877.)* This was a suit for redemption of certain property mortgaged in 1812 and clearly barred but for certain acknowledgments which the plaintiff pleaded had the effect of extending the period of limitation. The acknowledgments were contained in (i) a petition signed and filed by the pleader of the mortgagee dated 18th February, 1826, (ii) a deposition made by the mortgagee on the 27th July, 1869. In the deposition the mortgagee had stated that the mortgage no longer existed, having been converted into a sale by virtue of a stipulation; that if the mortgage-money was not paid within a year the mortgage shall become a sale. Held that, as the admission of the 18th February, 1826, was made by the agent of the mortgagee and as the deposition was not an acknowledgment of the title of the mortgagor, the mortgagor's right to redeem had become barred by s. 15 of Act XIV of 1859 which was repealed by Act IX of 1871, and no provisions of Act XV of 1877 could revive it. *KIDAR NATH AND ANOTHER v. ULFAT RAI AND OTHERS.*

[III-202]

(9).—*—* In 1807, *A* mortgaged his two properties *X* and *Y* to *B* by two separate deeds. This suit is for redemption of these both. In 1823 *A* had sued for redemption of *X*, seeking for a declaration of his right to redeem and of the mortgagee's duty to resign possession. He obtained a decree declaratory of his status as alleged, but no decree for possession was given and the mortgagee did not resign possession. In 1868 questions again arose in the settlement department as to the status of the parties, *A* alleging a subsisting mortgage against *B*, who denied it, and the matter was settled in favor of *A* by an award of arbitrators. Held that the redemp-

ACT XV OF 1877, s. 19.—(continued.)

tion suit was time-barred as neither the proceedings of 1868 (acknowledgment after the claim was time-barred) nor those of 1823 (as no acknowledgment was made in that suit) could save time. *MUNIR-UD-DIN v. MUHAMMAD KAIM.*

[V-194]

(10).———.] A village having been sold for arrears of revenue all the co-sharers obtained in 1821 a decree against the purchasers setting aside the sale and directing that they should obtain possession on payment of a certain sum to the purchaser. *K*, one of the co-sharers, paid this sum and obtained possession. After this the other co-sharers sued him for possession of their shares and obtained a decree in 1828 declaring that they should obtain possession on payment of their proportionate shares. In 1840 the village was settled and in the *wajib-ul-arsz* the decree of 1878 was recited and in it was stated by the representatives of *K* that he was in possession of the shares of certain co-sharers, which they could recover by the payment of their shares. This suit was brought in 1883 by *B*, one of the old co-sharers for the recovery of his share on payment of his share of the money. The defendant pleaded that the claim was time-barred. *Held* that the defendant was a mortgagee within the meaning of art. 148, Limitation Act, and the statement in the *wajib-ul-arsz* was an acknowledgment within the meaning of s. 19 of the Limitation Act. *Held* further that the period of limitation began to run from 1821 and not from 1828. Hence the claim was not time-barred. *RAM SINGH AND ANOTHER v. BALDEO SINGH AND OTHERS.*

[V-300]

(11).———.] This suit for the redemption of a conditional mortgage was resisted by the defendants on the plea of limitation. The mortgage-deed appeared to have been lost from the custody of the defendants. But in an action brought by the present plaintiffs in the year 1866 the written statement put in by the Collector of the district who then represented the defendants (the property in question being under the Court of Wards) and a letter from the *Mukhtar* of the *riyat* to another *Mukhtar* clearly showed that the mortgage must have been made somewhere about 1822 and as the term for which the mortgage was given appeared from those two documents to be ten years, the period of limitation would begin to run from 1832 or 1833 the suit was within time. *KAMLA KUAR AND ANOTHER v. HAR SAHAI AND OTHERS.*

[VIII-187]

(12).———.] *Held* that the documents relied upon did not amount to an acknowledgment within the meaning of s. 19 of the Limitation Act. *BISHESHAR PRASAD AND OTHERS v. BHAGI RATTU RAM.*

[V-211]

ACT XV OF 1877, s. 19.—(continued.)

(13).———.] The plaintiffs were mortgagors under a usufructuary mortgage admitted to have been made by their predecessor in title over 100 years before suit. The contract provided that the mortgagor should be entitled to redeem whensoever he found himself ready to pay off the whole debt. The plaintiffs brought their suit in 1877 for redemption, and relied to save limitation upon an acknowledgment of their title as mortgagors made by the defendants, mortgagees, in 1841. *Held* that the suit for redemption was not barred by limitation. *JAMNA PRASAD AND OTHERS v. GOKLA AND OTHERS.*

[XIV-87]

(14).———. *Signing an award.*] *Held* that an award on an arbitration for the division of the property of a deceased person amongst his heirs, by which award it was provided that certain specified persons amongst the heirs should become liable for the payment of a certain specified debt due by the deceased, did not give the creditor a fresh cause of action based on the award for the recovery of such debt, but at most a fresh starting point for limitation in respect of a suit to recover it—*Sukho Bibi v. Ram Sukh Das* (I. L. R., 5 All., 263) and *Raghobar Dial v. Madan Mohan Lal* (I. L. R., 16 All., 3) referred to and distinguished. *GOPAL LALJI AND ANOTHER v. RAMAN LALJI.*

[XVII-144]

(15).———. *Execution of decree.*] In the course of proceedings in execution of a decree, dated the 14th June, 1878, the parties on the 11th January, 1881, entered into an agreement, which was registered and filed in the Court executing the decree. The deed recited that the decree was under execution, that a mortgage bond in favor of the judgment-debtor had been attached and advertised for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree. Then the method was recited. On the same day that this deed was executed, the decree-holder filed a petition in the Court, praying that the sale might be postponed and the application for execution struck off for the present, and the previous attachment maintained; and stating that, after realization of the amount as agreed an application for execution would be made. On this the order was that the execution case be struck off the file, and the attachment maintained. On 24th December, 1883, the decree-holder applied for execution of the decree, and was met by the plea of limitation. *Held* that the application was within time in as much as the acknowledgment in the deed of the 11th January, 1881, came within the terms of s. 19 so as to originate a fresh period of limitation. *Ghansham v. Mukha* (I. L. R., 3 All., 320), *Janki Prasad v. Ghulam Ali* (I. L. R., 5 All., 201) *Ramhit Rai v. Satgur Rai* (I. L. R., 3 All., 247) followed. *FATEH MUHAMMAD v. GOPAL DAS.*

[V-76]

ACT XV OF 1877.—(continued.)

(1) s. 19 & 20.—*Acknowledgment—Application for execution of decree.* A decree for money, dated the 24th June, 1878, directed that a certain instalment should be paid on the 22nd July, 1878, and a like on the 20th December, 1878, and the balance by certain instalments commencing from a certain date; and that, in case of default, the decree-holder might realize the whole amount of the decree. The instalments were not paid at the fixed dates, but part-payment of the amount of the decree were made by the judgment-debtor from time to time out of Court. On the 7th May, 1879, he made a part-payment and an endorsement on the decree to the following effect:—"I, G, judgment-debtor of this decree, have myself paid Rs.—and have endorsed this payment on the decree in my own handwriting." On the 5th September, 1881, the decree-holder applied for execution of the whole decree. *Held* by the Court that the application was governed by the rule contained in s. 19 of the Limitation Act, 1877; that the endorsement made by the judgment-debtor on the decree was an acknowledgment of liabilities under the decree; and that consequently the period of limitation for the application should be computed from the time such endorsement was made, and the application was therefore within time. *Ramhit Rai v. Satgur Rai* (I. L. R., 3 All., 247) followed, but with doubt.

Per Mahmood, J., That, following the *ratio decidendi* in *Ramhit Rai v. Satgur Rai* (I. L. R., 3 All., 247) the part-payment made and endorsed on the decree by the judgment-debtor fell within the terms of s. 20 of the Limitation Act of 1877. *Asmutullah Dalal v. Kaly Churn Mitter* (I. L. R., 7 Calc., 56) distinguished. Also that it was doubtful whether in this case the decree-holder was bound to execute the whole decree when the first default occurred, as the terms of the decree appear to give the decree-holder an option in the matter, and therefore whether the application for execution was barred because it was made more than three years after that date. *Shib Dat v. Kalka Prasad* (I. L. R., 3 All., 443) distinguished. *JANKI PRASAD v. GHULAM ALI*.

[II-221]

(2). —————.] *Held* that a joint application by the decree-holder and the judgment-debtor in which they stated on the one hand that the decree-holder had received Rs. 2,900 in part-payment of the decretal amount and on the other that there was a certain balance due from the judgment-debtor under the decree and that arrangements had been made between the parties for the payment of such balance, was a valid acknowledgment for all purposes and sufficient under ss. 19 and 20 to save limitation in respect of the execution of the decree. *MUHAMMAD SAID KHAN v. PAYAG SAHU*.

[XIV-55]

ACT XV OF 1877.—(continued.)

(1). s. 20.—*Payment of interest as damages.* The part-payment after due date of principal and interest due under a bond will not give a fresh starting point for limitation in respect of a claim for damages for non-payment of principal and interest on the due date, the liability for damages having formed no part of the original liability under the bond. *GURDAYAL SINGH AND OTHERS v. CHATARBHUJ*.

[XII-239]

(2). ————— *Endorsement on a hundi.* Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a *hundi* to the creditor; *held* that such endorsement was not sufficient within the meaning of s. 20 of Act XV of 1877 to give a new starting point for limitation. *Mackenzie v. Tiruvengadathan* (I. L. R., 9 Mad., 271) followed. *RAM CHANDAR v. CHANDI PRASAD AND OTHERS*.

[XVII-49]

(3). ————— *Mortgage.* S. 20 of Act XV of 1877 does not have the effect of extending indefinitely the period within which a usufructuary mortgage must be redeemed. *KALLU v. HOLKI*.

[XVI-68]

(4). ————— *Payment of interest.* The respondents kept a floating account with the appellant, receiving interest on the money in deposit with the appellant at the rate of 10 annas *per cent.* such interest being credited to them yearly. On the 25th November, 1878, the account was stated, and a balance of Rs. 584-11-0 was found to the credit of the respondents. On the following day, the 26th November, the appellant paid the respondents Rs. 60 on account of interest. On the 12th April, 1880, the respondents brought the present suit against the appellant, claiming Rs. 564-11-0, and Rs. 55-5-0 interest on that sum. *Held* that, whether art s. 59 or 60, sch. ii of Act XV, of 1877 applied, the suit was within time. The account was a running one, and interest was credited yearly. And after the adjustment of the balance on the 25th November, 1878, interest to the amount of Rs. 60 was paid on the 26th November, 1878. *KABARI PURI v. RATAN CHAND AND ANOTHER*.

[I-48]

(1). s. 21.—*Acknowledgment by one of two mortgagees.*
See s. 19 No. (7).

(2). ————— *'Only.'* The meaning of the word "only" in s. 21 of the Limitation Act is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner unless also it can be shown that he had power to bind that partner for the purpose of making such an acknowledgment, and in effect purported so to bind him. *GADU BIBI AND OTHERS v. PARSOTAM*.

[VIII-93]

ACT XV OF 1877.—(continued.)

(1). s. 22.—*New defendant—Pre-emption.* By a sale-deed which was registered on the 12th April, 1879, *Z* jointly with *A* purchased a three pie share of certain undivided estate. Thereupon *P* brought this suit for pre-emption originally against *Z* alone, but subsequently on the 3rd May, 1880, *A* was also made a defendant to the suit. *Held* that the suit against *A* having been instituted more than one year after the date of the registration of the sale-deed was clearly barred by time and the contract of sale being joint and indivisible the whole suit must be dismissed. *ZAKA-UL-LAH AND ANOTHER v. ACHARBAR PANDEY.*

[I-153]

(2). ————— *Company.* In a suit brought against the Elgin Mills Company, the partners of the Company were, on a date subsequent to the institution of the suit, brought upon the record, on their own application. *Held* that s. 22 of Act XV of 1877, refers to cases when a new defendant is substituted or added, and that in this case there was no substitution or addition of new defendants, the defendants having been comprised in the designation of Elgin Mills Company and at most what was done was to correct a misdescription. *PRAGI LAL v. MAXWELL AND OTHERS.*

[V-40]

(3). ————— *Misdescription.* In a suit to recover a debt due to a company which had gone into liquidation the plaintiff was described in the plaint as—"The Official Liquidator, Himalaya Bank, Limited, in liquidation." The plaint was subscribed and verified in the same terms. On objection taken by the defendant, the plaint was allowed to be amended, but after the period of limitation prescribed for the suit had expired, so as to read, "The Himalaya Bank, Limited, in liquidation, plaintiff." *Held* that the amendment even if necessary did not introduce new plaintiff into the suit so as to let in operation the terms of s. 22 of Act XV of 1877. *Ghulam Muhammad v. The Himalaya Bank, Limited.* (1. L. R., 17 All., 292,) overruled. *In re Winterbottom* (L. R. 18 Q. B. D. 446) distinguished. *MUHAMMAD YUSUF v. THE HIMALAYA BANK LIMITED.*

. [XVI-28]

(4). —————.] *Held* that where the name of a respondent had been left out from the memorandum of appeal and the name of some other person was entered through some mistake and the Court on the application of the appellant, rectified the error after the period of limitation had expired, such rectification was not equivalent to adding or substituting a new party within the meaning of s. 22 of Act XV of 1877. *JAMNA v. IBRAHIM AND ANOTHER.*

[VIII-58]

ACT XV OF 1877.—(continued.)

(1) s. 23.—*Continuing breach—Successive breaches.* *Held* that s. 23 of Act XV of 1877 differs from the corresponding section 23 of Act IX of 1871 in the fact that the latter (s. 23 of Act IX of 1871) gave the benefit of the rule contained in the section to suits "for the breach of a contract where there are successive breaches," and also to suits "where the breach is a continuing breach," while the former confines that benefit to the latter class of cases only; and thus under the present Act a covenant by an obligor to pay to the obligee a sum of Rs 3-13 *per annum* as *malikana* due or in default to give over 45 *Big. 11 biswa* of land was not covered by the section and it was not a case of continuing breach. *PARSHADI LAL, AND OTHERS v. GULSHAN ALI AND OTHERS.*

[II-125]

(2). *See* s. 4 (11-18).

(2). —————.] *Held* that the non-payment of a debt on the date stipulated did not give rise to a continuing breach so as to extend the period of limitation. *MANSAB ALI v. GULAB CHAND AND ANOTHER.*

[VII-292]

(3). —————.] Where a mortgagor by conditional sale failed to fulfil a covenant that the conditional vendee should, during the term of the mortgage, have possession of the mortgaged property and take the profits in lieu of interest. *Held* that the covenant was broken once and for all immediately after the execution of the sale-deed and that there was not a "continuing breach" within section 23 nor "successive breaches" within arts. 115, 116 of sch. ii of Act XV of 1877, *Mansab Ali v. Gulab Chand* (W. N., 1887, p. 292) referred to. *BALGOBIND DAS v. BARKAT ALI AND ANOTHER.*

[VIII-15]

(4). —————.] *Held* that the withholding of a wife from her husband is a continuing breach within the meaning of s. 23 of Act XV of 1877. *BINDA v. KAUNSILIA AND ANOTHER.*

[XI-18]

(5). —————.] *A* agreed with *B* to refund to *N* the price of certain property sold by *A* to *N*, and of which a share belonged to *B*. *A* having died without fulfilling the agreement, *N* obtained against *B* a decree for possession of part of the property. Five years subsequent to *N*'s suit, *B*'s heirs sued *A*'s heirs for damages for breach of the agreement. *Held* that such breach of the agreement was a continuing breach, and had not even yet ceased, and that therefore the present suit was not barred by No. 115, sch. ii, of the Limitation Act. *IMDAD ALI AND OTHERS v. NIJABAT ALI.*

[IV-168]

ACT XV OF 1877.—(continued.)

s. 27.—*Land—Trees* (Act IX of 1871.) Trees growing upon land are "land," within the meaning of s. 29 of Act IX of 1871. **JUGRANI BIBI AND ANOTHER v. GANESHI.**

[I-9]

(1) s. 28.—*Held* that a person, holding a title to real property which he cannot reduce into possession, without bringing a suit, would stand barred from the remedy if he does not come in Court within the limitation period. **PIR BAKSH v. MAKHAN LAL AND OTHERS.**

[VII-92]

(2.)—Possession of land by a wrong doer for twelve years not only extinguishes the title of the rightful owner of such land, but confers a good title on the wrongdoer. **JUGRANI BIBI AND ANOTHER v. GANESHI.**

[I-9]

Art. 3.—Held by Edge C. J., Straight and Tyrrel J. J.—That s. 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who being, whatever his title, in possession of immovable property, is ousted therefrom. That section does not debar a person who has been ousted from the possession of immovable property, to which he has merely a possessory title, by a mere trespasser from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. *Davidson v. Gent* (L. J. 26 Exch. 122); *Asher v. Whitlock* (L. R. 1, Q. B., 1); *Wise v. Ameer-un-nissa Khatun* (L. R., 7 I. A., 73); *Pemraj Bhawani Ram v. Narayan Shiva Ram Khisti* (I. L. R., 6 Bom., 215); *Krishna Rao Yashvant v. Vasudev Apaji Ghotikar* (I. L. R., 8 Bom., 371) and *Muhammad Yusuf v. Sukhnath* (W. N. 1887, p. 55) referred to.

Per Mahmood, J.—A person who is suing upon a merely possessory title to recover possession of immovable property against a person who has ousted him must bring his suit, if at all, under s. 9 of Act I of 1877 and therefore within six months from the date of his dispossession. **WALI AHMAD KHAN AND OTHERS v. AJUDHIA KANDU.**

[XI-196]

(1). **Art. 10.—Physical possession—Share in undivided mahal.** *Held* that a share in an undivided *samindari mahal* is not susceptible of "physical possession" in the sense of Act No. XV of 1877, sch. ii, No. 10. Limitation, therefore, in a suit to enforce a right of pre-emption in respect of such a share runs from the date of the registration of the instrument of sale. **UNKAR DAS v. NARAIN AND ANOTHER.**

[I-116]

SHIBLAL v. BHAWANI DAS.

[I-146]

MAHADEO NARAIN SINGH AND OTHERS v. SHEONANDAN SINGH.

[XV-46]

ACT XV OF 1877, Art. 10.—(continued.)

(2).—In a suit to enforce a right of pre-emption in respect of a sale of property consisting in part of a share of an undivided *mahal*, which does not admit of physical possession, limitation will run from the date of registration of the instrument of sale. **BHOLI AND ANOTHER v. IMAM ALI AND OTHERS.**

[I-176]

(3).—This was a suit for pre-emption and the only question before the High Court was whether the suit was within time or not which depended upon the question whether limitation should run from the date of the registration of the deed of sale or from the date of physical possession. A part of the *thoke* in which the property was situate was admitted to have been common. *Held* that it is perfectly conceivable that land held in common should be susceptible of physical possession by each of the co-sharers jointly with the others, just as two or more persons living in a house may both be in physical possession of the house. That the two rulings, noted below, apply strictly to cases of undivided *samindari mahals*, where no co-sharer is entitled to take possession of the land and his right is limited to claiming a definite portion of the profits at the end of the year. The case was remanded for the consideration of the point whether the share sold was susceptible of physical possession. *Unkar Das v. Narain* (I. L. R., 4 All., 24) and *Bholi v. Imam Ali* (I. L. R., 4 All., 179) referred to. **BAKAR HUSAIN AND OTHERS v. BHAGGU RAI AND OTHERS.**

[IV-317]

(4).—*Share in undivided house.* A purchased $\frac{1}{3}$ of a house occupied by certain tenants, in common, on the 6th March, 1878, which he resold to G. The sale-deed was registered on the 21st July, 1879. G sued for partition and obtained possession on the 18th September, 1885. M (the plaintiff) brought this suit of pre-emption on the 9th October, 1885, (within a year from the date of possession). *Held* that the suit was within time as G has purchased a potential right, i. e., a right to possession of a specific portion of a building which was reducible to physical possession. The *terminus a quo* in this case was Ganpat's physical possession and not the date of registration. **GANPAT RAI v. MASITA KHAN.**

[VII-235]

(5).—*Vendor not in possession.* On the 28th March, 1885, two ladies, daughters of one G R, executed a sale-deed whereby they conveyed a specific area of land decreed to them as the heirs of G R as against certain persons who claimed to have a superior right of inheritance, to C P and J K. It was not till the 22nd April, 1885, that the ladies obtained possession under that decree and it is admitted that it was thereafter that the vendees

ACT XV OF 1877, Art 10.—(continued.)

C P and *J K* obtained possession of the property which they had purchased. The present suit for pre-emption was instituted on the 22nd April, 1886, that is to say within time from the date when the vendor obtained physical possession of the property but beyond time if the period from which the limitation should be calculated is to be the date of the execution of the sale-deed which was also the date of its registration. It was contended on behalf of the vendee that because at the date of the sale the vendors were not themselves in physical possession of the land and as they could not obtain such possession without executing the decree, therefore this was a case "where the subject of the sale did not admit of physical possession" within the meaning of art. 10 of sch. ii of Act XV of 1877, and that therefore the starting point of limitation should be the date of the registration of the sale-deed. *Held* that the contention was unsound. In interpreting the art. in question we must refer to the nature of the property sold and not to the capacity of the vendor to deliver possession. The specific land was clearly capable of physical possession. Time would run from the date when the vendor obtained physical possession and the suit was therefore within time. **CHANDAN SINGH v. CHANDI PRASAD.**

[VIII-227]

(6). ————— "*Whole property.*" In art. 10 of sch. ii of the Indian Limitation Act the words "physical possession of the object of sale" mean physical possession of the whole of the property sold. If the property sold, not having been susceptible of physical possession at the time of sale, subsequently becomes so, the point of time from which limitation begins to run is not thereby changed. **DAL CHAND AND ANOTHER v. NAUBAT SINGH AND ANOTHER.**

[XII-77]

(7). ————— "*Usufructuary mortgagee buying equity of redemption.*" *Held* that the conditions of a *wajib-ul-arz* which has not been replaced by another are still effectual and binding on all the persons who were originally co-sharers in the villages though their shares may have been subsequently separated by a perfect partition. *Held* that a mortgagee in possession who buys the equity of redemption does not purchase property capable of physical possession within the meaning and intention of art. 10 of the Limitation Act, so that limitation runs against him from the date of the registration and not from the date of the sale. **SHIAM SUNDAR v. AMANAT BEGAM.**

[VII-24]

(8). ————— "*Pre-mortgage.*" The limitation for a suit to enforce a right of pre-emption in respect of a mortgage by conditional sale is that provided by art. 120 and not that provided by art. 10. **RASIK LAL v. GAJRAJ SINGH.**

[II-83]

ACT XV OF 1877, Art 10.—(continued.)

NATH PRASAD v. RAMPALTAN AND OTHERS.

[II-28]

ASHIK ALI v. MATHURA KANDU.

[II-212]

UDIT SINGH v. PADARATH SINGH AND ANOTHER.

[V-330]

ALI ABBAS AND ANOTHER v. KALKA PRASAD.

[XII-108]

PARAG RAM AND OTHERS v. JAWAHIR LAL AND OTHERS.

[XIV-49]

Per Contra.

HAZARI RAM v. SHANKAR DIAL.

[I-66]

PRYAG CHAUBEY v. BHAJAN AND OTHERS.

[II-37]

(9). ————— "*Rival pre-emptor.*" *Held* that a suit to have it determined who of the two rival pre-emptors had a preferential right to purchase was governed by art. 120 and not art. 10. **DURGA v. HAIDAR ALI.**

[IV-315]

(10). ————— "*Mutation of names.*" By a registered agreement, dated 5th February, 1877, *A* agreed to provide *X* with the expenses of a suit for certain shares, to be brought by *X* against certain persons in consideration of his giving to *A* half the share sued for (if the claim be decreed). The suit was accordingly brought and *X* obtained a decree and in pursuance of the agreement caused mutation of names to be effected in favor of *A. B* thereupon brought the suit to pre-empt the property thus conveyed to *A. Held* that art. 120 and not art. 10 was applicable to the case. **MUTHRA PRASAD AND ANOTHER v. BHUREY SINGH.**

[III-6]

(1). **Art. 11.—Objection under s. 246, Act X of 1877 disallowed in 1876.]**

See s. 2, No. (3).

(2). ————— "*Judgment-debtor not made party.*" *See s. 2, No. (4).*

(3). ————— "*Order under s. 335, C. P. C.*" *Held* that an order under s. 335, C. P. C. was governed by art. 11 of the Limitation Act. **MISRI LAL AND OTHERS v. NAWAB BEGAM AND OTHERS.**

[VI-68]

(1). **Art. 12.—Decree-holder purchases subject to appeal.]** A decree-holder who purchases at an auction-sale under his decree purchases subject to the result of an appeal. **Zain-ul-abidin v. Muhammad Asghar Ali Khan (I. L. R., 10 All., 166) and Sadastvayyar v. Muttu Sabapathi**

ACT XV OF 1877 Art. 12.—(continued.)

Chetti (I. L. R., 5 Mad., 106) referred to. SAID-UN-NISSA v. MANGU LAL AND OTHERS,

[XVII-28]

(2.) **Art. 12 (a).—***Suit to set aside auction-sale.* *P* obtained a decree against *M* in April, 1874, in execution of which property belonging to the latter was sold in 1874, 1875 and 1876. In March 1880, this decree was reversed by the Court of last appeal. In February 1881, *M* sued to set aside the sales of his property in execution of the decree and for possession of the property. *Held* that, both under No. 14, sch. ii, of the Limitation Act, 1871, and No. 12, sch. ii, of the Limitation Act, 1877, the suit was barred by limitation. PARSHADI LAL AND OTHERS v. MUHAMMAD ZAINULABDIN.

[III-155]

(3.) ————— and *for possession by a stranger to the decree.* The plaintiff, alleging the certain immoveable property belonging to him had been sold in execution of a decree, as the property of another, sued the purchaser to have the sale set aside, and to recover possession of the property. *Held* that the suit was one for possession of immoveable property to which the period of limitation of twelve years was applicable. NATHU v. BADRI DAS AND OTHERS,

[III-165]

(4.) —————. *A* assigned certain trees to *B* for good consideration. A few days prior to the assignment an order for the attachment of the trees had been obtained in a suit to which *B* was not a party. No actual seizure in attachment took place, and it did not appear that *B* knew any thing about the order. The trees having been sold, and a certificate of sale having been given, *B*, more than a year after the confirmation of the sale, brought a suit for possession of the trees. His claim was dismissed in the Court of first instance, but decreed in appeal. The defendant then appealed to the High Court. *Held* that the suit was not a suit to set aside a sale, but a suit by a stranger to claim property of his own which had been wrongfully sold as that of another; and consequently was not barred under art. 12 of Act XV of 1877. NISAR ALI AND OTHERS v. MADHO DAS AND OTHERS.

[X-224]

(5.) —————. This was a suit by the sons of a joint Hindu family for possession of their share of the ancestral property, against an auction purchaser who had purchased it in a sale held in execution of a decree against the father of the plaintiffs. The plaintiffs were not parties to the suit in which the decree was obtained. The decree was not against them and at the execution sale the share of the father alone was put up for sale. The present suit was instituted more than one year after the auction-sale. The defendant pleaded limitation, *Held* that the plea of limitation had

ACT XV OF 1877, Art 12(a).—(continued.)

no force as the suit did not aim at setting aside the auction sale. *Chandra Sen v. Ganga Ram (I. L. R., 2 All., 899)* followed. MIR KHAN v. KADAM SINGH AND OTHERS.

[I-109]

(6.) —————. *By zemindar—Occupancy holding.* An occupancy tenant having hypothecated his holding, the mortgagee sued to enforce the mortgage, and obtained a decree, in execution whereof the holding was sold. Subsequently the landholder brought a suit in which he prayed for a declaration that the mortgage-decree, and sale were invalid, and for the ejectment of the purchaser. *Held* that the land-holder was entitled to a decree for possession; and that the suit being one for the recovery of an interest in immoveable property, and it being immaterial to the plaintiff whether the sale of the occupancy holding stood or fell, art. 12 of sch. ii of the Limitation Act (XV of 1877) was not applicable. MULCHAND AND ANOTHER v. BHUPINDRA NARAIN SINGH.

[X-69]

(7.) —————. *House owned by tenant.* In execution of a simple money decree against an occupancy tenant a house owned by him was put up for sale and purchased by *T R*, one of the defendants. The plaintiffs, *zemindars* of the village brought this suit more than 8 years after the date of the sale for possession of the house on the ground that the sale was against the provisions of s. 266 (c), Civil Procedure Code, and the tenant having abandoned the village, the house reverted to the *zemindars*. *Held* that art. 12 did not apply and the suit was not barred. *Suryama v. Durgi (I. L. R., 7 Mad., 258)* distinguished. TOTA RAM AND OTHERS v. CHAIN SUKH AND OTHERS.

[VIII-154]

(8.) **Art 12 (b).**—Article 12, clause (b) of the second schedule to the Indian Limitation Act, 1877, does not apply to a suit to recover property sold ostensibly in execution of a decree, but the sale of which was in fact not authorized by the decree under which the said property purported to have been sold. *Ram Lall Moitra v. Bama Sundari Dabia (I. L. R., 12 Calc., 307)*; *Balwant Rao v. Muhammad Husain (I. L. R., 15 All., 324)*; *Lala Mobaruk Lal v. The Secretary of State for India in Council (I. L. R., 11 Calc., 200)*; *Dakhina Churn Chattopadhyaya v. Bilash Chunder Roy (I. L. R., 18 Calc., 526)*; *Mahomed Hossein v. Purundur Mahto (I. L. R., 11 Calc., 287)* and *Sriman Sadagopa v. Maha Desika Swamiar (I. L. R., 5 Mad., 54)* referred to. *Suryama v. Durgi (I. L. R., 7 Mad., 258)* dissented from. NAZAR ALI v. KEDAR NATH AND ANOTHER.

[XVII-71]

(1.) **Art. 13**—A suit by purchasers at an auction sale which has subsequently been set

ACT XV OF 1877, Art 13.—(continued.)

aside to recover possession of the property so purchased by them is not a suit to which art. 13 of sch. ii of the Indian Limitation Act 1877, applies. *Ayyasami v. Jamiya* (I. L. R., 8 Mad., 82) referred to. DEBI CHARAN AND OTHERS v. BARI BAHU AND OTHERS.

[XIV-78]

(1).—Art. 14.—*Suit for possession of trees and to set aside order of Settlement Officer.*] This was a suit instituted on the 12th March, 1880, by some co-sharers of a village against the other co-sharers and certain tenants for the possession of certain trees. The plaintiffs alleged that the trees belonged to all the co-sharers, that the defendants got these trees fraudulently recorded in their name, made a fraudulent objection before the Settlement Officer, obtained the appointment of nominal arbitrators who made an award in their favor. That when the plaintiffs became aware of these proceedings they preferred an objection in the Settlement Department which was disallowed on the 23rd May, 1877. Held that the trees having been in plaintiff's possession till May, 1877, the suit was not barred by time. The article applicable being No. 120 and not No. 14 or 45 of Act XV of 1877. *Komul Kishan Surkhul v. Bissonanth Chuckerbutty* (Sevester's Rep., 331 note) followed. SHEODAS AND ANOTHER v. BANGHU AND OTHERS.

[I-91]

(2).—*Suit to set aside order of Settlement Officer.*] At the framing of a record-of-rights a dispute arose between the appellant and the respondent as to whose name should be recorded in respect of certain land which both parties claimed to be in their proprietary possession. On the 8th June, 1876, the Settlement Officer recorded that the respondent's name should be recorded in respect of such land. Held that there was no limitation in Act XV of 1877 to contest orders such as that of the 8th of June, 1876, made under Act XIX of 1873. *IBRAHIM ALI v. HADI ALI.*

[I-15]

(3).—*On the 3rd June, 1884, a Collector, in partition proceedings under Act XIX of 1873, included a temple within the defendant's mahal, but ordered the plaintiff to contribute a certain sum yearly towards its expenses. On the 2nd June, 1887, the plaintiff instituted a suit for a declaration that this order was ultra vires. Held that although the order was ultra vires, still as the plaintiff had chosen to bring a suit to have it set aside, art. 14 of sch ii of Act XV of 1877 must be applied to it, and the suit was barred by limitation. BIJAI MISR AND OTHERS v. GOBIND GIR AND OTHERS.*

[X-195]

(4).—*Held that art. 14 of the second schedule of the Limitation Act did not apply to a suit in which the*

ACT XV OF 1877, Art 14.—(continued.)

plaintiff prayed for a declaration of his title to a certain cultivatory holding and of his right to redeem an alleged mortgage thereof, and for the cancelment of an order passed by the Settlement Officer in the defendant's favour, the latter prayer being surplusage. ANUP PANDE AND OTHERS v. SADHO PANDE.

[VIII-119]

(1). Art. 32.—*For removal of trees planted on waste-land.*] This was a suit by the zemindars of a village for removal of trees planted by the defendants in certain waste land of the village to which the defendants had no claim or title. Held that the suit was governed by art. 120 and not art. 32. *Ganga Dhar v. Zahurriya* (W. N. 1886, 210) distinguished. MUSHARAF ALI AND ANOTHER v. IFFKHAR HUSAIN AND ANOTHER.

[VIII-257]

(2).—*Planted on occupancy holding.*] Held that art. 32 of sch. ii of Act XV of 1877, applied to suits by a land-holder for the removal of trees planted by the defendants upon land held by them as the plaintiff's occupancy tenants. *Rajbahadur v. Birmha Singh* (I. L. R., 3 All., 85); *Amrit Lal v. Balbir* (I. L. R., 6 All., 68); and *Kedarnath Nag, v. Kheturpaul Sritirutho* (I. L. R., 6 Calc., 34) referred to. GANGADHAR AND ANOTHER v. ZAHURRIYA AND ANOTHER.

[VI-210]

(3).—*"Having a right to use the property."*] In art. 32 of sch. ii of the Indian Limitation Act the words "having a right to use the property" refer not to the time when the suit is brought but to the time when the property was perverted to other purposes. Where a zamindar, having regained possession of certain land by ejectment through a Court of Revenue of his tenant, sued the ejected tenant for removal of a shed erected during his tenancy on the land, more than two years having elapsed since its erection, it was held that art. 32 abovementioned applied and that the suit was barred. KRISHNA MURARI RAM v. GHIRAWAN SINGH AND OTHERS.

[XIV-165]

Art. 34 and 35.—*Suit for restitution of conjugal rights between Hindus.*] Held that the provisions of arts. 34 and 35, of sch. ii of Act XV of 1877, cannot be taken as applicable to suits between Hindus for the restitution of conjugal rights or for the recovery of a wife who has deserted her husband. The limitation applicable to such suits was that provided by art. 120 read with s. 23 of the Limitation Act. BINDA v. KAUNSILIA AND ANOTHER.

[XI-18.

Art. 36.—The special proceeding provided for by s. 214, Act VI of 1882, is not subject to the limitation prescribed by art. 36 of Act XV of 1877. D. CONNEL v. THE HIMALAYA BANK, LIMITED, IN LIQUIDATION.

[XV-136]

ACT XV OF 1877.—(continued.)

Art. 44.—This was a suit to recover possession of certain immoveable property belonging to the plaintiff by cancelment of a sale-deed executed by the plaintiff's uncles on their own behalf and as guardians of the minor. The only question in this second appeal is as to whether art. 44 or arts. 142 and 144 of sch. ii of Act XV of 1877 was applicable to the case. *Held* that the question would depend upon whether the uncles were lawful guardians of the plaintiff when they executed the sale-deed or not. If they were art. 44, but if they were not lawful guardians, arts. 142 and 144 would apply. As the Court below had not determined that question the suit must be remanded under s. 562, Civil Procedure Code, for adjudication. **GAJESHRI PRASAD v. DHARAM DAT AND OTHERS.**

[VIII-152]

(1). **Art. 45.—Award.** *D* died in 1860 leaving him surviving his first wife *G*, his second wife *B*, his mother *R*, and *M* his son by a woman to whom he had been married by the "*Gandharb*" form of marriage. On *D*'s death *G*'s name was registered in the record-of-rights in respect of his proprietary rights in a certain village. In 1871, *G* died and on her death *B*, *R* and *M* preferred separate claims to have their names registered in respect of such rights. The Assistant Settlement Officer before whom these claims came for decision, professing himself unable to decide which of the claimants was in possession, and observing that it was not shown that possession was joint, referred the case to the Settlement Officer. The settlement officer, without making any inquiry, disposed of the case on the evidence taken by the Assistant Settlement Officer, and held that the claimants were in joint possession of such rights, and it was proper that the name of each should be registered in respect of a one-third share of such rights. He at the same time intimated to the parties that, unless they settled their claims in the Civil Court or by arbitration, before the *khewat* was framed, it would be framed as he had directed. In 1873 *R* died and on her death *M* procured the registration of his name in respect of her one-third share. In 1879 *B* sued *M* for possession of the one-third share which he had obtained under the proceeding of the Settlement Officer, and of *R*'s one-third share, claiming as heir to her deceased husband *D* and alleging that *M* was not the legitimate son of *D* and was therefore not entitled to succeed to such rights. *M* set up as a defence that, as the proceeding of the Settlement Officer was an award under Regulation VII of 1822, and the suit was one to contest such award, and it had not been brought within three years from the date of such award, the suit was barred by limitation; that he was the legitimate son of *D* and therefore entitled to succeed; and that, assuming he was not legitimate, he was entitled to succeed by the custom of the village. In support of such custom *M* relied on the following entry in the village *Wajib-ul-arz*:—"In this

ACT XV OF 1877, Art. 45.—(continued.)

village a mistress treated as a wife and the child of such a mistress shall also have a right to transfer property and to obtain and receive property." *Held* that the suit was not barred by limitation under No. 44, sch. ii of Act IX of 1871, or No. 45, sch. ii, of Act XV of 1877, as the proceeding of the Settlement Officer was not an award under Regulation VII of 1822. **BHAUNI v. MAHARAJ SINGH.**

[I-48]

(2).—*Held* that the limitation of No. 45 is not applicable to an order passed under Act XIX of 73. **ZAINUL-ABDIN AND ANOTHER v. DURGA DAI.**

[II-131]

(3).—*Suit for possession of trees and to contest an award.*

See art. 14, No. (1.)

Art. 47.—Article 47 of the second schedule to Act No. XV of 1877 does not apply to a suit brought by one of the two claimants against the other to recover possession of property which has been attached by a Magistrate under the provisions of s. 146 of the Code of Criminal Procedure. *Chuj Mull v. Khyratee*, (N.-W. P., H. C. Rep., 1868, p. 65) and *Akilandammal v. Periasami Pillai* (I. L. R., 1 Mad., 309) referred to. To such a suit as above Government is not a necessary party. **GOSWAMI RANCHOR LALJI v. SRI GIRDHARIJI.**

[XVII-214]

Art. 48.—*R* sued *M* for a certain sum of money on the ground that he had given such sum to *M* to deliver to his (*R*'s) family; that *M* had not delivered the money and that when this fact became known to *R* and he demanded the money, *M* denied having received the same. *Held* that the limitation law applicable to the suit was that provided by No. 48, sch. ii, of the Limitation Act, 1877, and the time from which the period of limitation began to run was when *B* first learnt that *M* had retained the money in his possession instead of paying it as directed. **RAMESHAR v. MATA BHIK.**

[III-48]

Art. 52 & 53.—A suit was brought by *P* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November, 1879. The suit was brought on the 10th October, 1882; in January, 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. The defendants claimed a set off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October, 1879, and subse-

ACT XV OF 1877, Arts 52 & 53.—(continued)

quently. *Held* that art. 53, and not art. 52, sch. ii of the Limitation Act was applicable to the plaintiff's claim, the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied, but rather when the contract was completed by the whole wood being supplied, or when the contract came to an end. **PRAGI LAL v. MAXWELL AND OTHERS.**

[V-40]

(1).—**Art. 57.—For money personally and by sale of moveable property hypothecated.** Where a plaintiff who had lent money on the security of moveable property sued to recover the money both by sale of the property pledged and also asked for a decree personally against the defendant, should the amount realised by the sale prove insufficient, it was *held* that, so far as the plaintiff prayed for a decree against the defendant personally, art. 57 of the second schedule of Act No. XV of 1877, was applicable; but, so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell within art. 120. **Nim Chand Baboo v. Jagabundhu Ghose (I. L. R., 22 Cal., 21)** followed. **MADAN MOHAN LAL AND ANOTHER v. KANHAI LAL.**

[XV-46]

(2).—**Account stated—One sided account.** Where the plaintiffs, being bankers, were in the habit of lending sums of money at intervals to the defendants who were cloth-merchants and from time to time a balance was struck which was always in favor of the plaintiffs. *Held* that the transactions abovementioned came within the meaning of art. 57 of sch. ii of Act XV of 1877, and could not be brought under art. 85 of the same schedule. **BALLAB SHANKAR AND OTHERS v. RAM KUAR AND OTHERS.**

[XIII-34]

JAMUN AND ANOTHER v. NAND LAL.

[XII-215]

BHAWAN SINGH v. TIKA RAM.

[XVI-186]

(3).—[] The plaintiff in this suit claimed Rs. 43-3 principal and interest on accounts stated. It appeared that the plaintiff had advanced money to the defendant and that on the 8th February, 1879, an account had been taken and a balance found due to the plaintiff. Thereupon an entry to the following effect was made in the plaintiff's account book and signed by the defendants.—“Account of Imam Bakhsh, *Sambat* 1935, *Magh Sudi Puranmashi*, made up and the balance struck in their presence of Rs. 25-11.” Defendants set up plea of limitation. *Held* that art. 64 of the Limitation Act was applicable to the suit. **SITAL PRASAD v. IMAM BAKHSH AND ANOTHER.**

[III-47]

ACT XV OF 1877, Art 57.—(continued.)

(4).—[] This was a suit for money due on an account stated which was instituted on the 16th July, 1880. The account was stated on the 27th July, 1877. It was not signed by the defendants or by their agent duly authorized in their behalf. The Court observed that the law applicable to the suit was Act XV of 1877; and, as the account on which the claim was based was not signed by the defendants or any agent duly authorized on their account, art. 64, sch. ii, of that Act would not apply. **BALDEO v. CHANDAN SINGH AND ANOTHER.**

[I-29]

(1). **Art. 61.—For an account.** Under an award two persons were made liable each for the payment of a moiety of the expenses of certain temples which were held jointly. One of the persons so made liable, alleging that he had paid more than his share of the expenses, sued the other for the balance in excess of the moiety which he was bound to pay under the award. *Held* that the suit was governed by art. 61 of Act XV of 1877, and that, although the taking of accounts might be necessary, the suit was not a suit for an account to which art. 120 of Act XV of 1877 might apply. **Rohan v. Jwala Prasad (I. L. R. 16 All., 333)** referred to. **SRI RAMAN LALJI MAHARAJ v. GOPAL LALJI MAHARAJ.**

[XVII-43]

(2).—**For contribution.** One A S obtained a decree against M K and S H. In satisfaction of this decree M K paid certain sums, the last payment so made being on the 4th November, 1886. On the 4th November, 1889, M K sued S H in the Small Cause Court for contribution. The suit was resisted on the ground that it was barred by limitation. *Held* that, whether No. 61 or No. 81 of sch. ii of the Limitation Act applied, the period of limitation began to run from the time when the plaintiff made a payment in excess of his share. **SAYED HASAN v. MIR KHAN**

[XI-102]

(1). **Art. 62.—Resulting trust—Account.** M and S purchased certain property jointly in 1865 and had equal interests in it till 1868, when M's interest was reduced to one-third. S paid the entire purchase-money in the first instance, and incurred expenses in conducting suits for possession of the property and for registration of the deed and ultimately obtained possession in 1869 or 1870 and took the profits from that date. M did not pay any part of the money up to 1870 and it was not till 1871, that the whole of his share of it was subscribed and he paid little or nothing towards the expenses, subsequently he sued S for possession of his share, to have an account taken of the profits and to recover his share of them with future mesne profits and costs. *Held* that under the above circumstances there was a resulting trust in favor of the

ACT XV OF 1877, Art 62.—(continued.)

plaintiff, and the defendant became liable to account to him for his share. *Held* further that art. 120 and not art. 62 or 89, sch. II of Act XV of 1877, was applicable to the case. *Guru Doss Pyne v. Ram Narain Shao* (L. R., 11 Mad., Ap. 59;) (I. L. R., Calc., 860) referred to. **MUHAMMAD HABIB-UL-LAH KHAN v. SAJDAR HUSAIN KHAN.**

[IV-219]

(2). —————. *Held* that a suit by the assignee of a pre-emptor for the recovery of money deposited by the pre-emptor in Court and withdrawn by the vendee was not governed by art. 62. **KOJI RAM v. ISHAR DAS AND ANOTHER.**

[VI-95]

(3). —————. *Mortgaged land taken for public purposes—Suit for sum received by mortgagee as compensation.* In this suit for redemption of certain property usufructually mortgaged to the defendants, plaintiffs also claimed certain sums received by the defendants as compensation for portions of the land mortgaged which had been taken for public purposes. *Held* that the cause of action in respect of the sums arose on the date the money was paid to the defendant mortgagees and the suit having been brought long after was barred by art. 62, Limitation Act. **ABUL HASAN AND OTHERS v. CHIRANJI AND OTHERS.**

[I-41]

(4). —————. *For mesne profits against benami purchaser.* *Held* that in suits for the recovery of immoveable property and mesne profits against a benami purchaser (who denies the title of the real purchaser) the period of limitation applicable is that provided by arts. 62 and 144 respectively. It is regarded in the nature of a trust. **DALIP SINGH AND ANOTHER v. TULSHI RAM AND OTHERS.**

[VII-91.]

(5). —————. *For haqi-chaharrum.* *Semble* that a suit by a zamindar against a parjoidar to recover from him, in enforcement of a custom of haqi-chaharrum, one-fourth of the price of a house sold by the defendant is practically a suit for money received by the defendant for the plaintiff's use and as such would be subject to the limitation prescribed by art. 62, sch. II of the Indian Limitation Act, 1877. **RAGHUNATH PARSAD v. GIRDHARI DAS.**

[XIII-65.]

Per Contra:—

SHAM CHAND AND OTHERS v. BAHADUR UPADHIA.

[XVI-140]

(6). —————. *For money realized by one member of a joint Hindu family.* After the separation of P and T, two members of a joint Hindu

ACT XV OF 1877, Art 62.—(continued.)

family, certain bonds continued to be held by them jointly. Four years after the separation, P obtained a decree in respect of one of these bonds (which had been obtained in his name alone), and realized the amount decreed in the same year. Eight years afterwards, T brought a suit against P, claiming to be entitled to a share in the money realized. *Held* that art. 62, and not art. 127, of sch. II of the Limitation Act, was applicable to the suit. **THAKUR PRASAD v. PARTAB.**

[IV-154]

(1.) **Art. 64.—Accounts stated.**

See art. 57, Nos. (3) and (4).

(2). —————. *One sided account.* The striking of a balance in an account the items of which are all on one side does not amount to an "account stated" in the proper sense of the term *Nahani Bhai v. Nathu Bhai* (I. L. R., 7 Bom., 414) followed. **JAMUN AND ANOTHER v. NAND LAL.**

[XII-215]

BALLAB SHANKAR AND OTHERS v. RAM KUAR AND OTHERS.

[XIII-34]

(1.) **Art 65.—Vendor and vendee covenant to refund—purchase money.** The vendor of certain land agreed in the conveyance, which was registered, that, in case the land actually conveyed proved to be less than that purporting to be conveyed, he should make a refund to the purchaser of the purchase-money in proportion to the value of the quantity of land deficient. The land actually conveyed having proved to be less than that purporting to be conveyed, and the vendor having failed to make a refund of the purchase-money in proportion to the value of the quantity of land deficient, the purchaser sued the vendor for the value of the quantity of the land deficient.

Held (by Spankie, J.) that the suit was one of the nature described in No. 65, to which, the agreement being in writing registered, the limitation provided by art. 116, was applicable.

Held (by Oldfield, J.) that art. 116 was applicable to the suit. **KISHEN LAL AND OTHERS v. KINLOCK.**

[I-67]

(2). —————. The plaintiffs purchased certain immoveable property from the defendant by a registered sale-deed on the 20th of June, 1888. It was stipulated in the sale-deed that if the profits of the property should be below Rs. 300, the vendors would make good the deficiency. The vendees sued upon this contract on the 19th of September, 1892, alleging that the profits amounted to only Rs. 177-1-0. *Held* that the suit as regards limitation was governed by article 116 of the second schedule of Act No. XV of 1877, and not by article 65. *Kishen Lal v. Kinlock* (I. L. R. 3 All. 712) referred to. **AMANAT BIBI AND ANOTHER v. AJUDHIA AND OTHERS.**

[XVI-15]

ACT XV OF 1877.—(continued.)

Art. 66.—On the 3rd February, 1871, the defendants, having borrowed Rs. 1,000 from the plaintiffs, executed in their favor an instrument in which they mortgaged, by way of conditional sale, certain immoveable property as security for the loan, and in which it was provided that they should pay certain interest on such sum annually and should pay such sum on the expiration of five years from the date of such instrument, and in the event of failure in these respects that the plaintiffs might apply for foreclosure. On the 18th January, 1879, the plaintiffs sued the defendants for the balance of such sum and interest, waiving their claim on such property, and suing for such balance as a simple debt, as such instrument was not registered. *Held* that art. 66 of Act XV of 1877, was not applicable to the suit, as the claim was not based on a single bond, that is to say a bill or written engagement for the payment of money, without a penalty. **LACHMAN SINGH AND ANOTHER v. KESRI AND OTHERS.**

[I-93]

Art. 67.—A bond dated in October, 1865, provided that the money due under it should be paid before payment of the amount advanced to the obligors by the obligee under a *zar-i-peshgi* lease. The amount due under the lease having been paid in August, 1885, the present suit was brought on the bond by the representatives of the original obligee. No date was specified in the bond for payment. *Held* that the period of limitation should be reckoned from that date of the bond and not from the date the money due under the lease was paid, as was contended by the plaintiff and the suit was barred by time. **YAD ALI AND OTHERS v. AISBA BIBI AND OTHERS.**

[VIII-234]

Art. 75.—[Conditional decree.] *L* obtained a decree against *U*, dated the 26th September, 1867, for possession of a certain estate subject to this provision *viz.*, that if *U* paid in cash in the treasury of the Court, year by year, for *L*'s maintenance, so long as she might live, an allowance of Rs. 15 *per mensem*, in three instalments of Rs. 60 each, the decree for possession should not be executed, but if default were made in payment of three such instalments, *L* should be entitled to delivery of possession of such estate. The first default was made on the 18th January, 1874, but *L* waived the benefit of the provision. A fresh default was made, and on the 23rd January, 1880, *L* applied for possession of such estate. *Held* that art. 179, cl. 6, and not art. 75, cl. 3, was applicable to the case and the application was barred. **UGRA NATH v. LAGANMANI.**

[I-124]

(2).—Default—Waiver—(Act IX of 1871.)] On the 24th May, 1866, *H* gave *A* a bond payable by instalments which provided that, if de-

ACT XV OF 1877, Art. 75.—(continued.)

fault were made in the payment of one instalment, the whole should be due. The first default was made on the 28th June, 1866. No payment was made after Act IX of 1871, came into force. *Held*, in a suit upon such bond, that limitation began to run when the first default was made, and no waiver before Act IX of 1871, came into force could affect it. **AHMAD ALI v. HUSAIN BAKHSH AND ANOTHER.**

[I-17]

(3).—Option to enforce payment of whole.] This was a suit instituted in 1880 on a hypothecation bond, dated 19th April, 1866. The bond provided that the principal amount should be paid within 4 years from its date with interest at 24 *per cent. per annum*; that the interest should be paid every six months and that if default were made in the payment; of interest every six months, the obligee should be at liberty to sue for the principal amount, interest and compound interest at once. The defendants contended that as no interest had ever been paid, plaintiff's cause of action accrued on 19th October, 1866, when default was made in payment of interest for the first six months, and as the suit was brought more than twelve years after that date it was barred by time. *Held*, following the ruling in *Ball v. Stowell*, (1 L. R., 2 All., 322.) that the contention had no force and the suit was not barred by time. **BUDHAI SINGH v. KALKA PRASAD AND ANOTHER.**

[I-157]

Art. 81.—For contribution.]

See Art. 61.—No (2).

Art. 83.—A suit was brought by *P* against the Elgin Mills Company for recovery of the price of wood supplied under two contracts, each of which contained a clause by which the plaintiff contracted to indemnify the defendants for loss arising by reason of failure on his part to supply the wood as contracted for. No wood was supplied after the 11th November, 1879. The suit was brought on the 10th October, 1882. In January, 1883, the partners of the Elgin Mills Company were, on their own application, brought upon the record as defendants. The defendants claimed a set off as damages for loss incurred by the plaintiff's failure to supply all the wood contracted for, such loss having arisen on the 25th October, 1879, and subsequently. *Held* that the law of limitation applicable to the set off was art. 83 of Act XV of 1877. That the limitation would run from the time when the plaintiff was actually damaged and should be reckoned to the date of the institution of the suit, and not to that of claiming the set off which was after the defendant's names were brought on the record; and that the set off was therefore in time. *Walker v. Clements* (15 Q. B. 1046) referred to. **PAAGI LAL v. MAXWELL AND OTHERS.**

[V-40]

ACT XV OF 1877.—(continued.)

(1). **Art. 85.**—"Account stated"—One sided account.] The striking of balance in an account the items of which are all one sided does not amount to an "account stated" in the proper sense of the term. *JAMUN AND ANOTHER v. NAND LAL.*

[XII-215]

BALLAB SHANKAR AND OTHERS v. RAM KUAR AND OTHERS.

[XIII-34]

(2). —————.] Article 85 of the second schedule of the Indian Limitation Act, 1877, applies where the course of business has been of such a nature as to give rise to reciprocal demands between the parties, in other words, to cases in which the dealings between the parties are such that some times the balance may be in favour of one party and sometimes of the other. *Ballab Shankar v. Ram Kuar* (*W. N.* 1893, p. 34) and *Narain Dass Hemraj v. Vissandas Hemraj* (*I. L. R.*, 6 *Bom.* 134) referred to. *BHAWAN SINGH v. TIKA RAM.*

[XVI-186]

(1). **Art. 89.**—Resulting trust—Account.]

See art. 62, No. (1).

(2). —————.] "During the continuance of the agency." Where an agent for the sale of goods receives the price thereof the agency does not terminate, with reference to sections 201 and 218 of the Contract Act (IX of 1872) until he has paid the price to the principal; and a demand made by the principal for an account of the price is made "during the continuance of the agency" within the meaning of sch. ii, art. 89 of the Limitation Act (XV of 1877); and a suit by the principal to recover the price is therefore within time if brought within three years from the date of such demand. The agency does not terminate immediately on the sale of the goods. It does not terminate at the time when the plaintiff obtained knowledge of the defendant's breach of duty. *BABU RAM AND ANOTHER v. RAM DAYAL AND ANOTHER.*

[X-99]

(1). **Art. 91.**—Suit for maintenance of possession by cancelment of sale by a co-sharer.] The plaintiff sued for maintenance of possession in certain joint family property by cancelment so far as his interest was concerned of a certain deed of sale by which another co-parcener in the same property had purported to convey the whole to a stranger. *Held* that the limitation applicable to such a suit was that prescribed by art. 120 and not that prescribed by art. 91. *Sobha Pandey v. Sahodra Bibi* (*I. L. R.*, 5 *All.* 222) referred to; *Janki Kunwar v. Ajit Singh* (*I. L. R.*, 15 *Calc.*, 58) distinguished. *DINDIAL v. HARNARAIN AND OTHERS.*

[XIV-1]

ACT XV OF 1877, Art. 91.—(continued.)

(2). —————.] For possession of immovable property by avoidance of instrument—Sale by plaintiff's brother during his minority.] This was an action brought by a Muhammadan to recover possession of his share in a certain village on the allegation that during his minority on the 5th February, 1874, his elder brother sold the plaintiff's share to the predecessor in title of the defendant, and that the defendant and his predecessor in title have ever since been in possession thereof. The suit was instituted two days less than twelve years from the date of the sale in 1874. *Held* that the period of limitation applicable was that of twelve years inasmuch as it was not necessary for the plaintiff to sue for a cancellation of the sale deed. *Janki Kunwar v. Ajit Singh* (*I. L. R.*, 15 *Calc.*, 58) distinguished. *SHEO SAHAI v. MUHAMMAD ASKARI.*

[VIII-256]

RAMAUSAR PANDEY v. RAGHUBAR JATI AND OTHERS.

[III-64]

(3). —————.] By co-sharer.] The widow of a Muhammadan, who was entitled as one of his heirs to a share in his estate consisting half of a house, executed a deed of sale whereby she joined with the owner of the other half in conveying the entire house to the vendee. In a suit by another of the heirs to recover his share of the half house, it was pleaded that at the date of the sale, the vendor was in possession of the property in suit in lieu of her dower, and that the rights conveyed by the deed included the entire rights of the deceased, and not only the vendor's one-fourth share. It was found that the vendor did not obtain possession of the half house in lieu of dower with the consent express or implied of her husband's heirs. *Held* that all that the vendor could convey by the deed of sale was her rights and interests by inheritance from her husband, and not her right of dower. *Ali Muhammad Khan v. Aziz-ul-lah Khan* (*I. L. R.*, 6 *All.*, 50) and *Aziz-ul-lah Khan v. Ahmad Ali Khan* (*I. L. R.*, 7 *All.*, 353) referred to. *Held* also that art. 91 and not art. 144 of schedule ii of the Limitation Act (XV of 1877) was applicable to the suit. *Hazari Lal v. Jadaun Singh* (*I. L. R.*, 5 *All.*, 76) referred to. *AJUBA BEGAM AND ANOTHER v. NAZIR AHMAD.*

[X-115]

(4). —————.] Occupancy holding.] When a plaintiff sought to recover an ancestral occupancy holding from certain persons who were in possession ostensibly as vendees of his paternal grandfather from whom he claimed. *Held* that he was not obliged first to obtain a declaration of the invalidity of the deed, in virtue of which the defendants had obtained possession, but that he was entitled to bring his suit irrespective of that

ACT XV OF 1877, Art 91.—(continued.)

deed and that the period of limitation applicable to the suit was that prescribed by art. 144 of Act XV of 1877. *MURLI v. BRIJ LAL AND OTHERS.*

[XII-26]

(5). ————— *Gift—By insensible person.*] *Per* Straight, J., that a suit for possession of immoveable property by avoidance of a spurious deed of gift executed by a deceased person in favour of the defendant was governed by art. 144 and not by art. 91.

Per Stuart, C. J., *contra*. *HAZARI LAL AND OTHERS v. JADAUN SINGH AND ANOTHER.*

[II-180]

(6). ————— *Fraudulent.*] A Muhammadan who in October, 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June, 1885, never having taken any steps to have the deed of gift set aside. In February, 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that the plaintiff was aware of the existence of the deed soon after its execution; and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit. *Held* that the plaintiff had during the donor's lifetime, no reversionary or vested interest in the estate but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accrued to the plaintiff came to the latter affected by the donor's acts and dispositions; and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art. 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff who claimed through him, the cancellation of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancellation before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. *Abdul Wahid Khan v. Nuran Bibi* (L. R., 12 I. A. 91) and *Jagadamba Choudhary v. Dakhina Mohun* (L. R. 13 I. A. 84) referred to. *HASON ALI AND OTHERS v. NAZO AND ANOTHER.*

[IX-109]

(7). ————— *Invalid for want of possession.*] One of the heirs of a deceased Muhammadan sued for her share, under the Muhammadan Law, of the estate of the deceased and to set aside a gift of his estate by the deceased as invalid under that law, by reason that

ACT XV OF 1877, Art 91.—(continued.)

possession of the property transferred by the gift had not been delivered by the donor to the donee. *Held* that, because the suit was brought within three years from the date of the gift, it did not necessarily follow that the suit was barred by art. 91 of the Limitation Act, 1877, inasmuch as the plaintiff's title to impeach the gift could only accrue from the moment when, by receipt of possession, the gift had become operative by law. *MEDA BIBI v. CHHEDI AND OTHERS.*

[IV-34]

(8). —————.] This was a suit by the heirs-at-law of a deceased person for the possession of the property left by him, and for the cancellation of a deed of gift made in favor of the defendant on the ground that the gift not having been accompanied with possession was invalid. The Courts below have found that possession never passed to the defendants. *Held* that on this finding which can not be disturbed in second appeal the title by gift fails. *Held* further that the limitation applicable to the suit was that of twelve years and not that mentioned in No. 91 of the Limitation Act. *SARAJUL HAQ AND ANOTHER v. KHADIM HUSAIN AND ANOTHER.*

[IV-60]

(9). ————— *Mortgage by judgment-debtor before auction-sale.*] The purchasers at a sale in execution of decree of land sued to set aside an instrument of usufructuary mortgage of the land executed by the judgment-debtor before the sale, and for possession of the land, alleging that the mortgage was fraudulent and collusive. *Held* that, as the main and substantial relief sought was the recovery of possession of immoveable property from persons trespassing on it under the title of a fictitious mortgage, and the declaration of the invalidity of the defendant's pretensions was no more than an incidental step in the assertion of the plaintiff's title and right to possession, the limitation of twelve years was applicable to the suit. *Twangar Ali v. Kura Mal* (I. L. R., 3 All., 394. *Faizal Singh v. Mata Bakhs* (W. N. 1882, p. 173); *Sobha Pandey v. Sahodra Bibi* (I. L. R., 5 All., 322); *Ramansar Pandey v. Raghubar Jati* (I. L. R., 5 All., 490); *Uma Shankar v. Kalka Prasad* (I. L. R., 6 All., 75) and the judgment of Straight, J. in *Hazari Lal v. Jadaun Singh* (I. L. R., 5 All., 76) followed. *Bhawani Prasad v. Bisashar Prasad* (I. L. R., 3 All., 846) and *Asghar Ali v. Muhammad Zain-ul-abdin* (I. L. R., 5 All., 573) distinguished. *IKRAM SINGH AND ANOTHER v. INTIZAM ALI AND OTHERS.*

[IV-73]

(10). ————— *Mortgage by judgment-debtor before auction sale.*

ACT XV OF 1877, Art. 91.—(continued.)

The purchasers of property sold in execution of a decree, having been resisted in obtaining possession of the property by a person claiming under a mortgage from the judgment-debtor, sued for possession, by avoidance of the mortgage, alleging that the same was collusive and fraudulent. The plaintiffs did not ask for the cancellation or setting aside of the instrument of mortgage. *Held* that the law of limitation governing the suit was not art. 91 or 95 of the Limitation Act, but art. 138. *Hazari Lal v. Jadaun Singh* (1. L. R., 5 All., 76); *Ram-ansar Pandey v. Raghubar Jati* (1. L. R., 5 All., 490); *Sobha Pandey v. Sahodhra* (1. L. R., 5 All., 322) and *Raj Bahadur Singh v. Achambit Lal* (L. R., 6 Ind. App., 110) referred to. **UMA SHANKAR AND ANOTHER V. KALKA PRASAD AND ANOTHER.**

[III-212]

(11.) ————Lease by judgment debtor before auction sale.] *A* brought a suit against *B* and *C* on a mortgage bond, obtained a decree, brought the mortgaged property to sale and bought it himself. But when he endeavoured to obtain possession he was resisted by *O*, who claimed the property under a lease granted by *B* and *C*. *A* then brought this suit for possession of the immovable property and for cancellation of the fictitious lease. *Held* that as the main object of the suit was to obtain possession and the second relief claimed was merely incidental thereto the limitation applicable was that of twelve years and not that of three years. **BANWARI LAL V. BHAGWAN DIN.**

[IV-88]

(12.) ————For cancellation of a mortgage.] The plaintiff, alleging that he was the proprietor of certain land, that defendant No. 2 had wrongfully and fraudulently mortgaged it to defendant No. 1; and that defendant No. 1 had applied for foreclosure of the mortgage, and notice of foreclosure had issued; claimed "that, the mortgage-deed being set aside, the land be protected from the illegal foreclosure, by cancelment of the foreclosure proceedings." *Held* that the suit was not strictly one for the cancelment or setting aside of an instrument to which the limitation in No. 91, sch. ii. of the Limitation Act, 1877, would apply, (which relates to suits of the nature of those referred to in s. 39 of the Specific Relief Act), but rather one for a declaratory decree. **SOBHA PANDEY V. SABODHRA BIBI.**

[III-49]

(13.) ————For cancellation of lease.] *B*, *P*, and *G* sued to cancel a lease of certain land on the ground that the lessor was not competent to grant the same, the defendants being the lessor and the lessee. The lessee's defence to the

ACT XV OF 1877, Art. 91.—(continued.)

suit was that the lease had been executed with *B*'s knowledge, who caused it to be attested and registered; that it was recognized and adopted by *P* and *G*, who allowed the lessee to take possession of such land and had accepted rent from him in respect thereof; that under those circumstances the plaintiffs were estopped from denying the lessor's competency to grant the lease; and that the suit was barred by limitation, as more than three years had elapsed from the date of the lease. The lower appellate Court affirmed the decree of the Court of first instance in the favor of the plaintiffs on the ground that the lessee was aware that the lessor was not competent to grant the lease. *Held*, on second appeal by the lessee, that the limitation applicable to the suit was to be found in No. 91, sch. ii, of Act No. XV of 1877, and not No. 114, that last article referring to the rescission of contracts as between promisors and promisees, and not to suits by third parties to have an instrument cancelled or set aside; and that, as regards *B*, inasmuch as the existence of the lease became known to him at the time of its execution, and three years from that time had expired, the suit was barred by limitation. The proper issues as between *P* and *G* and the lessee framed and remitted for trial. **BHAWANI PRASAD SINGH V. BISHESHWAR PRASAD AND OTHERS.**

[I-95]

(14.) ————Knowledge.] *K*, to whom *B* had given a usufructuary mortgage of certain land, promising to put him in possession, sued *B* for the mortgage-money, *B* having failed to put him in possession. This suit was instituted on the 22nd November, 1875. On the 25th of the same month *K*, learning that *B* was about to dispose of his property, caused a notice to issue to him directing him not to transfer any of his property. This notice was served on *B* on the 29th November. On the 1st December, 1875, *B* transferred certain land to *T* by way of sale. *K*'s suit was dismissed by the lower Courts, but the High Court, on the 7th August, 1876, gave him a decree. Certain property belonging to *B* was sold in execution of this decree, but the sale-proceeds were not sufficient to satisfy the amount due on the decree. *K* thereupon, on the 1st July, 1879, sued *T* to cancel the conveyance to him by *B* on the ground that it was fraudulent and without consideration. *Held* that the words in No. 91, sch. ii, Act XV of 1877, "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him," must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit," and consequently the period of limitation for *K*'s suit began to run, not merely when he had knowledge of the fraudulent character of the conveyance to *T*, but when, having such knowledge, it had become apparent to him that there was no other property than that conveyed to *T* available for the realization of the unsatisfied balance of his

ACT XV OF 1877, Art 83.—(continued.)

decree, and the suit was within time. TEWANGIR ALI v. KURA MAL.

[I-2]

(15) ——— *For declaration that land in suit was not mortgaged to defendant.*] This was a suit for a declaration that certain plots of land were not mortgaged to the defendants and to recover possession of certain other plots, on the allegation that the defendants alleged themselves to be mortgagees of the former and that they have dispossessed plaintiffs from the latter. The lower Courts held that the suit was barred by art. 91, Limitation Act inasmuch as the object of the suit was to cancel the instrument of mortgage by virtue of which the defendants claimed to be mortgagees. *Held* that the suit was not barred in respect of either of the two reliefs claimed. JAIPAL SINGH AND ANOTHER v. MATA BAKSH AND ANOTHER.

[II-173]

(1) Art 95.—*For possession of immoveable property by avoidance of instrument—Fraudulent decree.*] Z and his three minor sons were joint owners of a village. This Z hypothecated by deed of simple mortgage to J. Subsequently Z executed another deed of mortgage to J, part of the consideration whereof was the cancellation of the former bond, which was paid off and extinguished accordingly. J, however, fraudulently caused it to appear from the novating document that the former mortgage was still alive, and, after the death of Z, put the bond in suit against Z's widow who, being ignorant of the fraud confessed judgment as guardian of her minor sons. The entire rights and interests of Z's heirs were sold in execution of the decree so obtained by J. Subsequently the fraud was discovered, and Z's sons brought a suit to set aside the execution sale, and to recover possession of the property first mortgaged. In regard to three-fourths of this property, they prayed that "possession might be awarded to them by establishment of their right and share, by amendment of the revenue papers." In regard to the remaining one-fourth they prayed for possession "by right of inheritance to Z," by cancellation of the execution sale, and of the fraudulent decree. They further alleged that they had first become aware of the fraud upon the day when they obtained from the registration office a copy of the novating instrument in which the fraudulent entries were contained. *Held* that the law of limitation applicable to the case was not that contained in art. 12, nor in art. 144, but that contained in art. 95 of sch. ii of the Limitation Act, inasmuch as fraud vitiates all things, and prevents the application of any other law of limitation than that specially provided for relief from its consequences. *Held* also, in reference to the terms of certain statements made by the plaintiff's pleader, from which the lower appellate Court had inferred that the plaintiffs must have become aware of the fraud at a date earlier than that alleged by them, that verbal admissions

ACT XV OF 1877, Art 95.—(continued.)

made by the pleader of a party to a suit must be received with caution, must be taken as a whole, and must not be unduly pressed. *Held* further, that the knowledge predicated by the terms of art. 95 of sch. ii of the Limitation Act is not mere suspicion, but such definite knowledge as enables the person defrauded to seek his remedy in Court. *Held*, under the circumstances of the present case, that the burden of proving such knowledge on the part of the plaintiffs, prior to the date alleged by them, lay upon the defendants. NATHA SINGH AND ANOTHER v. JODHA SINGH AND OTHERS.

[IV-140]

(2). ——— *To set aside compromise and decree.*] Certain of the grantees of lands, granted for the maintenance of the grantees and support of a mosque and other religious purposes, sued for the removal of the Superintendent of the property from his office. The parties to this suit entered into a compromise which made certain arrangements for the management of the property, and a decree was made in accordance with the compromise. The grantees who were not parties to this suit then sued the grantees who were to set aside the compromise and decree on the ground of fraud. *Held* that the suit fell within the terms of No. 95, Act XV of 1877. MUHAMMAD BAKSH AND OTHERS v. MUHAMMAD ALI AND ANOTHER.

[III-40]

Art. 96.—Where certain members of a joint Hindu family partitioned the family property amongst them in such a manner as to give one member who was then a minor less than the share to which he was entitled, the minor's uncle who purported to bind the minor in the matter of the partition not being the minor's natural guardian or in any way entitled to deal with the minor's property, and when such minor after attaining majority sued for the recovery of his full share:—*Held* that this was not a suit for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstances affect in any way the rights of the minor. The suit was therefore not subject to the limitation of three years prescribed by arts. 95 and 96 of the second schedule of Act XV of 1877. LAL BAHADUR SINGH, v. SISPAL SINGH AND OTHERS.

[XII-61]

Art. 97.—*For money deposited by pre-emptor and withdrawn by vendee.*] Pending an appeal from a decree for pre-emption in respect of certain property conditional upon payment of Rs. 1595, the pre-emptor decree-holder in August, 1880, applied for possession of the property in execution of the decree, alleging payment of the Rs. 1595 to the judgment-debtors out of Court, and filing a receipt given by them for the money. This application was ultimately struck off. In April 1881, judgment was given in the appeal, increasing the amount to be paid

ACT XV OF 1877, Art 97.—(continued.)

by the decree-holder to Rs. 1,994, which was to be deposited in Court within a certain time. The decree-holder did not deposit the balance thus directed to be paid and the decree for possession of the property accordingly became void. In 1882, the decree holder assigned to *K* his right to recover from the judgment-debtors the sum of Rs. 1,595 which he had paid to them in August, 1880. In December, 1880, *K* sued the judgment-debtors for recovery of the Rs. 1,595 with interest. *Held* that No. 62 of the Limitation Act did not govern the suit, but that No. 97 and, if not, No. 120 would apply, and the suit was therefore not barred by limitation. *KOJI RAM v. ISHAR DAS AND ANOTHER.*

[VI-95]

(1). **Art. 99.—Contribution.** Where the owner of two villages, sold under a decree obtained upon a mortgage, claimed contribution proportionably against the owners of the other properties included in the mortgage. *Held* that the suit was governed by art. 132 and not art. 99. *IBN HASAN AND ANOTHER v. RAMDAI AND OTHERS.*

[X-81]

(2). ————— *Held* that the period of limitation prescribed for suits for contribution was three years and not that provided by art. 120 (six years) in cases in which no period of limitation is prescribed. *POWELL v. POWELL.*

[VII-128]

Art. 103.—A mere demand without refusal is not sufficient to start the period of limitation for a suit by a Muhammadan for exegible dower, provided for by art. 103, sch. ii, of the Limitation Act (XV of 1877). The period begins to run when there has been a definite demand and a definite refusal. The plaintiff in a suit for dower, which was instituted on the 26th May, 1886, and in which it did not appear whether the dower was "prompt" or "deferred," alleged in her plaint that the defendant (her husband) had definitely refused to pay the dower on the 28th June, 1885. There was no evidence as to the date of demand or of refusal. *Held* that in the absence of proof to the contrary, the dower must be taken to be prompt; that art. 103, sch., ii of the Limitation Act therefore applied; that the defendant, if he desired to raise the plea of limitation, was bound to allege and prove the date on which he finally refused to pay the dower; and that, as he had not done so, and the allegation of the plaint on this point stood uncontradicted, the suit must be held not barred by limitation. *Abdul Kadir v. Salima (I. L. R., 8 All., 149)* and *Ranee Khajoorunnissa v. Mirza Saifoodla Khan (15 B. L. R., 306)* referred to. *AMIR ALI v. JAN BIBI.*

[IX-122.]

Art. 106.—For account. *T, B, R* and *W*, the owners of a certain estate in equal shares, in

ACT XV OF 1877, Art 106.—(continued.)

1863 entered into a partnership for "the cultivation of tea and other products" upon such estate. In 1864, *H, E, and I* joined the firm. In 1870, *H* died; and in 1871 *T* purchased his share and those of *E* and *I*, and in 1873 of *R*. In 1875, *T* gave the D. and L. Bank a mortgage on such estate as security for the repayment of money which he had borrowed from the Bank ostensibly for the purposes of the estate. The Bank, obtained a decree against him personally for the money, in execution of which his rights and interests in the estate were put up for sale on the 20th June, 1877, and were purchased by the Bank which obtained possession of the estate in August, 1877. In August, 1879, *B* and *W's* executor sued *T* and the Bank claiming a declaration that they were or had been partners with *T* in the estate; that if the partnerships should be held to be subsisting, it might be dissolved, or that if it had ceased to exist, the date of its termination might be fixed; and that in either event liquidator might be appointed to take an account, and after realizing assets and discharging liabilities, might be ordered to pay them each one-third of such balance as remained. *Held* that the period of limitation applicable to the suit was that provided in art. 120 and not art. 106 of Act XV of 1877; but that in either case the suit was within time, as the partnership was dissolved, and consequently time began to run not from the death of *H*, or the purchases by *T* of his share or those of *E* and *I* in 1871, or of *R* in 1873, but in August, 1877, when the defendant Bank took possession of the partnership property. *HARRISON AND ANOTHER v. THE DELHI AND LONDON BANK AND ANOTHER.*

[II-87]

Art. 109.—*Held* that the period of limitation prescribed by art. 109, sch. ii, of Act XV of 1877, begins to run from the date profits are received. *LACHMA v. JIWAN SAHAI AND OTHERS.*

[I-18]

Art. 111.—*Held* that a suit by a vendor of immoveable property to enforce his lien for unpaid purchase-money was governed by art. 111 of Act XV of 1877. *BALDEO PRASAD v. JIT SINGH AND OTHERS.*

[XI-130]

(1). **Art. 113.—For specific performance—Contract of mortgage—Possession.** *A* gave a mortgage of his share to *B* with a promise to give the mortgagees possession over the property. He subsequently sold the share to *C*. This was a suit by *B* against *A* and *C* for possession as promised. *Held* that though it was a suit within art. 113 of the limitation Act (for specific performance of contract) it was none the less a suit within the meaning of art. 135 of the same Act. Twelve years limitation was therefore available to the plaintiff. *GOPAL RAO v. BAJI LAL AND ANOTHER.*

[IV-128]

ACT XV OF 1877, Art 113 (*continued.*)

(2.) ————— *Contract of sale.*] A contract was made for the sale of certain immoveable property, in the event of the vendor obtaining a decree establishing his title to the property, in a suit which had been brought for that purpose. The vendor obtained such decree in that suit. The purchaser subsequently brought a suit "to have a sale-deed executed and completed" and for possession of the property. It was contended that the limitation applicable to the suit was that provided by art. 144 of the Limitation Act, 1877, and not art. 113. *Held* that the suit was essentially one for specific performance of contract, and the limitation applicable was art. 113. The contention that, so far as the suit was for possession of immoveable property, it should be governed by art. 144 was invalid. The right to possession sprang out of the contract of sale, and the relief by giving possession was comprised in the relief by specific performance of the contract of sale, and could not be governed in this suit by any but art. 113. But assuming the suit might, so far as limitation was concerned, be entertained, still as the right to possession was dependent on the contract of sale, if the suit could not be maintained for specific performance of the contract, it could not be maintained for possession of the property sold under the contract. **MOHIUDDIN AHMAD KHAN v. MAJLIS RAI AND OTHERS.**

[IV-42]

(3.) ————— *Cause of action.*] In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881, the plaintiffs brought an action against a third party who claimed title to some of the exchanged lands, and joined the defendants as defendants, the latter admitting the plaintiff's title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendants refused to give them other land), they sued on the deed of 1871 to have the exchange therein provided for carried out. *Held* by the Full Bench that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it, was within the time fixed by art. 113, sch. ii of the Limitation Act (XV of 1877). **HARI TIWARI AND OTHERS v. RAGHUNATH TIWARI AND ANOTHER.**

[VIII-254]

ACT XV OF 1877, Art 113 (*continued.*)

(4.) ————— *Mutation of names.*] In 1876, A sold his property to B under a registered sale deed which gave B legal possession of the property. But soon after a difficulty arose as to the mutation of names, A saying that part of the consideration had not been paid. In 1885, B brought this suit to assert his proprietary right in the estate making the *dakhil kharij* resistance his cause of action. *Held* that the suit was not governed by art. 113. **KALU AND ANOTHER v. KISHORI AND ANOTHER.**

[VI-36]

(5.) ————— *Award.*] A suit for the recovery of a balance of money due under the terms of an award, being virtually a suit for the specific enforcement of the award, is, by reason of section 30 of the Specific Relief Act, 1877, subject to the limitation prescribed by art. 113 of sch. ii of the Indian Limitation Act, 1877. **Sukho Bibi v. Ramsukh Das (I. L. R., 5 All., 263)** followed. **RAGHUBAR DIAL v. MADAN MOHAN LAL.**

[XIII-179]

SUKHO BIBI v. RAMSUKH DAS.

[III-16]

(6.) ————— *Held* that an award on an arbitration for the division of the property of a deceased person amongst his heirs, by which award it was provided that certain specified persons amongst the heirs should become liable for the payment of a certain specified debt due by the deceased, did not give the creditor a fresh cause of action based on the award for the recovery of such debt, but at most a fresh starting point for limitation in respect of a suit to recover it. **Sukho Bibi v. Ramsukh Das (I. L. R., 5 All., 263)** and **Raghubar Dial v. Madan Mohan Lal (I. L. R., 16 All., 3)** referred to and distinguished. **GOPAL LALJI AND ANOTHER v. RAMAN LALJI.**

[XVII-144]

* **Art. 114.**—*Held* that art. 114 of Act XV of 1877 applies to cases for the revision of contracts as between promissors and promisees and not to suits by third parties to have an instrument cancelled or set aside. **BHAWANI PRASAD v. BISHESHAR PRASAD AND OTHERS.**

[I-95]

(1.) **Art. 115.** *Continuing breach.**See s. 23, No. (5).*

(2.) ————— *Implied contract—Compensation for marrying widow.*] This was a reference from the Court of Small Causes at Ajmere. The plaintiff sued the defendant for compensation payable by him in consequence of his having married the plaintiff's deceased brother's widow. He founded his claim on a custom prevailing among the *jats* of Ajmere, under which it was incumbent on any person of that caste who married a widow to recoup the expenses incurred by her deceased husband's family in respect of her marriage with her deceased hus-

ACT XV OF 1877, Art. 115.—(continued.)

band. The question of law referred was whether the limitation applicable to such a suit was that provided by art. 115 or by art. 120, sch. ii., Act XV of 1877. The Court held that the effect of such a custom, being to create an implied obligation in the nature of a contract, such a suit was governed by art. 115, sch. ii., Act XV, of 1877. *MADHO v. SHEO BAKSH.*

[I-7]

Arts. 115 and 116.—Where a mortgagor by conditional sale failed to fulfil a covenant that the conditional vendee should during the term of the mortgage have possession of the mortgaged property and take the profits in lieu of interest. *Held* that this was not a case of "successive breaches" within the meaning of arts. 115 and 116. *Mansab Ali v. Gulab Chand (W. N., 1887, p. 292)* referred to. *BALGOBIND DAS v. BARKAT ALI AND ANOTHER.*

[VIII-15]

MANSAB ALI v. GULAB CHAND.

[VII-292]

Art. 116.—Vendor and vendee covenant to refund purchase money.]

(1). *See* art. 65, No. (1) and (2).

(2).—*Cause of action.*] Where in a usufructuary mortgage it was covenanted that if the mortgagee was not given possession he should have a right to obtain the sale of the mortgaged property, the mortgage debt meanwhile being payable on a certain specified date, it was held that in respect of an application under s. 90 of Act No. IV of 1882, the mortgaged property having been sold under the above-mentioned covenant and proving insufficient to satisfy the debt, limitation began to run from the breach of the covenant to pay on due date and not from the breach of the covenant to put the mortgagee in possession. *SHEO CHARAN SINGH v. LALJI MAL.*

[XVI-197]

(3). *Compensation—Money under a registered bond.*] *Held* following *Husain Ali Khan v. Hafiz Ali Khan (I. L. R., 3 All., 600)*, that a suit on a registered bond for the payment of money, which has not been paid on the due date, is a suit for compensation for the breach of a contract in writing registered, and therefore the limitation applicable to such a suit is that provided by No. 116, sch. ii., of the limitation Act. The principle on which the ruling that a suit on a bond which has not been paid on the due date is a suit for compensation explained by *Stuart, C. J.*, and *Nobocoomar Mukhopadhaya v. Sires Mullick (I. L. R., 6 Calc., 94)* referred to. *KHUNNI v. NASIRUDDIN AHMAD.*

[I-159]

GOKAL v. RAGHU AND OTHERS.

[II-11]

(4).—*Interest by way of damages.*] *Held* that a suit for the recovery of interest

ACT XV OF 1877, Art. 116.—(continued.)

in the way of damages for the non-payment on the due date of money under a registered bond is governed by Art. 116. *BHAGWANT SINGH v. DARYAO SINGH AND OTHERS.*

[IX-165]

MATHURA DAS AND ANOTHER v. BHAWANI GHULAM PAL.

[XI-126]

(5).—*Interest under Act XXXII of 1839.*] Art. 116 of Act XV of 1877 applies to a claim to have interest allowed under Act No. XXXII of 1839 in respect of the non-payment on the due date of the money due under a registered mortgage-deed, if the suit is not brought within six years of the breach of contract. *NARINDRA BAHADUR PAL v. KHADIM HUSAIN AND OTHERS.*

[XV-128]

(6).—*Unpaid portion of mortgage-money*] A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (XV of 1877), sch. ii., Act 113 (for specific performance of a contract), is applicable. The period of limitation applicable to such a suit is that prescribed by art 116 of sch. ii of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed. *Gauri Shankar v. Sujju, (I. L. R., 3 All., 275); Husain Ali Khan v. Hafiz Ali Khan (I. L. R., 3 All., 600); Nobocoomar Mookhopadhaya v. Sires Mullick (I. L. R., 6 Calc., 94); Vythilinga Pillai v. Thetchana Murti Pillai (I. L. R., 3 Mad., 76), and Ganesh Krishn v. Madhavurav Rajji, (I. L. R., 6 Bom., 75)* referred to. *NAUBAT SINGH AND OTHERS v. INDAR SINGH AND ANOTHER.*

[XI-5]

(1) **Art. 118.—For possession of immoveable property and for declaration that adoption is invalid.**] The parties to the suit were Jats. The plaintiffs were claimants of the estate of one N. S. which was held by the defendant Jehangira as the adopted son of N. S., his paternal uncle. They alleged that they were the next heirs, and that, as Jehangira was married before his adoption took place, that adoption was invalid. Both the lower courts agreed in dismissing the plaintiff's suit, holding that the adoption, which was evidenced by a registered deed of the 16th December, 1874, was fully established. The plaintiffs then appealed to the High Court. *Held* that the appellants had failed to prove that the adoption was absolutely vicious and invalid; and that they must be taken to have been aware of the adoption at the time it was made; the suit was therefore barred by limitation under art. 118 of sch. ii of

ACT XV OF 1877, Art. 118—(continued.)
the Limitation Act. *INDA AND ANOTHER v. JEHANGIRA AND OTHER.*

[X-241]

(2). ————.] Art. 118 of Act XV of 1877 applies only to suits where the relief claimed is purely for a declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. *BASDEO v. GOPAL.*

[VI-232]

NATTHU SINGH v. GULAB SINGH.

[XV-86]

(3). ———— For declaration that adoption is invalid and plaintiff is reversionary heir.] In this suit the plaintiff prayed that a declaratory decree should be passed to the effect that one Kundon Singh was not the adopted son of Hardev (plaintiff's paternal uncle); that he had no right to the property of Hardev; and that the plaintiffs were the reversionary heirs. Held that art. 118, Limitation Act, was applicable to such suit. *MAN KUAR AND ANOTHER v. LACHMAN SINGH AND OTHERS.*

[VI-244]

(3). ————.] On the death of a Hindu, who died on the 25th April, 1862, leaving a widow and two daughters, the widow succeeded to his estate. But subsequently, in 1866 she applied to the Collector to have the name of S N, the adopted son of her husband, recorded in respect of the estate. S N's name was accordingly recorded and he obtained actual possession over the property. On the 2nd July, 1879, the present suit was brought by the minor sons of one of the two daughters, who were born subsequently to the proceedings of the 21st April, 1866, against the widow and S N, for a declaration of their right to the estate of their maternal grand father, and to have the adoption set aside. The mother of the plaintiffs died in 1877. The other daughter died childless. Held that the right to sue accrued to the mother of the plaintiffs, they being not then in existence either at the date of adoption, or in 1862, or in 1866, and the suit having been brought more than twelve years after the latest date, it was barred by limitation. Under the circumstances of the case No. 118, sch. ii, of act XV of 1877, and s. 2 of Act No. IX of 1871 could not help the plaintiffs. *GOPI NATH AND OTHERS v. SRI NARAIN AND ANOTHER.*

[I-83]

(1) Art. 120.—Suit for possession of trees and to set aside order of settlement officer.]

See art. 14, No. (1)

ACT XV OF 1877, Art. 120—(continued.)

(2) ———— For removal of trees planted on waste land.]

See art. 32, No. (1).

(3) ———— For account.]

See art. 61, No. (1), art. 62 No. (1) and art. 106.

(4) ———— Implied contract. Compensation for remarrying widow.]

See art. 115, No. (1).

(5) ———— For maintenance of possession by cancelment of sale by a co-sharer.]

See art. 91, No. (1).

(6) ———— Preemption. Rival pre-emptors.]

See art. 10, No. (9).

(7) ———— Mutation in pursuance of agreement to sell.]

See art. 10, No. (10).

(8) ———— Pre-mortgage.]

See art. 10, No. (8).

(9) ———— Period from which time begins to run. Where a mortgage by conditional sale has been duly foreclosed in accordance with the procedure laid down in ss. 7 and 8 of Regulation XVII of 1866 and at the expiration of the year of grace any portion of the mortgage-money remains unpaid the title of the conditional vendee becomes absolute on the expiration of such year of grace. Where therefore under the circumstances above-mentioned a suit is brought for pre-emption of the mortgaged property, the plaintiff's right accrues and limitation will begin to run against the expiration of the year of grace. *Forbes v. Ameeroonissa Begum* (10 Moo. I. A. 340) distinguished. *Rai Suddin Chowdhry v. Khoda Newaz Chowdhry* (12 C. L. R., 479); *Jai Karan Rai v. Ganga Dhari Rai* (I. L. R., 3 All. 175); *Moonshee Syud Ameer Ali v. Bhado Soonduree Debia* (6 W. R., C. R., 116); *Mohunt Ajoodhya pooree v. Sohun Lal* (7 W. R., C. R. 428); *Jeorakkun Singh v. Hookum Singh* (N. W. P., H. C. Rep. 1868, 358); *Buddree Doss v. Durga Pershad* (N. W. P., H. C. Rep., 1870, 284); *Musammatt Tara Kunwar v. Mangri Meea* (6 B. L. R., App., 114); *Huari Ram v. Shankar Dial* (I. L. R., 3 All. 770); *Tawakkul Rai v. Lachman Rai* (I. L. R., 6 All. 344) and *Ajaib Nath v. Mahipura Prasad* (I. L. R., 11 All. 164) referred to. *Prag Chaubey v. Bhajan Chaudhri* (I. L. R., 4 All. 291); *Rasik Lal v. Gajraj Singh* (I. L. R. 4 All. 414) and *Udit Singh v. Padarath Singh* (I. L. R., 8 All. 54) overruled. *ALI ABBAS AND ANOTHER v. KALKA PRASAD.*

[XII-108]

ACT XV OF 1877, Art. 120.—(continued.)

(10).—[*Contribution*] Held that the period of limitation prescribed for suits for contribution was that provided by art. 99 and not that provided by art. 120. **POWELL v. POWELL.**

[VII-123]

(11).—[*For restitution of conjugal rights.*] Held that art. 120 read with s. 23 of Act XV of 1877, was applicable to suits between Hindus for the restitution of conjugal rights or for the recovery of a wife who has deserted her husband. **BINDA v. KAUNSILIA AND ANOTHER.**

[XI-18]

(12).—[*To enforce pledge.*] Where a plaintiff who had lent money on the security of moveable property sued to recover the money both by sale of the property pledged and also asked for a decree personally against the defendant should the amount realized by the sale prove insufficient, it was held that, so far as the plaintiff prayed for a decree against the defendant personally, art. 57 was applicable; but, so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell within art. 120. **Nim Chand Baboo v. Jagabundhu Ghose** (I. L. R. 2 Cal. 21) followed. **MADAN MOHAN LAL AND ANOTHER v. KANHAI LAL.**

[XV-46]

(13).—[*Suit against Muhammadan widow for money realized.*] Held that a suit brought by the other heirs to recover from the widow of a deceased Muhammadan a sum of money said to have been realized by her on account of a mortgage debt due to her deceased husband was a suit to which the limitation applicable was that prescribed by art. 120 of Act XV of 1877. **Mahomed Riasat Ali v. Hasin Banu** (I. L. R., 21 Cal., 157); **Sithamma v. Narayan** (I. L. R., 12 Mad. 487) and **Kundun Lal v. Bansidhar** (I. L. R. 3 All. 170) referred to. **UMAR DARAZ ALI KHAN AND OTHERS v. WILAYAT ALI KHAN AND ANOTHER.**

[XVII-34]

(14).—[*To enforce haq-i-chaharum.*] Held that the limitation applicable to a suit by a zamindar to recover "*Haq-i-Chaharum*" alleged to be payable to him by custom on the sale of a house was that prescribed by art. 120 of the second schedule of the Indian Limitation Act, 1877, and not that prescribed by art. 62. **Kirath Chand v. Ganesh Prasad** (I. L. R., 2 All. 358) approved. **Nanku v. The Board of Revenue for the N.-W. P.** (I. L. R. 1 All. 444) referred to. **Raghunath Prasad v. Girdhari Das** (Weekly Notes, 1893, P. 65) dissented from. **SHAM CHAND AND OTHERS v. BAHADUR UPADHIA.**

XVI-140.

(15).—[*By vendor of immoveable property for unpaid purchase-money or the property.*] **S B** sold to **B P** his interest in certain pro-

ACT XV OF 1877, Art. 120.—(continued.)

perty then in the possession of two persons as usufructuary mortgagees. The vendee obtained mutation of names in his favour, but omitted to pay the purchase-money. The representatives of the vendor subsequently sued the vendee for possession of the property on payment of the sale-consideration. The prayer of their plaint was as follows:—"That the plaintiffs may be put in possession of the equity of redemption of the 20 *biswa* mahal No. 1 in *mauzah* Pura-yah, *parganah* Tilhar, assessed at Rs. 1,120 five times of which is Rs. 5,600, and valued at Rs. 10,500, subject to the mortgage-debt, by invalidation of mutation proceeding taken on the petition for mutation of names filed by Musammatt Maha Kuar, widow of Suburn Singh, on 21st July, 1881, and by ejectment and declaration of want of right of the defendant owing to his non-payment of the sale-consideration mentioned in the aforesaid deed of sale. If the defendant wish to give effect to the sale he may be ordered to pay to the plaintiffs the sale-consideration, Rs. 10,500, with future interest—otherwise the sale to the defendant may be declared inoperative claim valued at Rs. 10,500, the consideration mentioned in the sale-deed and the value of the property." The sale was made on the 27th July, 1878, and the suit was brought on the 15th March, 1889. Held that the suit was barred by limitation; if it was for cancellation of the sale-deed by No. 91 of sch. ii, of the Limitation Act; if it was for specific performance by No. 113; if it was a suit by a vendor of immoveable property to enforce his lien for unpaid purchase-money by No. 111, assuming the object of the sale to be immoveable property: while if the object of the sale were not immoveable property the suit would be barred under No. 120. **BALDEO PRASAD v. JIT SINGH AND OTHERS.**

[XI-180]

(16).—[*For money in the bonds of a trustee.*] One **A P** having certain moneys lying at his credit in Calcutta empowered **A L** to receive the same and hold them on his behalf. **A P** died at Moradabad, and subsequently to his death the said moneys, which remained in the hands of **A L**, were attached by one of the creditors of **A P** in execution of a decree. The decree-holder sold his rights under the decree in respect of the moneys in the hands of **A L** to the plaintiffs, who sued to obtain the same from **A L**. Held that the period of limitation applicable to such a suit was that prescribed by Art. 120 of the sch. ii of the Indian Limitation Act (Act. XV of 1877.) **Gurudas Pyne v. Ram Narain Sahu** (I. L. R., 10 Cal. 860) referred to. **CHAND MAL AND ANOTHER v. ANGAN LAL.**

[XI-180]

(17).—[*For recovery of money deposited in Court by a pre-emptor and withdrawn by the vendee.*] Held that a suit by the assignee of a pre-emptor for the recovery of money deposited in Court by the pre-emptor, and withdrawn

ACT XV OF 1877, Art 120.—(continued.)

by the vendee, was governed by Act. 97 or 120 and not by Art. 62. *KOJI RAM v. ISHAR DAS AND ANOTHER.*

[VI-95]

(18).———*For declaration of right to and possession of immoveable property.*] A suit for a declaration of right to and of actual possession in immoveable property is governed by the limitation prescribed by art. 120 of the second schedule to the Indian Limitation Act 1877. *Moru Bin Pallaji v. Gopal Bin Satu* (I. L. R., 2 Bom. 120); *Durga v. Haidar Ali* (I. L. R., 7 All. 167); *Bhikaji Baji v. Pandu* (I. L. R., 19 Bom. 43) and *Mahommed Riasat Ali v. Hasin Banu* (I. L. R. 21 Calc. 157) referred to. The judgment of Oldfield J. in *Debi Prasad v. Jafar Ali* (I. L. R., 3 All., 40) not followed. *FRANCIS LEGGE v. RAMBARAN SINGH AND ANOTHER.*

[XVII-193]

(1). **Art 125.—“Alienation”.**] *Held* that the action of a Hindu widow in causing a collusive suit to be brought against her and confessing judgment therein whereby the plaintiff in that suit got a decree for possession of property of which the widow was in possession holding a Hindu widow's estate, was an “alienation” of such property within the meaning of article 125 of the second schedule of Act No. XV of 1877. *SHEO SINGH AND OTHERS v. JEONI AND OTHERS.*

[XVII-141]

(2).———] A hypothecation of immoveable property is an “alienation” within the meaning of art. 125, sch. ii, of the Limitation Act (XV of 1877). *GULAB SINGH v. LACHHO KUER AND OTHERS.*

[X-184]

(3).———*Hindu widow—Mortgage—Sale—Declaratory suit.*] A Hindu widow having a widow's estate in certain immoveable property mortgaged that property by a simple mortgage. More than twelve years after the date of the mortgage the mortgagee sued on it and ultimately brought the mortgaged property to sale. The daughters of the mortgagor then brought a suit for a declaration, that the sale affected only the life interest of the widow. *Held* that the suit was barred by limitation. *JAGGI v. PRITHI PAL AND OTHERS.*

[XIV-194]

Art. 126.—Alienation by widow—Compromise.] The plaintiff claimed possession of two villages alleging that her father in his life-time had given them to her elder sister and her husband and had put the donees in possession, and that after her father's death his widow, the donees and the plaintiff had arrived at a compromise whereby the plaintiff was to have the two villages claimed. The father of the plaintiff died in 1873. His widow, who was found to have

ACT XV OF 1877, Art 126.—(continued.)

been in possession in 1874, sold one of the villages and mortgaged the other in 1875. The deed of compromise relied on by the plaintiff was filed in 1878 and the suit for possession was instituted in 1888. *Held* that if the plaintiff claimed through her father, her suit was barred by limitation under No. 126, Sch. II, of the Indian Limitation Act (XV of 1877) while if she claimed under the compromise the suit was barred under No. 142. *CHANDRA PALI KUARI v. BHAIROON SINGH AND OTHERS.*

[XI-109]

(1) **Art. 127.—For money realized by one member of a joint Hindu family.**]

See. Art 62 No. (6).

(2).———*Joint family property—Muhammadan family.*] The words “joint family property” in No. 127 of schedule ii of the Limitation Act (XV of 1877) mean “the property of the joint family.” Hence the limitation prescribed by No. 127 of Schedule II of the Limitation act does not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immoveable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they alleged they had been dispossessed by the defendants. *Bavasha v. Masumsha* (I. L. R., 14 Bom. 70) dissented from. *AMME RAHAM AND OTHERS v. ZIA AHMAD AND OTHERS.*

[XI-88]

(3).———*“Exclusion.”*] A Muhammadan family consisting of three brothers and their uncle jointly owned certain immoveable property which the uncle managed. Two of the brothers effected a settlement of accounts with the uncle, with reference to the profits of the estate; the share of the three brothers was appropriated; and the money representing that share was deposited with the uncle. Subsequently the two who had effected the settlement withdrew their portion of the common share, and the third brother sued the uncle to recover a sum of money as his one-third portion. He alleged that he had been deceived by the defendant into supposing that his portion was included in the amount withdrawn by his brothers; but he did not base his suit upon any allegation of fraud. It was contended that art. 127, sch. ii, of the Limitation Act (XV of 1877) applied to the suit, Limitation running from a date whereon the defendant had denied all liability in respect of the plaintiff's demand. *Held* that the amount claimed could not, under the circumstances, be regarded as joint family property, that the defendant's denial of the plaintiff's right to recover that amount was not an exclusion of the plaintiff from such property and, that, consequently, art. 127 did not apply to the suit. *AHMAD ALI KHAN v. HUSAIN ALI KHAN.*

[VIII-8]

ACT XV OF 1877, Art. 132.—(continued.)

(Limitation Act). *Dulli v. Bahadur* (N.-W. P., H. C. Rep., 1875 p. 55), and *Pestonji Bezonji v. Abdool Rahiman* (I. L. R., 5 Bom., 463) dissented from. *Maharana Futeh Sangji Farswant Sangji v. Desai Kullian Raji Hakoomut Raji* (13 B. L. R., 254) referred to; *Lallubhai v. Naran* (I. L. R., 6 Bom., 719) followed. MUHAMMAD ZAKI AND OTHERS v. CHATKU MISR.

(3) —————.] The respondents gave the appellants a usufructuary mortgage of certain immovable property for Rs. 399.5 for a term of years, promising, if the possession of the appellants were in any way disturbed to pay interest at the rate of 12 *per cent. per annum*. The mortgage money was charged on the property. The appellants alleging that the respondents had failed to deliver possession of the property, sued them to recover the mortgage money by the sale of the property. Held that the suit was one contemplated by No. 132, sch. ii, of the Limitation Act, 1877. The terms of the deed were radically different from those of the instrument discussed in *Sheo Narain v. Jae Gobind* (W. N. 1882, P. 33). JAGAT SINGH AND OTHERS v. NAND LAL SINGH AND OTHERS.

[III-216]

(4) —————.] *Mortgage of unspecified property.*] "The words of a bond were:—To secure this money I pledge voluntarily and willingly my wealth and property in favour of the said banker." Held that these words were sufficient to create a charge upon the property (though not sufficient to create a mortgage) so that article 132 of the Limitation Act was applicable and the person in whose favour the bond was executed had twelve years limitation and not that of six years. **RAM SIDDH PANDE. v. BAL GOBIND AND OTHERS.**

[VII-15]

(5) ————— [Mortgage.] Held that a suit for sale on a bond in the following terms:—"We have pledged and hypothecated our share of the *zamin-dari* in village to secure the creditors. Until payment of the aforesaid money we shall not transfer the aforesaid property to any one...." was governed by art 147 and not by art 132 of Act No. XV of 1877. *Gurwar Singh v. Thakur Narain Singh* (I. L. R., 14 Calc. 730) dissented from. *Mohi Ram v. Vital* (I. L. R., 13 Bom. 90) and *Kishan Lal v. Ganga Ram* (I. L. R., 13 All. 28) approved. TODAR AND ANOTHER, vs. AYUB KHAN AND OTHERS.

[XIV-57]

(6). ----- *Suit to enforce mortgage against Alienee.*] A held a bond hypothecating the property in suit, dated 28th April, 1869, from X and on the 25th February, 1880, obtained a decree for enforcement of the lien against him, and proceeded in execution to attach and bring the property to sale. B, who

ACT XV OF 1877, Art. 132—(continued.)

had bought the property in 1877-79, objected, but his objection was disallowed. *B* then brought a suit to have the attachment removed and obtained a decree on the ground that the property no longer belonged to the judgment-debtor and *A* was referred to a regular suit to establish his right to the mortgage and sale. *A* thereupon brought this suit with a prayer that the property be put up to sale in execution of his decree. *Held* that the suit was not governed by art. 132 but art. 147 of the Limitation Act, and was therefore within time. *RADHO, GUARDIAN OF RATI RAM, MINOR v. UMAR DARAZ KHAN AND OTHERS.*

[III-200]

SHIB LAL *v.* GANGA PRASAD.

[IV-188]

(7). ————— *Mortgage—Trees.* *Held* that the hypothecation bond charging certain standing trees is for the purpose of limitation a mortgage bond (trees being regarded as immoveable property) to which art. 132 of the Limitation Act applies. *RAM GHULAM v. MANOHAR DAS.*

[VII-59]

(8). ————— *Remedy against mortgagor's person.* In a suit by a mortgagee to enforce the mortgage, No. 132, sch. ii of the Limitation Act, 1877, is not applicable, so far as relief against the mortgagor personally is claimed. *Lallu Bhai v. Naran (I. L. R. 6 Bom., 719)* dis-sented from. *RAGHUBAR DIAL v. LACHMIN.*

[III-114]

PATI RAM *v.* BALDEO AND OTHERS.

[III-185]

(9). **Art. 132—(Explanation).—Suit for cesses.** *Held* that a suit by the *zemindars* of a village against the *muafidars* with whom the village had been settled for *zemindari* duties or cesses was governed by art. 132 (expl.) of Act XV of 1877. *RAHAT ALI AND OTHERS v. MAHARAJ SINGH AND OTHERS.*

[II-28]

(1). **Art. 134.—For redemption against mortgagor who has redeemed.** *Held* that a suit by the owner of a portion of a mortgaged estate which has been redeemed by his co-mortgagor, to redeem such portion, brought against the co-mortgagee, is governed by art. 148 and not 134 of Act XV of 1877. *Umr-un-nissa v. Mohammad Yar Khan (I. L. R., 3 All., 24)* distinguished. *Pancham Singh v. Ali Ahmad (I. L. R., 4 All., 58)* referred to. *NURA BIBI v. JAGAT NARAIN AND ANOTHER.*

[VI-98]

RAGHUBIR SAHAI AND OTHERS *v.* BUNYAD ALI AND ANOTHER.

[VI-152]

ACT XV OF 1877, Art. 134—(continued.)

ASHFAQ AHMED AND OTHERS *v.* WAZIR ALI AND OTHERS.

[XI-211]

(2). ————— *For redemption against purchaser of mortgagee right.* *Held* that No. 134, sch. ii of Act No. XV of 1877, has not any application to the case of a person purchasing, not the property itself, but the interests of the mortgagee. *CHANDAN KUAR v. JHURAN SINGH AND ANOTHER.*

[I-75]

KAMTA PRASAD AND OTHERS *v.* BAKAR ALI AND OTHERS.

[I-122]

BHAGWAN SAHAI *v.* BHAGWAN DIN AND OTHERS.

[VI-303]

RUGI RAI AND OTHERS *v.* WALI MUHAMMAD AND OTHERS.

[II-169]

Art. 135—For possession against mortgagor. See art. 113 (1)

Art. 136.—Where in a suit for redemption a compromise was entered into between the mortgagor and his mortgagees to the effect that the former should be entitled to redeem the mortgaged property on payment of a certain sum. *Held*, as between the purchaser of the equity of redemption and the representatives of the mortgagees, that the limitation prescribed by art. 136 of sch. ii of the Indian Limitation Act, 1877, could not be applied in the absence of payment of the sum fixed under the compromise, the mortgagor's vendee not being entitled to possession until such payment. *MAHABIR PANDE AND OTHERS v. NASIRULLAH AND OTHERS.*

[XIII-67]

Art. 137.—In execution of a decree obtained upon a bond executed by one *A B* certain immoveable property owned by him was put up for sale and purchased by *B R*. *B R* got actual possession of the land on the 16th March, 1873. In execution of another decree obtained on a bond executed by *K* and *A* (the son and grandson of *A B*) the same land was again put up for sale and purchased by *A R*. *K* and *A* had no interest in the land at the time. *A R* got formal possession over the land purchased by him on the 16th September, 1873, and subsequently transferred it to *A H* the present plaintiff. This was a suit by *A H* for the possession of the land against *B R*, the first auction purchaser, on the ground that the decree under which *B R* purchased was irregularly and illegally obtained. The suit was brought on the 19th March, 1885,

ACT XV OF 1877, Art. 137.—(continued.)

Held that the suit having been brought more than twelve years after *B R* had obtained actual possession it was barred by time. *Faisri Singh v. Pal Singh* (*W. N.* 1883, p. 193) referred to. *ABID HUSAIN v. BALLU RAM*,

[VIII-156]

(1). **Art. 138.—Formal possession.** Where possession of property purchased at auction-sale in execution of a decree is formally given by the Court under s. 318 or s. 319 of the Code of Civil Procedure, although the actual possession may remain with the judgment-debtor, the date of granting of such formal possession forms a fresh starting point for limitation in respect of a suit for possession of the property sold, brought by the auction purchaser or his representative. *Juggobundhu Mukerjee v. Ram Chunder By-sack* (*I. L. R.*, 5 *Calc.*, 584) and *Juggobundhu Mitter v. Purnanund Gossami* (*I. L. R.*, 16 *Calc.*, 539) referred to. *MANGLI PRASAD v. DEBI DIN*.

[XVII-127]

(2).—**Extinguishment of right—Resistance.** It is unquestionable that a person holding a title to real property which he cannot reduce into possession without bringing a suit (e.g. a purchaser at auction) would stand barred from the remedy if he does not come in the Court within the limitation period of twelve years under sec. 28 and art. 138 of the Limitation Act. But the Court must come to a distinct finding of fact that he was resisted from getting possession. *PIR BAKHS V. MAKHAN LAL AND OTHERS*.

[VII-92]

(3).—**Adverse possession.** This suit for possession of certain immoveable property purchased by the predecessor in title of the plaintiff at an auction-sale held on the 20th June, 1868, was instituted on the 16th August, 1880. The plaintiff had never obtained possession of the property, whether formal or actual, since the date of his purchase. *Held* that the suit was barred by time. *MEHRAB KHAN AND OTHERS v. MUHAMMAD ALI*.

[II-31]

Arts. 140 & 141.—Adverse possession—Reversioner. Where property which by law should be in the possession of a female heir is held adversely to such heir by a trespasser, the possession of the trespasser is adverse also as against the reversioners of such female heir as well as against the female heir; and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. *Hanuman Prasad v. Bhagauti Prasad* (*W. N.*, 1897, p. 80) approved. *TIKA RAM AND ANOTHER v. SHAMA CHARAN*.

[XVII-195]

(1) **Art. 141. Reversioner—Adverse possession.** Where a reversioner entitled to succeed

ACT XV OF 1877, Art. 141.—(continued).

to immoveable property on the death of the widow of a separated Hindu, sued after the death of the widow to recover possession of the said property by ejectment as trespassers of certain persons who had obtained possession during her life-time:—*Held* that limitation did not begin to run against the plaintiff until the time when her estate fell into possession, *viz.*, the death of the widow, and that the period applicable to such a suit was that prescribed by art. 141 of sch. ii of the Indian Limitation Act (Act No. XV of 1877). *Sri Nath Kuar v. Prosunno Kumar Ghose* (*I. L. R.*, 9 *Calc.*, 934) followed. *RAM KALI v. KEDAR NATH AND ANOTHER*.

[XII-22]

(2).—**Reversioner as such—Heir-at-law.** Art. 141 of the Limitation Act does not apply to the case of an heir-at-law suing for possession of immoveable property in that character, but provides for a suit instituted by a Hindu or Mohammedan who, prior to the date of the death of the female, occupied the position of a remainder man or reversioner or a devisee, upon the basis of such title. *HASHMAT BEGAM AND ANOTHER v. MAZHAR HUSAIN AND OTHERS*.

[VIII-38]

(3).—**Adoption—Adverse possession.** The plaintiffs sued for possession of certain *zamin-dari* property as reversioners to the estate of one *C*, their right to sue having accrued as alleged on the death of the widow of *C*, which took place on 14th October, 1884. The defendant, alleging himself to be the adopted son of *C*, and being in possession of the property in dispute since the death of *C*, which happened in 1869, contended that the claim was barred. The Court of first instance dismissed the claim as barred by art. 118 of the Limitation Act, and in appeal the District Judge held the claim was barred by defendant's adverse possession over the property for more than twelve years. On second appeal it was contended that the suit being by a Hindu entitled to possession as a reversioner on the death of a female, was governed by art. 141 of the Act, and therefore not barred. *Held* that, as on the facts found the adopted son held adversely to the widow, adverse possession which barred the widow, barred also the reversioners and therefore the claim was barred. The *Shiva Ganga Case* (9 *Moo.*, 1. A. 543) was referred to. The following cases were cited in the course of the argument.—*Rai Bahadoor Singh v. Achambit Lal* (*L. R.*, 6 *Ind. App.* 110); *Jagdamba Chowdhurani v. Dakhnia Mohun* (*L. R.* 13 *Ind. App.* 84); *Rajendro Nath Holder v. Jogindro Nath Banerjee* (14 *Moo.*, 1. A. 67). *GHANDHRAP SINGH AND OTHERS v. LACHMAN SINGH AND OTHERS*.

VIII-192-

(4).—**For possession of immoveable property and for declaration that adoption is invalid.** Art. 118 of the Limitation Act applies only to suits where the relief claimed is purely for a

ACT XV OF 1877, Art. 141.—(continued.)

declaration that an alleged adoption is invalid or never in fact took place. Such a suit is distinct from a suit for possession of property, and the latter kind of suit cannot be held to be barred as a suit brought under art. 118, merely by reason of its raising a question of the validity of an adoption, but is separately provided for by art. 141. It is discretionary in a Court to grant relief by a declaration of a right, and consequently the fact that a person has not sued for a declaration should not be a bar to a suit for possession of property on any ground of limitation prescribed for the former. In a suit by a person who had objected to an attachment of immovable property in execution of a decree, and whose objection had been disallowed to set aside the order disallowing the objection, for removal of the attachment, and for possession of the property, the defendants, at whose instance the attachment had been made, set up a title based on the adoption of the judgment-debtor by the widow of the person whom the plaintiff claimed to succeed by right of inheritance. *Held* that the limitation applicable to the suit was art. 141 and not art. 118 of the Limitation Act (XV of 1877), the suit being not to obtain any declaration that the alleged adoption was invalid, but for recovery of possession of immovable property, for which there was a special limitation. **BASDEO v. GOPAL.**

[VI-232]

NATTHU SINGH v. GULAB SINGH.

[XV-36]

Per contra:—

INDA AND ANOTHER v. JEHANGIRA AND OTHERS.

[X-241]

(1). **Art. 142—Alienation by widow—Compromise.]***See art. 126.*

(2).—*Mortgage by guardian—Suit to set aside and for possession.] Held* that a suit for possession of immovable property belonging to the plaintiff, by the cancelment of a sale-deed executed by the plaintiff's uncles as guardians of the minor (plaintiff) was governed by art. 44 if the uncles were lawful guardians and by art. 142 and 144 if they were not lawful guardians. **GAJESHRI PRASAD v. DHARAM DAT AND OTHERS.**

[VIII-152]

(3).—*_____.] The* plaintiff sued to set aside a mortgage by conditional sale of certain immovable property belonging to him, made on his behalf during his minority, and for possession of the property. *Held* that the suit was one described in No. 142, sch. ii, Limitation Act, 1877, and not in No. 91 of that schedule. **RAMAUTAR PANDEY v. RAGHOBAR JATI AND OTHERS.**

[III-64]

ACT XV OF 1877, Art. 142.—(continued.)

SHEO SAHAI v. MUHAMMAD ASKARI.

[VIII-253]

(4).—*Dispossession.] In* 1867 plaintiff objected to B's erecting a wall on a piece of land attached to a mosque and on a complaint being preferred by the plaintiff, the Magistrate ordered (in the same year) the defendant not to build the wall till he had inspected the locality. No proceedings were taken by the defendant. In 1882 the Magistrate inspected the locality and allowed the defendant to build the wall. The plaintiff consequently brought this suit. *Held* that the suit was not barred by art 142, Limitation Act, as the defendant cannot be said to have been in possession or plaintiff dispossessed from 1867. **ABDULLAH AND ANOTHER v. HARGU LALL AND OTHERS.**

[VI-277]

(1). **Art. 144.—For possession of immovable property by avoidance of instrument.]***See:—*

Art. 44.

Art. 91, Nos. (2)—(11).

Art. 95, No. (1).

Art. 96.

(2).—*For possession of immovable property and for declaration that adoption is invalid.]**See art. 118, No. (1).*(3).—*For declaration of right to and actual possession of immovable property.]**See art. 120, No. (18).*(4).—*Suit to set aside auction-sale and for possession of immovable property.]**See art. 12 (a) Nos. 3, 4, 5, 6 and 7.*(5).—*Auction-sale set aside—Suit by purchaser for possession.]**See art. 13.*(6).—*For specific performance of contract of sale.]**See art. 113, No. (2).*

(7).—*Suit against benami purchaser.] Held* that a suit for the recovery of immovable property against a benami purchaser, who denies the title of the real purchaser is governed by art. 144 of Act XV of 1877. **DALIP SINGH AND ANOTHER v. TULSHI RAM AND OTHERS.**

[VII-91]

(8).—*Adverse possession—Reversioner.] Where* property which should by law be in the possession of a female heir is held adversely to such heir by a trespasser, the possession of the trespasser is adverse also as against the reversioner of such female heir as well as against

ACT XV OF 1877, Art. 144.—(continued.)

the female heir and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. *Hanuman Prasad v. Bhagarti Prasad* (W. N. 1897, p. 80) approved. *TIKA RAM AND ANOTHER v. SHAMA CHARAN.*

[XVII-195]

(9). —————.] A female heir in possession of immoveable property for her life can without legal necessity make a valid alienation of her life estate, but the possession of the alienee will not under ordinary circumstances be adverse to the reversioner, whose cause of action to the possession of the property will not accrue until the death of the female heir or of the last of the such heirs if more than one. One Paltan Singh, a separated Hindu, died about 1822, leaving two widows, Harnam Kunwari and Asman Kunwari, and three daughters, Rachpali, Jairaji, and Dilraji. The widows took possession of the property of Paltan Singh, and sometime before 1857 Harnam Kunwari sold a certain village to one Harnam Pathak. Harnam Kunwari died in 1857, having survived the other widow. The three daughters next succeeded to the immoveable property left by Paltan Singh, and the last of them died in 1890. In 1894 the two sons of Rachpali sued for the possession of the property which had been sold by Harnam Kunwari. *Held* that the suit was within time.

Per BURKITT, J. :—Decrees affecting immoveable property obtained against a female heir in respect of the subject matter of the inheritance (if obtained without fraud or collusion of the like) are binding on the reversioner. An alienation made by a female heir in possession is good against her for her life, but is not necessarily binding on the reversioner, to whom if it be invalid, a cause of action accrues on the death of the female heir. Where property, the estate in which has descended to a female heir, never reaches her hands, but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of the adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property. The enactment of article 142 in the schedule to Act No. IX of 1871 and of art. 141 in the schedule to Act No. XV of 1877 has not made any alteration in the law as laid down in the last preceding rule. *Sambasiva v. Ragava* (I. L. R., 13 Mad., 512); *Curpandas Govindji v. Vundravandas Purshottam* (I. L. R., 14 Bom., 482); *Mukta v. Dada Valad Supadu* (I. L. R., 18 Bom., 216); *Babu Valad Sheikh Ibrahim v. Bhikari* (I. L. R., 14 Bom., 317); *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (9 W. R., 505); *Amirto*

ACT XV OF 1877, Art. 144.—(continued.)

Lal Bose v. Rajonee Kant Mitter (23, W. R., 214; S. C., I. R. 2 I. A., 113); *Sri Nath Kur v. Prosuno Kumar Ghose* (I. L. R., 9 Calc., 934); *Hari Nath Chatterjee v. Mohur Mohun Goswami* (I. L. R., 21 Calc., 8); *Mussummat Lachhan Kunwar v. Anant Singh* (L. R., 22 I. A., 25); *Appasami Odayar v. Subramanya Odayar* (L. R., 15 I. A., 167); *Drobomoyi Gupta v. Davi*, (I. L. R., 14 Calc., 323) and *Ramkali v. Kedar Nath* (I. L. R., 14 All., 156) referred to. *HANUMAN PRASAD SINGH AND OTHERS v. BHAUTI PRASAD AND OTHERS,*

[XVII-80]

(10). ————— *Denial of right.* The estate in dispute originally belonged to one N S. On his death in 1861 the name of one of his heirs R G was recorded in the revenue papers as proprietor. At this time the estate was held by certain persons under a farm from the Government under Regulation IX of 1833. In 1866 such estate was put up for sale in execution of a decree against R G and was purchased by the farmers. On the 28th August, 1868, one G obtained a decree against R G and the farmers, for the enforcement of a lien against such estate. In September, 1869, he caused the estate to be sold and purchased it himself. In September, 1868, the farm of the estate had expired. In 1880 G S and others brought the present suit against G for possession of a portion of such estate claiming as heirs to N S. G put up as a defence to this suit that he and R G had been in adverse possession of such share for more than 12 years and the suit was therefore time-barred under No. 144, sch. ii of Act No. XV of 1877. *Held* that the plea of adverse possession could not be sustained as it was not shown that R G at any time in 1861 or subsequently asserted or intended to assert any title adverse to the plaintiffs. And again so long as the farm continued possession was not in R G and the possession of farmers being in no way on behalf of R G to the exclusion of any rightful owner. The suit must therefore be decreed. *GHAROM v. GOPAL SINGH AND OTHERS.*

[I-143]

(11). ————— *Occupancy holding.* A sued for certain land alleging that it was part of his father's cultivatory holding. The defence was that it was not such cultivatory holding but was land given to her by the *zemindar*. The lower appellate Court dismissed the suit on the ground that A had not been in possession within twelve years prior to the institution of the suit and was therefore barred. *Held* that the suit was governed by art. 144, Act XV of 1877; it was therefore necessary to look not to the appellant's possession within twelve years, but to the respondent's adverse possession against them. The suit was remanded. *MOTAR AND ANOTHER v. DIPA.*

[II-40]

ACT XV OF 1877, Art. 144.—(continued.)

(12).—[Mortgage.] Certain property mortgaged by *A* was redeemed by *B* who claimed to be the heir of *A*. After more than twelve years of the redemption, the true representatives of *A* brought this suit to have their rights declare to the property. *Held* that the suit was barred by art. 144, Limitation Act. JAI-PAL RAI AND ANOTHER *v.* ILAHI BAKSH AND ANOTHER.

[III-178]

(13).—[Mortgage.] One *A* mortgaged a certain *zemindari* share to *X B*, one of the 3 sons of *A* brought a suit to redeem the property but failing to deposit the mortgage money found due, his suit was dismissed. In execution of the decree for the costs the right and interest of *B* in the property was sold in auction and was purchased by the present defendant. The defendant (now standing in the shoes of *B* mortgagor) deposited the money found due to the mortgagee and was on the 8th July, 1857, declared by the Court as entitled to the property and was put in possession. *C* and *D* the other two sons of *A* now brought this suit to recover possession of two-thirds of the property from the defendant, contending that he had acquired one-third only of the property, the share of *B*. The defendant contended that his possession being adverse from the beginning the suit was barred by limitation under art. 144, Limitation Act. *Held* that the suit was not barred. Before a claim otherwise good can be defeated on the ground of adverse possession on part of defendant it is necessary that the latter prove to the satisfaction of the Court that their possession has been unmistakably in their own right and to the exclusion of an adverse to the plaintiff. KARIM DAD KHAN AND OTHERS *v.* FAIZAN BIBI AND OTHERS.

[V-51]

(14).—[Mortgage.] *Held* that where a mortgagee under a deed of conditional sale had taken possession of the mortgaged property after the end of the mortgage term adversely and in his own right under the terms of the conditional sale and not as a mortgagee. A suit by the mortgagor for possession of the property by redemption was governed by art. 144 and not 148 of Act XV of 1877. BHOLA AND OTHERS *v.* AJUDHIA PRASAD AND OTHERS &c.

[II-84]

(15).—[Mortgage.] This was a suit by the purchasers of the equity of redemption from one *F D* under a sale-deed dated in 1867, for a declaration of their title. It was resisted by the representatives of *F D* on the ground of adverse possession for twelve years and that a declaratory suit does not lie. It appears that the property in dispute was from before the year 1867 in possession of certain persons as mortgagees and was even at the date of the suit so held by them. *Held* that under these circum-

ACT XV OF 1877, Art 144.—(continued.)

stances no question of adverse possession arises between the plaintiffs and the defendants, and that a declaratory suit was maintainable. *Held* further that as regards defendant *B* who claims title not through *F D* but adversely to him and those who took under him, her right, if any to the property, is lost under s. 28 of Act XV of 1877 as a suit by her against the mortgagees would be barred by art. 144 of sch. ii of Act XV of 1877. BIRANGI AND OTHERS *v.* RAMSARAN AND ANOTHER.

[VII-103]

(16).—[Usufructuary mortgagee holding over after stipulated period.] When a mortgagee in possession under a usufructuary mortgage, holds over after the time limited in the mortgage-deed for surrender of the property, his possession does not, by that fact alone, become adverse to the mortgagor, who still has a period of sixty years within which to sue for recovery of possession. Juggurnath Sahoo *v.* Syed Shah Mahomed Hossein (14. B. L. R., 389) referred to. POKHPAL SINGH *v.* BISHAN SINGH.

[XVII-214]

(17).—[Award—Fresh limitation.] *A, B D* and *E* were recorded proprietors of a certain village but *D* and *E* were not in possession. At the settlement *A* and *B* applied for the exclusion of the names of *D* and *E* for want of possession; the matter was referred to arbitration and an award made declaring that the names of *D* and *E* should continue to be recorded and fixing the extent of their shares. Neither of them however obtained possession. *C*, having purchased the shares of *D* and *E*, brought this suit to recover possession of the shares. *Held* that the plaintiff and his predecessor in title having been out of possession for over twelve years the suit was barred by time and the award which declared their title only but did not give possession could not give a new start. MOHAN AND OTHERS *v.* MOHSIM ALI.

[I-70]

(18).—[Cause of action—Suit against vendee for possession] In 1876 *A* sold his property to *B* under a registered sale-deed by which he gave *B* legal possession of the property. But soon after a difficulty arose as to the mutation of names, the defendant saying that part of the consideration had not been paid. In 1885 *B* brought this suit to assert his proprietary right in the estate, making the *dakhil kharij* resistance his cause of action. *Held* that the suit was governed by art. (144) and not by art. 113 of the Limitation Act. KALU AND ANOTHER *v.* KISHORE AND ANOTHER.

[VI-96]

(19).—[Formal possession.] The usufructuary mortgagees of certain land sued for possession thereof and obtained a decree, on the 16th September, 1875. On the 15th July, 1875, one *G* obtained a money decree against

ACT XV OF 1877, Art. 144.—(continued.)

the mortgagors of the same land and in execution thereof caused it to be sold on 23rd September, 1876, himself purchasing. On the 4th July, 1879, the mortgagees executed their decree of 1875, and were formally put in possession by the court *amin* on the 11th December, 1879. When they went on the land they were obstructed by G. Hence they brought this suit on the 9th August, 1881, for possession of the land. *Held* following (*Gopal Das v. Than Singh* (J. L. R., 4 All., 184) that the date from which limitation ought to be reckoned was the 11th December, 1879, the date on which the *amin* had made over formal possession to the plaintiffs, and the suit was therefore not barred by time. **UTTAM CHAND AND ANOTHER v. SHAIKH GHAZIUDDIN.**

[III-192]

(20).—*Adverse possession—Possession of mortgagee.* The possession of a usufructuary mortgagee being the possession of all the persons who have the right of redemption, that is, of all the persons entitled to the estate, it is only when after redemption possession is taken by some of the persons so entitled that their possession can become adverse as against the others. **MAYAT HUSEN AND OTHERS v. ALI HUSEN AND OTHERS.**

[XVIII-19]

(1). **Art. 147.—Foreclosure of mortgage executed while Act XIV of 1859 was in force.** See s. 2, No. (2).

(2).—*Suit on hypothecation bond.* A suit upon a bond for money payable on demand, by which immoveable property is hypothecated as security for the debt, wherein the relief prayed is recovery of the amount with interest by establishment of the right to enforce the hypothecation by auction-sale of the interest of the obligor in such property, is governed by art. 147 of Act XV of 1877, and not by art. 132 of Act XV of 1877 (Limitation Act). **SHIB LAL v. GANGA PRASAD.**

[IV-188]

TODAR AND ANOTHER v. AYUB KHAN AND OTHERS.

[XIV-57]

RADHO, GUARDIAN OF RATI RAM MINOR v. UMAR DARAZ KHAN AND OTHERS.

[III-200]

(1). **Art. 148.—Sale for arrears of revenue—Conditional decree—Mortgage.**

See s. 19, No. (10).

(2).—*Usufructuary mortgagee holding over after stipulated period—Adverse possession.*

See art. 144, No. (16).

(3).—*For redemption—Against purchaser of mortgagee right.* It was not intended

ACT XV OF 1877, Art. 147.—(continued.)

that property which would pass on the sale by mortgagee of his interest should come within the scope of art. 134. That article was intended to protect, after the expiration of twelve years from the date of a purchase, a person who, happening to purchase from a mortgagee, had reasonable grounds for believing, and did believe, that his vendor had the power to convey and was conveying to him an absolute interest, and not merely the interest of a mortgagee. *Radanath Das v. Gisborne and Co.* 14 Moo. (J. A. 1); *Piare Lal v. Saliga* (J. R. L. 2 All. 394); *Kamal Singh v. Batul Fatima* (J. L. R. 2 All. 460) referred to **BHAGWAN SAHAI v. BHAGWAN DIN AND OTHERS.**

[VI-30]

RUJI RAI AND OTHERS v. WALI MUHAMMAD AND OTHERS.

KAMTA PRASAD AND OTHERS v. JUTUP AND OTHERS,

CHANDAN KUAR v. JHURAN SINGH AND OTHERS.

(4).—*Agreement of redemption.* Where a co-mortgagor redeems the whole mortgage thereby puts himself into the position of a mortgagee as regards that portion of the property which represents the interest of the other co-mortgagors and the period under applicable to a suit for redemption of the co-mortgagors is that provided in schedule ii of the Limitation Act. Such period begins to run from the date the original mortgage was redeemable from the date of its redemption by the co-mortgagor. *Nura Bibi v. Jagat Narain* (J. R. L., 8 All., 295) and *Raghubir Sahai v. yad Ali*, *Weekly Notes*, 1886, p. 152) distinguished. *Ram Singh Baldeo Singh* (W. N., 1885, p. 300) referred to **ASHFAQ AHMED AND OTHERS v. WAZIR AND OTHERS.**

[XI]

RAGHUBIR SAHAI AND ANOTHER v. BUNALI.

[VI-]

NURA BIBI v. JAGAT NARAIN AND ANOTHER

VI.

(5).—*By purchase of equity of redemption.* In a suit for redemption of a usufructuary mortgage, where the plaintiff had acquired the mortgagors' rights by purchase at a sale in execution of a decree, that such acquisition being admitted, art. 148, and not art. 137, nor art. 144 of the second schedule

ACT XV OF 1877, Art. 147.—(continued.)

the Limitation Act (XV of 1877) was applicable. In ordinary cases of suits for redemption of mortgage, the time from which the period of limitation begins to run under art. 148, sch. ii of the Limitation Act, is the date of the mortgage. But where a term is fixed for the repayment of the mortgage-money, and it does not appear that the plaintiff is entitled under the deed to redeem before the lapse of the term, the period begins to run from the time when the term expires. *Bhagwat Das v. Parshad Singh (I. L. R., 10 All., 602)* referred to. *THE MAHARAJAH OF BENARES v. SITA RAM NAIK AND OTHERS.*

[IX-135]

Art 156.—Appeal.] This was an appeal not from the order made under s. 32, C. P. C. making the appellant a defendant in the suit, dated 8th February, 1882, but from the order disallowing the mortgage-money, and it does not appear that the plaintiff is entitled under the deed to redeem before the lapse of the term, the period begins to run from the time when the term expires. *Bhagwat Das v. Parshad Singh (I. L. R., 10 All., 602)* referred to. *THE MAHARAJAH OF BENARES v. SITA RAM NAIK AND OTHERS.*

[III-8]

Art 156.—Appeal.] This was an appeal not from the order made under s. 32, C. P. C. making the appellant a defendant in the suit, dated 8th February, 1882, but from the order disallowing the mortgage-money, and it does not appear that the plaintiff is entitled under the deed to redeem before the lapse of the term, the period begins to run from the time when the term expires. *Bhagwat Das v. Parshad Singh (I. L. R., 10 All., 602)* referred to. *THE MAHARAJAH OF BENARES v. SITA RAM NAIK AND OTHERS.*

MUHAMMAD ABID AND ANOTHER v. AD ASGHAR,

[VI-2]

Art 161.—Held that art. 161 of Act XV of 1883, on the application of the respondent, no application to cases where the decree-holder took steps *suo motu*. *GOPAL DAS v. SINGA RAM AND ANOTHER.*

[VIII-115]

Art. 164.—“Process”.] On the 15th January, 1883, on the application of the respondent, the District Judge made an *ex parte* order under section 21 of Act XL 1858 directing (i) that the certificate of guardianship granted to the appellant should be cancelled, (ii) that the property of the minor should be made over to the appellant to the respondent, &c. in the same day a notice was issued to the respondent to the effect that as the certificate granted to him had been revoked and granted to the respondent he should make over the minor's property to the respondent. This notice was served on the appellant on the 4th of February, 1883. On the 11th April, 1883, the appellant applied to the District Judge under s. 108

ACT XV OF 1877, Art. 158.—(continued.)

of the Code of Civil Procedure for an order to set aside the *ex parte* order of the 15th January, 1883. *Held* that the application was barred by art. 164 of the Limitation Act, the notice being a “Process for enforcing” the *ex parte* order which had been executed within the meaning of the article. *SUNRAJ KUARI v. AMBIKA PRASAD.*

[IV-1]

(2) ———— “Any.” *Held* that the word “any” in the third column of art. 164 must be read as meaning “first.” *PACHU v. JAIKISHEN.*

[IV-322]

(3) ———— Where property had been attached in execution of a decree, *held* that the date on which the property was attached and not the date of the sale in execution, being the date of executing the first process for enforcing the decree, was the date from which limitation should be computed under art. 164. *PACHU v. JAIKISHEN (N. N. 1884, p. 322)* referred to. *HAR PRASAD AND OTHERS v. JAFAR ALI.*

[V-73]

Art. 167.—Obstruction.] *B* and *A* held a decree for certain immoveable property. They applied for execution of their decree, but, on the *amin* going to the spot to deliver possession, obstruction was offered by the *karinda* of one *F A*. This obstruction was made the subject of a suit which was decided by the Court of first instance in favour of the plaintiffs. The defendants appealed both to the District Judge and to the High Court, but their appeals failed on technical grounds. The decree-holders then applied again for execution, and obstruction was again made on the part of *F A* on the 30th January, 1886. On the 20th February, 1886, *F A* filed a *mukhtarnama* in favour of the person who had actually been instrumental in obstructing the execution of the decree. The decree-holders filed a complaint of this second obstruction on the 13th March, 1886. This complaint was dismissed by the Subordinate Judge as barred by limitation. The decree-holders then appealed to the High Court. *Held* that the defendant *F A* might properly be said to have raised an obstruction within the meaning of the s. 328, C. P. C. when he filed a *mukhtarnama* in favour of the person who might or might not have been causing obstruction before that date and the claim was not barred by limitation. *BUDHAN AND OTHERS v. FAZAL ALI.*

[XI-131]

Art. 168.—For re-admission of appeal—Discretion of Court.] A Court has no power to extend the time allowed by art. 168, schedule ii of the Limitation Act (XV of 1877) for making an application under s. 558 of the Code of Civil Procedure for re-admission of an appeal dismissed for default under s. 556. Where such an order of dismissal has become final by the expiration of the period allowed for an appeal, it is immaterial to consider whether or not it was well

ACT XV OF 1877, Art. 168.—(continued.)
made. MANRAKHAN MISR v. SOBHA SINGH
AND ANOTHER.

[X-196]

BHUNDAR TIWARI AND OTHERS v. THAKUR
TIWARI AND OTHERS.

[IX-151]

Art. 173.—*A* obtained a decree against *B*, father of *C*, and in execution thereof attached certain property. *C* objected to the attachment on the ground that *B* had transferred the property to him under a sale-deed, dated 15th December, 1877. The decree was dated 4th August, 1878. The objection was allowed and the property released by an order dated 13th April, 1880. *A* then brought a suit against *B* and *C* with the object of setting aside the order. This suit was dismissed on the 29th April, 1881, on the ground that the decree of the 4th August, 1878, had already been satisfied by sale of the judgment-debtor's property other than that in dispute. That sale however which had satisfied the decree was set aside by the High Court on the 16th March, 1882, and the proceedings in connection of the refund of the purchase money by the decree-holder terminated on the 29th May, 1883. On the 28th August, 1883, *A* whose suit was dismissed on the 29th April, 1881, applied for a review of judgment under s. 623, C. P. C. Held that the period of limitation began to run from the 29th April, 1881, "the date of the decree or order". KUBER SINGH v. FATEH SINGH.

[IV-330]

(1). Art. 175 C.—*For substitution of names—Death of plaintiff-respondent.* Held that art. 171 B of Act XV of 1877 does not apply to an application by a defendant-appellant to have the representative of a deceased plaintiff-respondent made a respondent. *Lakshmi Bai v. Balkrishna* (I. L. R., 4 Bomb., 654); *Rajnone Dbee v. Chander Kant Sanial* (I. L. R., 8 Calc., 440); *Baijner v. Haihi Singh* (I. L. R., 9 Bom., 56) referred to. NARAIN DAS AND OTHERS v. LAJJA RAM.

[V-169]

(2). ———— Held that art. 178 and not 171 B applies to an application by a defendant appellant to have the representative of a deceased plaintiff respondent made a respondent. CHAJMAL DAS AND OTHERS v. JAGDAMBA PRASAD.

[VIII-111]

RAM SARUP v. RAM SAHAI AND ANOTHER.

[VIII-114]

DEBIDIN v. CHUNNA LAL.

[VIII-112]

Per contra.

BALDEO v. BISMILLAH BEGAM AND OTHERS.

[VI-305]

ACT XV OF 1877, Art. 175 (c).—(continued.)

RAMESHAR SINGH v. BISHESHAR SINGH.

[V-217]

Art. 177.—Section 599, C. P. C., was not inconsistent with art. 177 of sch. ii of Act XV of 1877 as read in conjunction with the provisions contained in the sections of that Act which are applicable to art. 177. The limitation therefore for an application for leave to appeal to Her Majesty in Council is six months from the date of the decree to appeal from which leave is sought. In the matter of the petition of SITA RAM KESHO AND OTHERS.

[XII-152]

(1). Art. 178.—*Application—For substitution of names.—Death of plaintiff respondent.*

See art. 175 (C), No. 2.

(2). ———— Under s. 316, C. P. C.,] Held that the law of limitation was not applicable to applications for the grant of a certificate under s. 316, C. P. C. *Kylasa Goundan v. Ramasami Ayyar* (I. L. R., 4 Mad., 172); and *Vithal Janardan v. Vithojirav Putlajirav* (I. L. R., 6 Bom., 586) followed. PETITION OF KISHEN SINGH.

[III-262]

(3). ———— For an order absolute for sale.] Art. 178 of sch. ii of the Indian Limitation Act, 1877, does not apply to an application for an order absolute for the sale of mortgaged property, under s. 89 of the Transfer of Property Act, 1882. *Baimanekbai v. Manekji Kavasji* (I. L. R., 7 Bom., 213) approved. RANBIR SINGH v. DRIGPAL AND OTHERS.

[XIII-198]

(4). ———— Under s. 206, C. P. C.,] Held that an application under s. 206 for amendment of a decree, by bringing it into conformity with the judgment was not governed by art. 178 or any article of the Limitation Act. It is the bounden duty of the Court to see that its decrees are in accordance with the judgments and the Court can do so after any length of time provided that the decree is alive. Art. 178 applied only to applications made to Court to exercise powers while without being moved by such application it is not bound to exercise. DARBO v. KESHO RAY.

[VII-79]

DHAN SINGH v. BASANT SINGH.

[VI-182]

Per contra :—

GAYA PRASAD v. SHIKHAR PRASAD.

[I-114]

(5). ———— By judgment debtor for refund of money paid in excess.] The judgment-debtors against whom a decree had been executed applied for a refund of money which

ACT XV OF 1877, Art. 178.—(continued.)

they alleged had been recovered in execution by the decree-holders in excess of what was actually due under the decree. Upon this application, an account was taken by order of the Court. *Held* that the limitation applicable to the case was that provided by art. 178, sch. ii of the Limitation Act, and that the right to apply for the refund of the excess amount paid in execution accrued at the time when the account was taken and stated on the application of the judgment-debtors in the course of the proceedings in execution. **MULA RAJ AND OTHERS v. DEBI DIHAL AND OTHERS.**

[V-61]

(6.) ————— *By auction purchasers for refund of purchase money under s. 315 C. P. C.]* A suit by a judgment-debtor whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June, 1884. On the 11th June, 1887, the purchaser at the sale applied, under s. 315 of the C. P. Code, for a refund of the purchase money. *Held* that the limitation applicable was that provided by art. 178 of sch. ii of the Limitation Act (XV of 1877), that the right to apply accrued on the passing of the High Court's decree, and the application was therefore not barred by limitation; but that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs. **GIRDHARI AND OTHERS v. SITAL PRASAD.**

[IX-113]

(7). ————— *Application by a creditor—Insolvency.]* In July, 1873, a person was declared insolvent under the provisions of Chapter XX of the Civil Procedure Code. Only one creditor then proved his debt, and no schedule was framed. This creditor having applied for the sale of property belonging to the insolvent, another creditor, in May, 1883, applied to prove his debt and to have his name inserted in the schedule which the Court then ordered to be framed. *Held* that such application could not be treated as made under s. 353, as no schedule had been framed, but must be regarded as in the nature of a tender of proof of debt under s. 352; that it was governed by art. 178 of the Limitation Act, 1877; and that, the right to apply having accrued at the date of the declaration of insolvency, the application was beyond time. **PARSHADI LAL AND ANOTHER v. CHUNNI LAL.**

[III-264]

GANGA BISHAN AND ANOTHER v. CHATTAR SINGH.

[IX-84]

Per contra:—

MADHO DAS v. BHOLA NATH.

[III-15]

ACT XV OF 1877, Art 178.—(continued.)

(8). ————— *Under section 195. Cr P. C.]* Act XV of 1877, sch. ii, No. 178, does not include applications made under the provisions of s. 195 Criminal Procedure Code. **QUEEN EMPRESS v. AJUDHIA SINGH AND OTHERS.**

[VIII-92]

(1). **Arts. 178 and 179.—Application for execution of decree—Agreement to give time.]** *J K* held a decree against *P*. He took out execution on the 4th May, 1878, by imprisonment of the judgment-debtor and attachment of his property. On the 28th August, the decree-holder gave his assent to an arrangement to give time to the judgment-debtor to pay the decree by instalments and in case of default to execute the decree. On the 28th November, 1881, *A* again applied for execution of the decree. *Held* that the present application may be regarded as one to enforce the agreement rather than an application for execution of the decree and as such was governed by art. 178 and not by art. 179. Time will run from date of default. **Raghubunns Gir v. Sheo Saran Gir (W. N. 1888, p. 8)** and **Kalyanbhai Dip Chand v. Ghanasham Lal Jadunathji (I. L. R., 5 Bom; 29)** followed **JAIKARAN v. PIARI.**

[III-143]

See also

SITLA DIN v. SHEO PRASAD AND ANOTHER

[I-113]

DULHIN MAINATH KUARI v. DEBI BAKHSI RAI.

[I-56]

(2). ————— *Struck off for want of record.]* On the 27th March, 1878, the holder of a decree applied for execution. On the 27th May, 1878, the Court made an order directing that the application should be struck off, as the record of the former execution proceedings was in the appellate Court, and that the decree-holder should make a fresh application when such record was returned. On the 28th May, 1881, the decree-holder renewed the application in accordance with such order. *Held*, on the question whether this application was barred by limitation, that it was not an application within the meaning of No. 179, sch. (ii) of Act XV of 1877, but one to which No. 178 would apply; that limitation began to run when the record was returned; and that therefore, (three years not having elapsed from that time), the application in question was within time. **Kalyanbhai Dip Chand v. Ghanasham Lal Jadunathji (I. L. R., 5 Bom., 29)** and **Paras Ram v. Garadner (I. L. R., 1 All., 355)** referred to. **RAGHUBUNSGIR v. SHEO SARANGIR.**

[III-8]

(3). ————— *]* A decree-holder in execution of his decree applied on the 11th January, 1888, for arrest of the judg-

ACT XV OF 1877, Arts 178 & 179.—(continued.)

ment-debtor. On the 25th February, 1888, in consequence of the record of the case being required in the High Court, the Court executing the decree struck off that application *suo moto*. On the 23rd February, 1891, the decree-holder again applied for execution of his decree, but this time by attachment and sale of the judgment-debtor's property. *Held* that the second application could not be regarded as a continuance of the former application, and that execution of the decree was time-barred. *Krishnaji Raghunath Kohavle v. Anandram Ballal Kolhalkar* (I. L. R., 7 Bom., 293) followed. *HAR SARUP v. BALGOBIND AND ANOTHER*.

[XV-133]

(4) ————— *Execution stayed by injunction.*] A decree was made against B, K, and Z. On the 13th May, 1879, application was made for execution of the decree against B and K. In August, 1879, Z, who had preferred an appeal in the suit, applied on the ground for the stay of execution, and on the 22nd August, 1879, the Court on the same ground ordered execution to be stayed. On the 16th December, 1879, Z's appeal was dismissed. On the 24th June, 1882, an application for execution of the decree against B and K was made. *Held* that such application might be regarded as one for revival of the proceedings in execution which had been stayed by injunction, to which No. 178, sch. ii of the Limitation Act of 1877, was applicable, and such application was therefore within time. The principle of decision in *Raghubans Gir v. Sheo Saran Gir* (I. L. R., 5 All., 243) and *Kalyanbhai Dip Chand v. Ghanasham Lal Jadunathji*, (I. L. R., 5 Bom., 29,) followed. *BUTI BEGAM AND ANOTHER v. NIHAL CHAND AND ANOTHER*

[III-89]

(5) —————.] On the 28th May, 1878, application was made for execution of a decree, in pursuance of which certain property was attached and proclaimed for sale. On the day fixed for the sale the Court issued an injunction to stay the same until a suit, which certain persons who claimed the property had instituted, had been decided. On the 14th September, 1882, the suit having been finally decided on the 24th January, 1881, the decree-holder applied for execution. *Held* that the application might properly be considered to be for revival of the former proceedings, after removal of the injunction, to which art. 178 of the Limitation Act, 1877, rather than art. 179, was applicable, and was within time from the date of accrual of the right to apply on the final decision of the suit. *BASANT LAL v. BATUL BIBI AND OTHERS*.

[III-181]

(6). —————.] A decree-holder in execution of his decree attached

ACT XV OF 1877, Arts 178 & 179.—(continued.)

a decree held by his judgment-debtor. On the 3rd of July, 1888, the decree-holder applied for execution of his decree by enforcement of the second decree and in pursuance of this application obtained attachment of certain property as belonging to the judgment-debtor under the second decree. Subsequently a suit was filed by the son of such judgment-debtor claiming the property as his own, and in that suit an injunction was granted staying execution under the application of the 3rd of July, 1888, until the suit was decided. On the 19th of March, 1892, the suit was decided and on the 29th of October, 1892, a fresh application was made for execution. *Held* that this second application was not barred by limitation, but must be regarded as an application to renew the proceeding commenced by the former application and which had been suspended by the act of the Court and not by anything for which the decree-holder was responsible. *Paras Ram v. Gardner* (I. L. R., 1. All., 355) referred to. *LAKHMI CHAND v. BALLAM DASS*

[XV-82]

(7). ————— *Application delayed by suits &c., Injunction.*] On the 2nd April, 1872, A obtained a decree against B, C, and D. First application for execution was made in March, 1874, and struck off on the 5th June, 1874. A second application was made on the 1st August, 1874, and A, B, and C, entered into a compromise. A third application was made on 14th December, 1875, against the three judgment-debtors. B and C objected to it on the ground that it could not be executed with reference to the compromise. This objection was disallowed on 22nd March, 1876, and the proceedings struck off on 28th March, 1876. The judgment-debtors preferred an appeal and the appellate Court held the decree to be incapable of execution. The decree-holders then appealed to the High Court, which, on the 28th June, 1878, reversed the lower appellate Court's order and directed the application to be disposed of on the merits. On the 15th August, 1879, the lower appellate Court affirmed the order of 22nd March, 1876. On the 16th August, 1880, the present application for execution was made. *Held* that the application was governed by art. 179 of Act XV of 1877 and that the same was barred. *Paras Ram v. Gardner* (I. L. R., 1. All., 355) distinguished. *MISRA SIPAHI SINGH v. HARDIAL AND OTHERS*.

[II-79]

(8). —————.] Certain holders of a decree for sale under s. 88 of the Transfer of Property Act applied for execution of their decree on the 6th of January, 1887, and the application was granted. A third party, however, appeared and filed an objection under s. 278 of the Code of Civil Procedure which was allowed. Thereupon the decree-holders brought a suit under s. 283 of the Code. They obtained a decree on the 5th of June, 1888; but the intervenor appealed, and the final decree in appeal

ACT XV OF 1877, Arts. 178 & 179.—
(continued.)

was not passed until the 28th of May, 1892. On the 27th of April, 1892, the decree-holders again applied for execution of the decree. *Held* that execution was time-barred under article 178 of the second schedule to Act No. XV of 1877. *Basant Lal v. Batul Bibi* (I. L. R., 6 All., 23) *Chintaman Damodar Agashi v. Balshastri* (I. L. R., 16 Bomb., 294) and *Paras Ram v. Gardner* (I. L. R., 1 All., 355) referred to. **DESAJ SINGH AND OTHERS v. KARAM KHAN.**

[XVI-188]

(9).—*Execution stayed by Court.* A decree of pre-emption was passed conditionally upon payment by the decree-holder of Rs. 1,139, and in July, 1880, the plaintiff paid this amount into Court, and it was drawn out by the defendant in August, 1881. Meanwhile, in July, 1881, the High Court in second appeal raised the amount to be paid by the plaintiff to Rs. 2,400, but the plaintiff allowed the time limited for payment of the excess difference to elapse without paying it and the decree for pre-emption thereupon became dead. In May, 1883, the plaintiff applied in the execution department for the refund of the deposit which had been drawn and retained by the defendant. This application was granted and the defendant ordered to refund, and this order was confirmed on appeal in January, 1885, and by the High Court in second appeal in May, 1885. Meanwhile the first Court had suspended execution of the order pending the result of the appeal, and in December, 1884, removed the application temporarily from the "pending" list. In February, 1885, the plaintiff applied for restitution of the amount deposited, asking for attachment and sale of property belonging to the defendant. This application was dismissed as barred by limitation. *Held* that this application was only a revival of the application of May, 1883, which was within time. *Held* also that the plaintiff was competent under s. 533 to move the local Court to execute the appellate decree in this respect in his favour "according to the rules prescribed for the execution of decrees in suits"; that he did this in May, 1883, by an application made according to law as the proper Court in the sense of art. 179 of Limitation Act; and that this present application to the same effect being within three years from that application was within time. **NAND RAM v. SITA RAM AND ANOTHER.**

[VI-178]

(10).—*Fresh period.* Amendment of decree. An application to execute a decree passed in April, 1880, was made on the 19th February, 1884, and rejected on the 26th March, 1884, as being beyond time. This order was upheld on appeal in March, 1885. While the appeal was pending the decree holder in May, 1884, applied to the Court of first instance to amend the decree under s. 206 of the Civil Procedure Code, and in December, 1884,

ACT XV OF 1877, Arts. 178 & 179.—
(continued.)

the application was granted. In April, 1885, an application was made for execution of the amended decree, the decree-holder contending that limitation should be calculated from the date of the amendment, and that art. 178 of the Limitation Act (XV of 1877) applied to the case. *Held* that No. 179 and not No. 178 was applicable, that the order rejecting the application of the 19th February, 1884, became final on being upheld on appeal, that the amendment could not revive the decree or furnish a fresh starting point of limitation, and that the application was therefore time-barred. *Mungul Pershad v. Grija Kant Lahiri* (I. L. R., 8 Calc., 51) and *Ram Kirpal v. Rupkuari* (I. L. R., 6 All., 269) referred to. Observations by Mahmood, J. on the amendment of decrees and s. 206 of the Civil Procedure Code. **TARSI RAM v. MAN SINGH AND OTHERS.**

[VI-158]

(11).—*Where a decree as originally framed was incapable of execution and was not finally amended until nearly twelve years after it was passed, it was held that the period of limitation applicable to the execution of such decree was that prescribed by art. 178 of sch. ii of Act No. XV of 1877, and began to run from the date when the decree was so amended as to become capable of execution.* **MUHAMMAD SULEMAN, KHAN v. MUHAMMAD YAR KHAN AND OTHERS.**

[XIV-191]

See also

KALU RAI AND OTHERS v. FAHIMAN AND OTHERS.

[XI-32]

(12).—*Conditional decree.* Where a decree was for possession of immovable property, but its execution was contingent on default being made by the judgment-debtor in the payment year by year of a certain annuity to the decree-holder. *Held* that the decree-holder was not obliged to execute such decree once and for all upon the occurrence of the first default, but might execute it on occasion of any subsequent default; also that the limitation applicable to the execution of such decree was that provided for by art. 178 of sch. ii of the Indian Limitation Act, 1877. *Thakur Das v. Shadi Lal* (I. L. R., 8 All., 56) referred to. **MUHAMMAD ISLAM v. MUHAMMAD AHSAN.**

[XIV-61]

(13).—*A decree, which was passed on the 8th December, 1881, in a suit on a simple mortgage-bond, contained the following provision:—"If the judgment debt is not paid within four months, the decree-holder shall have the power to recover it by a sale of the mortgaged property."* On the 17th February, 1885, the decree-holder applied for execution of the decree. *Held* that,

ACT XV OF 1877, Arts. 178 & 179.—
(continued.)

inasmuch as the decree provided expressly that the decree-holder might not apply for its execution till after the expiry of four months from its date, the limitation of art. 178, sch ii of the Limitation Act, and not of art. 179, should be applied to the case and the application for execution having been made within three years from the 8th April, 1882, when the right to ask for execution accrued, was not barred by limitation. *THAKUR DAS v. SHADI LAL.*

[V-327

(14.)—Application to revive previous application.] *G* sued *K* as the legal representative of her deceased husband *S*, on a bond executed by *S* in his favor, and obtained a decree. Subsequently he sued *K* on a bond which she had personally executed in his favour, and obtained a decree. On the 7th September, 1875, he applied for execution of both these decrees, and *S*'s landed estate, which stood recorded in *K*'s name, was attached. This estate was sold on the 20th February, 1877, being put up for sale in one lot, in satisfaction of both decrees, in accordance with an application made by *G* on the 16th February, and was purchased by *G* for the amount of the decrees. This sale was subsequently confirmed, and on the 10th December, 1877, satisfaction of the decrees was entered up, and the execution proceedings struck off the file. Subsequently three of the heirs of *S* in one case, and two in another, instituted suits against *G*, claiming to recover from him such portion of the proceeds of the sale of *S*'s property as had been appropriated to the discharge of *G*'s decree against *K* and such heirs obtained decrees for certain sums, which *G* was obliged to pay. *G* thereupon on the 16th May, 1879, applied for execution of his decree against *K*. Held that such application was not one in continuation of that made on the 7th September, 1875, but was a fresh application, and the application made by *G* on the 16th February, 1877, was not one for a step in aid of execution within the meaning of No. 179, sch. ii of Act XV of 1877, from which limitation could be computed, and the application of the 16th May, 1879, was barred by limitation. *Booboo Pyaro Tukobildarinee v. Syud Nazir Hussein* (23 *W. R.*, 183). *Paras Ram v. Gardner* (*I. L. R.*, 1 *All.*, 335) and *Issurree Dassee v. Abdool Khalak* (*I. L. R.*, 4 *Calc.*, 415) distinguished. *KHAIR-UN-NISSA v. GAURI SHANKAR.*

[I-1

(15.)—Application for execution of a decree by the arrest and imprisonment of the judgment-debtor was made on the 6th February, 1873. It was rejected by the first Court as time-barred but this order was set aside in appeal. No further application for the assistance of the Court to execute the decree was however made. On 12th February, 1876, the next application for execution by arrest and imprisonment of the judgment-debtor was made. Held that the

ACT XV OF 1877, Arts. 178 & 179.—
(continued.)

application was beyond time as it was a fresh application and not a continuation of the former. *Paras Ram Gardner v. (I. L. R., 1 All. 335)* distinguished. *BHOLA DAT v. TULSHI SINGH.*

[I-47

(16.)—Application for execution of decree under s. 89 of Act IV of 1882.] Art. 178 of sch. ii of Act XV of 1877 does not apply to an application for an order absolute for the sale of mortgaged property under s. 89 of Act IV of 1882, *Baimanekbai v. Manekji Kovesji* (*I. L. R.*, 7 *Bom.* 213) approved. *RANBIR SINGH v. DIRGPAL AND OTHERS,*

[XIII-198

(17.)—Application for an order absolute for sale under s. 89 of Act IV of 1882, is an application to which art. 179, sch. ii of Act XV of 1877, applies. *Oudh Behari Lal v. Nageshar Lal* (*I. L. R.*, 13 *All.* 278) referred to. *Roubir Singh v. Drigpal Singh* (*I. L. R.*, 16 *All.*, 23) overruled. *CHUNNI SAL v. HARNAM DAS.*

XVIII-40

(1). Art. 179, cl. (1)—Application for execution of decree—Under s. 89 of Act IV of 1882.] The period of limitation for execution of a decree for sale under s. 89 of the Transfer of Property Act, begins to run from the date of the granting of the order absolute for sale, without which the decree cannot be executed, and not from the date of application to the Court to grant such order. *Oudh Behari Lal v. Nageshar Lal* (*I. L. R.*, 12 *All.*, 278) and *Ram Kirpal v. Sheosahai*. (*W. N.*, 1892, p. 5) referred to. *MULCHAND v. MUKTAPAL SINGH.*

[XVI-100

(2).—Under s. 88 of Act IV of 1882.] The period of limitation for execution of a decree for sale under s. 88 of the Transfer of the Property Act begins to run from the date of the granting of an order absolute for sale under s. 89 of the Act, without which order the decree cannot be executed. *Oudh Behari Lal v. Nageshar Lal* (*I. L. R.*, 12 *All.*, 278) and *Mulchand v. Mukta Pal Singh* (*W. N.* 1896, p. 100) referred to. *MAHABIR PRASAD v. SITAL SINGH AND OTHERS.*

[XVII-137

(3).—Wrong application.—Amendment after limitation.]—*A*, together with five others, obtained a decree for joint possession of a house a week within the limitation of three years. *A* applied to execute the decree in the joint interest of all the decree-holders by putting them in possession of half the house, alleging that the other half had been sold by some of the co-decree-holders to strangers, who colluding with the judgment-debtors would not join in the application. Subsequently with the permission of the Court he amended his application so as to include

ACT XV OF 1877, Art. 179, cl. (1).—(continued.)

the whole house. The following objections were taken to the application: (i) The application was illegal as he could not execute the decree except as a whole. (ii) The amendment was made after limitation. *Held* that the application being under art. 179, cl. 1, and not cl. 4, was within time. **KHUDAI v. SHEODAYAL AND ANOTHER.**

[VI-125]

(4).—*Decree for redemption omitting to state what be the result in case of default.*] Where a decree for redemption of mortgage stated that the amount due under the mortgage should be paid within four months, but omitted to state what the result would be if the mortgage debt was not so paid:—*held*, that it was competent to the decree-holder to execute such decree at any time within the period of limitation prescribed by art. 179. **BANDHU BHAGAT v. SHAH MUHAMMAD TAQI.**

[XII-40]

(5). **Art. 179, cl. (2). Final decree—Order abating appeal.**] *Held* that the order of an appellate Court abating an appeal, because no representative of the appellant was on the record, was not the "final order or decree of the Appellate Court" within the meaning of clause 2 of article 179 of the second schedule to the Indian Limitation Act, 1877, but that limitation would run from the date of the original decree. **FAZAL HUSAEN v. RAJ BAHADUR.**

[XVII-218]

(6).—*Appeal against some of the defendants only—Limitation against others.*]—*B*, the mortgagee of certain property, sued *N*, the mortgagor, and *T*, to whom a part of the mortgaged property had been transferred by sale, for the mortgage-money, and the sale of the mortgaged property. On the 24th September, he obtained a decree, which directed *N* to pay the money, and that it might be realized by the sale of the mortgaged property. *T* appealed, contending that as the instrument of mortgage was not registered, it was not receivable as evidence of the mortgage, and therefore the sale of the property had been improperly ordered. *N* did not appeal. The Court of first appeal allowed this contention and set aside the order for the sale of the property. The mortgagee preferred a second appeal, and on the 15th January, 1880, the Court of last appeal modified the decree of the lower Court, directing that a part of the mortgage-money might be recovered by the sale of the mortgaged property. On the 14th September, 1882, *B* applied for execution of the decree against *N*. *Held* that the period of limitation for the application was governed by art. 179 of the Limitation Act, and such period would run from the final decree of the appellate Court. **BASANT LAL AND ANOTHER v. NAJMUNNISSA BIBI.**

[III-179]

(7).—] On the 11th July, 1887, a decree was made against

ACT XV OF 1877, Art. 179 cl. (2).—(continued.)

B and *J*, the defendants in a suit, against which *J* alone appealed, such appeal not proceeding on a ground common to him and *B*. The appellate Court affirmed such decree on the 20th November, 1877. On the 23rd September, 1880, the holder of such decree applied for execution, against *B*. *Held* that, so far as *B* was concerned, limitation should be computed from the date of such decree and not from the date of the decree of the appellate Court, and such application was therefore barred by limitation. **SANGRAM SINGH AND ANOTHER v. BUJHARAT SINGH.**

[I-128]

(8).—] *A* brought a suit against *B*, *C*, *D* and *F* and obtained a decree against the first two. He preferred an appeal against that part of the decree which stood against him but the appeal was dismissed. *Held* that limitation (for executing the decree) will run from the date of the final decree of the appellate Court, art. 179 (2) being applicable to the case. **RAM LAL v. JAGANNATH.**

[IV-138]

(9).—] **Art. 179, cl. (2) of the Limitation Act (XV of 1877)** must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings, and should certainly be applied to cases where the whole decree was imperilled by the appeal. *A* suit for pre-emption was decreed against the vendors, the purchaser, and another set of pre-emptors in March, 1882. The last mentioned defendants alone appealed, and their appeal was dismissed in May, 1882. In May, 1885, the decree-holders applied for execution of the decree. The application was objected to by the purchaser as barred by limitation, having been filed more than three years from the passing of the decree and it was contended that art. 179, cl. (2), did not apply to the case, inasmuch as the purchaser did not appeal from the original decree. *Held* that art. 179, cl. (2), of the Limitation Act was, applicable, and that the application, being made within three years from the date of the appellate Court's decree, was not barred by limitation. **Har Pershau Roy v. Enayet Hossein (2 Calc. L. R. 471)** and **Sangram Singh v. Bujharat Singh (1. L. R., 4 All., 36)** distinguished. **Mullick Ahmed Zuma v. Mahomed Syed (1. L. R., 6 Calc., 194)** and **Ram Lal v. Jagannath (W. N. 1884, 138)** relied on. **NUR-UL HASAN v. MUHAMMAD, HASAN AND OTHERS.**

[VI-237]

(10).—] Where a decree, which was found to be a several decree, was passed against six defendants, against a portion of which decree two of such defendants appealed, but on grounds not common to them and the other defendants; and where more than three years after the date of the original decree the plaintiff, decree-holder,

ACT XV OF 1877, Art. 179, cl. (2).—(continued.)

applied for execution :—*Held* by the Full Bench (Brodhurst and Mahmood, J.J., *dissentiente*) that under such circumstances the fact that two of the defendants in the original suit had appealed, did not operate to extend the period of limitation within the meaning of cl. (2), art. 179, schedule ii, of the Limitation Act, and, as s. 544 of the Code of Civil Procedure was not applicable, that execution of the decree was consequently barred by limitation. *F. P. Wise v. Raj Naraen Chakerburty* (19 *W.R.*, p. 30) and *Mullick Ahmed Zuma v. Mahomed Syed* (1. *L. R.* 6 *Calc.*, 194; 6 *C. L. R.* 573) approved.

Held by Brodhurst and Mahmood, J.J. *contra* (following the ruling in *Nurul Hassan v. Muhammad Hassan* (1. *L. R.* 8 *All.*, 573) that art. 179, cl. (2) of the ii schedule of the Limitation Act (XV of 1877) must be construed to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original suit. *MASHIAT-UN-NISSA v. RANI*.

[X-207]

(11).—*Act IX of 1871.* On the 27th July, 1864, a District Court gave the plaintiff in a suit a decree against all the defendants including *B*. All the defendants appealed to the Sadar Court from such decree except *B*. The Sadar Court on the 6th March, 1865, set aside such decree and dismissed the suit. The plaintiff appealed to Her Majesty in Council from the Sadar Court's decree, all the defendants except *B* being respondents to this appeal; Her Majesty in Council, on the 17th March, 1869, made a decree reversing the Sadar Court's decree and restoring that of the District Court. On the 9th October, 1869, the plaintiff applied for execution of the District Court's decree, and such decree was under execution up to July 1872. On the 9th October, 1874, the plaintiff applied for amendment of such decree in certain respects, it being incapable of execution in those respects. *B* was a party to this proceeding. On the 16th August, 1876, such decree was amended: and the plaintiff subsequently applied for its execution as amended against all the defendants. *Held* that, notwithstanding *B* was not a party to the appeals to the Sadar Court and Her Majesty in Council, such decree was a valid decree and capable of execution against him. Also that the application of the 9th October, 1869, was within time, computing from the date of the decree of Her Majesty in Council:—*Chedoo Lal v. Nundcoomar Lal* (6 *W. R. Misc.* 60). Also that the application to amend such decree, being substantially one for review of judgment, gave under art. 167, sch. ii of Act IX of 1871, a period from which limitation would run in respect of the subsequent application for execution which was therefore within time. *KRISHEN SAHAI v. THE COLLECTOR OF ALLAHABAD AS MANAGER OF THE COURT OF WARDS ON BEHALF OF PARTAB CHAND (MINOR.)*

[I-152]

ACT XV OF 1877, Art. 179, cl. (2).—(continued)

(12).—*Appeal—Against a portion only of the decree.* Certain plaintiffs obtained a decree for pre-emption in respect of four villages. The defendant appealed, and the lower appellate Court dismissed the appeal. The defendant again appealed, but in his appeal only questioned the decision of the lower appellate Court in respect of two of the villages in suit. In this second appeal the plaintiff's suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendant's appeal was dismissed as to the other. *Held* that in respect of all the three villages as to which the final decree stood in favour of the plaintiff, limitation began to run against the decree-holders from the date of the decree in second appeal, and not as to two of them from the date of the lower appellate Court's decree. *Hurproshaud Roy v. Enayet Hossein* (2 *C. L. R.* 471); *Sangram Singh v. Bujharat Singh* (1. *L. R.* 4 *All.*, 36) and *Mashiat-un-nissa v. Rani* (1. *L. R.*, 13 *All.*, 1) distinguished. *BADI-UN-NISSA v. SHAMSUDDIN AND OTHERS*.

[XV-20]

(13).—*Dismissal for deficiency of stamp.* *Held* that the rejection of an appeal in consequence of the failure of the appellant to pay additional Court fees declared by the Court to be leviable, was a decree and consequently the decree-holder may apply for execution within three years from the date the appeal was rejected. *RUP SINGH AND ANOTHER v. MUKHRAJ SINGH*.

[V-260]

(14).—*Where an application for appeal was presented to the High Court, but rejected, owing to the memorandum of appeal being insufficiently stamped, held that, under such circumstances, there had not been an appeal or a final decree or order of an appellate Court within the meaning of No. 179 (2) of the Limitation Act, so as to give period from which limitation for execution of the decree appealed from could run. DIANAT ULLAH BEG v. WAJID ALI SHAH.*

[IV-153]

(15).—*Dismissal on ground of limitation.* If there has been an appeal the starting point of limitation under art. 179, cl. (2) of sch. ii of the Indian Limitation Act will be the date of the decree in appeal. The question of limitation is not affected by the fact that such appellate decree may be merely a decree dismissing the appeal as barred by limitation. *Akshoy Kumar Nundi v. Chunder Mohun Chathati* (1. *L. R.*, 16 *Calc.*, 250). *MURLIDHAR SINGH v. TAPESHRI RAI*.

[XIV-46]

(16).—*Review.* The words "where there has been an appeal" in cl. 2, No. 179 of sch. ii of Act XV of 1877, do not contem-

ACT XV OF 1877, Art. 179 cl. (2).—(continued.)

plate and mean only an appeal from the decree of which execution is sought, but include, where there has been a review of the judgment on which such decree is based, and an appeal from the decree passed on such review, such appeal. *Held*, therefore, where there had been a review of judgment, and an appeal from the decree passed on review, and such decree having been set aside by the appellate Court, application was made for execution of the original decree, that time began to run, not from the date of that decree, but, from the date of the decree of the appellate Court. *Sheo Prasad v. Anrudh Singh*, (I. L.R. 2 All., 273) distinguished. *NAR SINGH SEWAK V. MADHO DAS AND OTHERS*.

[II-25]

(17).—*From an order passed in execution.* The holder of a decree for possession and partition of a share of certain immoveable property, dated the 19th January, 1878, applied for execution on the 2nd February, 1878. An order was made by the Court of first instance, from which the decree-holder appealed. The appellate Court, on the 18th September, 1878, reversed the order of the first Court and directed that the partition of the property should be effected by lots, and remanded the case for that purpose. The first Court proceeded to carry out the order of the appellate Court, but eventually struck off the case, on the 15th February, 1878, as the decree-holder failed to appear personally when ordered to do so. On the 13th September, 1881, the legal representative of the deceased decree-holder, who had meantime died applied, with reference to the order of the appellate Court dated the 18th September, 1878, to have lots drawn in accordance with that order. *Held*, on the question whether this application was barred by limitation, that, if it were regarded as nothing more than an application for execution of the original decree, it might be barred, inasmuch as it had been made more than three years after the date of the last application, and it was doubtful whether the 2nd clause in the 3rd column of No. 179, of sch. ii, of Act XV of 1877, would apply, since the appeal there referred to is probably an appeal from the decree or order of which execution is being taken, referred to in the 1st clause of that article, and not an appeal in course of execution of that decree or order; that, however, the order of the appellate Court, dated 18th September, 1878, was itself of the nature of a decree and capable of execution, and for the execution of which an application could be made to which that article would apply; that the application in question should be regarded as one for execution of that order; and that therefore, so regarding it, it was within time. *HULASI V. MAIKU AND ANOTHER*.

[III-5]

(18).—**Art. 179, cl (iv)—*Bonâ-fides*.** In computing the period of limitation prescribed by clause (4) of art. 179 of the second schedule of

ACT XV OF 1877, Art. 179 cl. (4).—(continued.)

the Indian Limitation Act, no question of the *bonâ fides* of the previous application for execution arises. *DEBI DAS AND ANOTHER V. UMRAO SINGH AND ANOTHER*.

[XI-148]

(19).—*Application for a second certificate.* In applying art. 179, sch. ii, of the Limitation Act (XV of 1877), the only questions are whether the former application for execution or for a step in aid of execution was in accordance with law and made to the proper Court; and the Court has not to consider whether such application displayed *bonâ-fides* or industry or diligence, as by payment of the necessary process fee. *HALIMA BIBI AND OTHERS V. NISHAN BIBI*.

[X-77]

(20).—*“Application”—“Proper Court.”* *Application for a second certificate.* *Held* that where a decree had been sent for execution to a Court other than that which made the decree with the necessary certificate an application for a second certificate to the latter Court while the decree was still in the former, could not save time as it was neither an application nor was it made to a proper Court within art. 179, Limitation Act. *BUDHI BIBI V. INDAR KUAR*.

[II-171]

(21).—*To have witnesses summoned.* An application by a decree-holder in the course of an investigation into an objection to the attachment of property to have his witnesses summoned is an application within the meaning of No. 179, (4), sch. ii, of the Limitation Act, 1877. *ALI MUHAMMAD V. GUR PARSAD AND ANOTHER*.

[III-57]

(22).—*To have sale confirmed.* An application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property belonging to him in execution of the decree should be disallowed, and the sale be confirmed, is an application from the date of which the period of limitation for a subsequent application for execution of the decree may be computed. *KEWAL RAM V. KHADIM HUSAIN AND ANOTHER*.

[III-112]

(23).—*“In accordance with law.”—Application in contravention of s. 341, C. P. C., and s. 99 of Act IV of 1882.* The expression “applying in accordance with law” in Act XV of 1877 (Limitation Act), sch. ii, No. 179, (4), means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which, either to the decree-holder’s direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do. *Held* therefore that an application to have the judgment-debtor arrested in execution of decree, which was in

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

contravention of the terms of s. 341 of the C. P. Code, and an application to bring mortgaged-property to sale, which was in contravention of s. 99 of the Transfer of Property Act (IV of 1882), were not applications "in accordance with law" within the meaning of No. 179, (4) of sch. ii, of the Limitation Act. **CHATTAR AND ANOTHER v. NEWAL SINGH.**

[IX-200]

(24).—*Application defective under s. 235 (g), C. P. C.* In an application for execution of a decree under which interest was due, the decree-holder deliberately omitted to state the interest then due, and the decree-holder, though invited to amend the application did not do so, and it was eventually struck off for want of prosecution. *Held*, with reference to section 235 (g) of the Code of Civil Procedure, that the application was not made "in accordance with law" within the meaning of art. 179, (4), sch. ii, of the Limitation Act (XV of 1877). **NATHU RAM v. TUFAIL AHMAD.**

[X-93]

(25).—*Application defective under s. 235 (f), C. P. C.* The omission from an application for execution of a decree of a full statement of the particulars required by cl. (f) of s. 235 of the Code of Civil Procedure will not prevent such application from being "an application in accordance with law" within the meaning of cl. (4), art. 179, sch. ii of the Indian Limitation Act, 1877. **MADHO SINGH AND ANOTHER v. RAM BHAROSE DAS.**

[XII-114]

(26).—*Application defective under s. 236, C. P. C.* In an application for execution of a decree the decree-holder stated the mode of execution prayed for to be by attachment of the moveable property of the judgment debtor. No inventory of the property sought to be attached was filed with the application and the applicant further stated that the application was put in merely for the purpose of saving limitation. *Held* that such "an application was not an application in accordance with law" within the meaning of cl. (4), art. 179, sch. ii, of Act XV of 1877 and could not therefore operate to save limitation. **MANGAL SEN v. BALDEO PRASAD AND ANOTHER.**

[XII-70]

(27).—*Absence of inventory.* An application for execution of a decree which does not contain an inventory of the property in respect of which execution is sought, is not "an application in accordance with law", within the meaning of art. 179, cl. (4), sch. ii, of Act XV of 1877. **LACHMI KUAR v. DAL CHAND AND OTHERS.**

[XII-47]

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

(28).—*Where an application for attachment in execution of a decree does not specify whether the property (jaidad) sought to be attached is moveable or immoveable property, and there is no extraneous evidence to show to which kind of property it relates, the absence of an inventory annexed to the application will not prevent such application from being an "application in accordance with law" within the meaning of cl. (4), art. 179, sch. ii, of Act XV of 1877.* **CHARAN DAS v. GHULAM JAHAN AND ANOTHER.**

[XII-55]

(29).—*Held* that an application for attachment which was not accompanied by an inventory of the property sought to be attached, but was not worded in a sufficiently definite manner to show whether such inventory was in fact necessary, was not necessarily "an application not in accordance with law" within the meaning of Act No. XV of 1877, sch. ii, art. 179. **MAHABIR SINGH AND ANOTHER v. SAIRA BIBI AND OTHERS.**

[XIV-54]

(30).—*Application defective under s. 237, C. P. C.* An application for attachment of immoveable property in execution of a decree which does not contain the particulars required by s. 237 of the Code of Civil Procedure is not an "application in accordance with law" within the meaning of art. 179 (4) of schedule ii of the Limitation Act (Act XV of 1877). *Ishri v. Serhmal (W. N., 1890, p. 22) followed.* **HIRA LAL v. DULARI KUAR.**

[XII-3]

(31).—*Application for execution after the death of judgment-debtor without the representatives being brought on.* Applications for the execution of a decree made after the death of the judgment-debtor and without either any representative of the judgment-debtor being brought upon the record or there being any subsisting attachment of the property against which execution is sought are not good applications for the purpose of saving limitation. *Sheo Prasad v. Hira Lal (I. L. R., 12 All., 440) distinguished.* **MADHO PRASAD v. KESHO PRASAD.**

[XVII-75]

(32).—*Defective application.* An application for execution of a decree against persons alleged therein to be the legal representatives of the original judgment-debtor, deceased, will not be a bad application within the meaning of art. 179, cl. (4) of sch. ii, of the Indian Limitation Act, 1877, merely because the persons named therein are subsequently found not to be the legal representatives of the judgment-debtor. **GOPAL v. HAR PRASAD AND ANOTHER.**

[XII-241]

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

(33).—*Misdescription.* A mere clerical error in an application for execution of a decree, such as the misdescription of former records referred to therein resulting in those records not being procurable, will not prevent such application from being a good "application according to law" within the meaning of cl. (4) of s. 179 of the Indian Limitation Act (XV of 1877); neither is the dismissal of such an application on account of the neglect of the applicant to supply a proper description of the records referred to, to be considered as equivalent to a withdrawal of the application within the meaning of s. 373 of the Code of Civil Procedure. *ASHRAF BEGAM v. MUHAMMAD SAFDAR ALI KHAN.*

[XI-154]

(34).—*Application for part execution.* A decree passed jointly in favour of more persons than one can only be legally executed as a whole for the benefit of all the decree-holders, and not partially to the extent of the interest of each individual decree-holder. *Held*, therefore, where one of two persons in whose favour a decree for money had been passed jointly applied on the 27th April, 1880, for execution of a moiety of such decree, and the other of such persons made a similar application on the 30th April, 1880, that such applications, not being made in accordance with law, were not sufficient to keep the decree in force. Also that the illegality of such applications could not be cured by a subsequent amended application for the execution of the decree as a whole preferred after the period of limitation had expired. *THE COLLECTOR OF SHAHJAHANPUR v. SURJAN SINGH AND ANOTHER.*

[I-120]

(35).—*Application by some only of the decree-holders for execution of a portion of the decree.* *Held* that whether or not previous application for execution of a decree made by some only of the decree-holders for their share only of the decree, were strictly allowable (and under and under *[The Collector of Shahjehanpur Manager of the estate of Raja Jagannath Singh v. Surjan Singh and another]* (I. L. R., 4, All. 721) they are not allowable) if they were actually allowed and no objections at the time were taken to them they must be held to be good for the purpose of keeping the decree alive. *NANDA RAI AND ANOTHER v. RAGHUNANDAN SINGH.*

[V-41]

(36).—*Application against some representatives of the judgment-debtors effective against all.* An application for execution of a decree against one of the several legal representatives of the deceased judgment-debtor, takes effect, for the purposes of limitation,

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

against them all. *RAM ANUJ SEWAK SINGH v. HINGU LAL AND OTHERS.*

[I-16]

(37).—*Not in accordance with law—Application on behalf of a deceased decree-holder.* Where a decree-holder died without taking out execution of his decree, and, two days after his death, his pleader made an application for execution on his behalf, this being the first application of the kind,—*held* that, inasmuch as the authority of a pleader ceases at the moment of his client's death, the application was invalid, and was not such an application or step in aid of execution of the decree as could save the subsequent application for execution by the decree-holder's heirs from being barred by limitation. *KALLU AND ANOTHER v. MUHAMMAD ABDUL GHANI AND ANOTHER.*

[V-131]

(38).—*Wrong application.* The holders of a decree made by a Civil Court, which directed *inter alia* that they should be maintained in possession of a share of a village, by cancelment of the order of the Settlement Officer directing the entry of the judgment-debtor's name in the revenue registers in respect of such share, applied for execution of such decree, improperly asking the Court executing the decree to order the Collector to amend such entry by the substitution of their names for that of the judgment-debtor in respect of such share, instead of asking it to send such officer a copy of such decree for his information, with a view to such amendment. *Held* that such application not being one "in accordance with law", within the meaning of No. 179, sch. ii. of Act XV of 1877, was not one which would keep such decree in force. *MUHAMMAD UMAR v. KAMILA BIBI AND ANOTHER.*

[I-123]

(39).—*Previous application withdrawn.* The holder of a decree for money dated the 7th June, 1879, applied on the 20th July, 1880, for execution thereof, but it appeared that in certain particulars the decree required correction, and it was therefore ordered, at the request of the pleader for the decree-holder, that the application should be dismissed, and the decree returned to him for amendment. The next application for execution of the decree was made by the decree-holder on the 19th February, 1883. *Held* that application of the 20th July, 1880, having been put in and afterwards taken back by the decree-holder, the proceeding became to all intents and purposes as though no application had been made; that therefore it could have no effect as an "application made in accordance with law" for execution within the meaning of art. 179, sch. ii. of the Limitation Act; that ap-

ACT XV OF 1877, Art. 179, cl. (4)—(continued.)

plying the rule contained in s. 374 of the Civil Procedure Code, in accordance with s. 647, to the application for execution of the 19th February, 1883, the question of limitation must be determined as if the first application had never been filed; and that the application now in question was consequently barred by limitation. *Ramanadan Chetti v. Periatambi Shervai* (I.L.R., 6 Mad., 250) dissented from. *Pirjade v. Pirjade* (I.L.R., 6 Bom., 681) referred to. **KIFAYAT ALI AND ANOTHER v. RAM SINGH.**

[V-51]

(40).—[Held] that a subsequent application for execution made five years after the decree, where the previous application was withdrawn by the decree-holder, is barred by art. 179 read with s. 374, Civil Procedure Code. **SARJU PRASAD AND ANOTHER v. SITA RAM.**

[VIII-1]

(41).—[Step in aid of execution—Application to strike off application with liberty to make fresh application.] Held that an application made before the passing of Act No. VI of 1892 by a decree-holder to a Court to strike off a pending application for execution with liberty to make a fresh application for execution of the same decree was an "application in accordance with law" to take a step in aid of execution of the decree within the meaning of Act No. XV of 1877, sch. ii, art. 179, cl. (4). **RAM NARAIN RAI AND OTHERS v. BAKHTU KUAR AND OTHERS.**

[XIII-219]

(42).—[Decree for costs and possession—Execution as to costs alone—Sufficient to keep decree alive.] Held that where a decree was for costs and for possession it was competent to the decree-holder to execute the decree first for costs and then for possession, and that applications to execute for costs merely were good applications under sch. ii, art. 179 of Act XV of 1897, to keep the decree alive. *Sadho Saran v. Hol Pandé* (W.N. 1893, p. 57) referred to. **BHIKHARI LAL v. ALI MARDAN KHAN.**

[XVII-31]

(43).—[Application for an order under s. 87, Act IV of 1882.] An application for an order under s. 87 of the Transfer of Property Act (Act IV of 1882) is a "step in aid of execution" within the meaning of art. 179 of the second schedule of the Indian Limitation Act (Act XV of 1877). *Kedar Nath v. Lalji Sahai* (I.L.R., 12 All., 61) and *Oudh Behari Lal v. Nageshar Lal* (I.L.R., 13 All. 278) referred to. **RAM KIRPAL v. SHEO SAHAI AND ANOTHER.**

[XII-5]

(44).—[Application to revive previous application.]

See art. 178 and 179. No. 14.

ACT XV OF 1877, Art. 179, cl. (4)—(continued.)

(45).—[Application for leave to bid.] The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is "a step in aid of execution" within the meaning of cl. (4), art. 179, sch. ii, of the Limitation Act. **BANSI v. SIKREE MAL.**

[X-230]

(46).—[Application under s. 232, C. P. C.] An application, under section 232 of the Code of Civil Procedure, by the transferee of a decree, which is otherwise in accordance with the provisions of that section, is not invalidated by the addition of a prayer for the enforcement of the claim of the applicant by attachment and sale of property hypothecated under the decree, although no inventory of the property sought to be attached is annexed to such prayer. Such a prayer is premature and superfluous, but its presence does not prevent the application from being a valid step in aid of execution within the meaning of art. 179, sch. ii, of the Limitation Act. An order striking an application for execution off the file of pending cases is not, in the face of the fact that the same Court subsequently allowed a fresh application of a similar nature to be presented, an order rejecting the application in the sense of s. 245 of the Code of Civil Procedure. **HAYAT ALI v. RUP CHAND AND OTHERS.**

[X-245]

(47).—[Where the assignee, under an unregistered deed, of a decree for the sale of hypothecated immoveable property applied to have his name substituted for that of the decree-holder and for execution; held that such an application was "a step in aid of execution" within the meaning of art. 179 of Act XV of 1877. **ABDUL MAJID v. MUHAMMAD FAZL ULLAH AND ANOTHER.**

[X-186]

(48).—[Giving time to judgment-debtor.] Application for execution of a decree was made on the 22nd November, 1875, and in pursuance of such application certain property belonging to the judgment-debtor was advertized for sale on the 27th March, 1876. On the latter date the parties to such decree made a joint application in writing to the Court, where in it was stated that the judgment-debtor had made a certain payment on account of such decree, and the decree-holders had agreed to give him four months time to pay the balance thereof, and it was prayed that such sale might be postponed and such time might be granted. The Court on the same day made an order on such application postponing such sale. The next application for execution of such decree was made on the 17th January, 1879. The lower appellate Court held, with reference to the question whether such application had been made within the time limited

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

by law, that it had been so made, as under No. 179, (6), sch. ii of Act XV of 1877, such time began to run from the date of the expiration of the period of grace allowed to the judgment-debtor under the application of the 24th March, 1876. *Held* that No. 179 (6) had not any relevancy to the present case; but, inasmuch as the proceedings of the 27th March, 1876, might be considered as properly constituting a "step in aid of execution," within the meaning of No. 179, (4), the application of the 17th January, 1879, was within time. **SITLADIN v. SHEO PRASAD AND ANOTHER.**

[I-113]

(49).—[An application by a decree-holder for the postponement of a sale in execution of the decree on the ground that he had allowed the judgment-debtor time is not "an application according to law to the proper Court for execution, or to take some step in aid of execution, of the decree," within the meaning of No. 179, sch. ii, Act X of 1877, and limitation cannot be computed from the date of such an application. **DULHIN MAINATH v. DEBI BAKSH.**

[I-56]

See also

JAI KARAN v. PIARI.

[III-143]

(50).—[Application to certify payment under s. 258, C. P. C.] *Held*, following **T. D. Bandyopadhyaya v. B. L. Mukhopadaya**, (I. L. R., 12 Cal., 608), (Tyrell, J. doubting) that an application made by a decree-holder, the object of which is that the receipt of certain sums of money paid out of Court may be certified, is a "step in aid of execution," such as will keep the decree alive, within the meaning of the Limitation Act (XV of 1877), sch. ii, No. 179 (4). **Gansham v. Mukha** (I. L. R., 3 All., 320) referred to. **MUHAMMAD HUSAIN KHAN v. RAM SARUP AND ANOTHER.**

[VI-292]

(51).—[The expression "step in aid of execution" in Act XV of 1877 (Limitation Act), sch. ii, No. 179, (4) was intended to cover any application made according to law in furtherance of the execution proceedings under a decree. It includes applications made by a decree-holder under s. 258 of the Code of Civil Procedure to enter up part satisfaction of the decree. **SUJAN SINGH v. HIRA SINGH AND OTHERS.**

[X-125]

(52).—[The decree sought to be executed in this case was dated the 20th August, 1871. After an infructuous application made on the 14th July, 1874, the parties came to a private arrangement which substantially altered the decretal order in respect of the interest payable thereunder and by

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

making the payment periodical. Intimation of this arrangement was given to the Court on the 14th January, 1875. The decree was a money decree. Attempts were made in 1877, 1879 and 1880, to execute the private compromise. In July, 1880, the decree-holder applied for the execution of the original decree. *Held* that the application was time-barred and the decree was dead, and the judgment debtors were not estopped from objecting to the continued execution of the compromise because they had consented or submitted to its partial execution, in the department of the execution of decrees. **Debi Ras v. Gokul Prasad** referred to. (*W. N.* 81, p. 42.) **JIWA RAM AND ANOTHER v. HUSAIN ALI.**

[I-118]

(53).—[Untrue certificate under s. 258.] An untrue certificate by a decree-holder under s. 258 of the C. P. C. is not a "step in aid of execution" such as will keep the decree alive within the meaning of Act XV of 1877, (Limitation Act), sch. ii, No. 179 (4). **Muhammad Husain Khan v. Ram Sarup** (I. L. R., 9 All., 9) referred to. **KANHIA LAL AND ANOTHER v. RUDAR SAHAI.**

[VIII-23]

(54).—[Application to be put in possession of property purchased at auction.] *Held* that an application made by a decree-holder to be put in possession of property which he had purchased at an auction-sale held in execution of his decree was a "step in aid of execution" of that decree, and would afford the decree-holder a fresh starting point for limitation. **Sujan Singh v. Hira Singh** (I. L. R., 12 All., 399) referred to. **MOTI LAL v. MAKUND SINGH AND OTHERS.**

[XVII-117]

(55).—[Objection to an application for set off.] *R*, in a suit against *S* and other persons obtained a decree on the 24th December, 1878, *S* being exempted from the decree, and being awarded costs against the plaintiff. In executing his decree, *R*, on the 16th June, 1880, sought to set off the costs awarded to *S* against the amount due to himself. On the 6th August, 1880, *S* preferred objections to this course. On the 19th July, 1883, *S* applied for execution of his decree for costs. *Held* that the application was barred by limitation, inasmuch as art. 179 (4) of the Limitation Act requires that the decree-holder should make a direct and independent application for execution on his own account, and it was not sufficient to satisfy the requirements of the law to offer objections under the circumstances under which they were offered in the present case. **SHIB LAL v. RADHA KISHEN.**

[V-287]

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

(56). —————.] *Application to execute an attached decree.* A decree was passed on the 20th February, 1878, by the Munsif of *M.* In November, 1878, it was in accordance with the provisions of s. 223 of the Civil Procedure Code, transferred to the Munsif of *J.* On the 21st January, 1879, an application for execution of the decree was made to the Munsif of *J.*, who thereupon issued an order for the attachment of some immoveable property belonging to the judgment-debtors and also for the attachment of three decrees standing in his Court in favour of the judgment-debtor against other persons. On the 18th March, 1882, the decree-holder applied to the Munsif of *J.*, to execute one of these decrees in his behalf, and he further asked that whatever might be realized in such execution should go to the account of the decree which had been transferred, and which was being executed. *Held* that the application of the 18th March, 1882, was perfectly legal, and such a proceeding as could keep alive the decree of the 20th February, 1878, and that a subsequent application for execution, dated the 12th April, 1883, was therefore not barred by limitation. An application to execute an attached decree is a "step in aid of execution" of the original decree, within the meaning of art. 179, sch. ii, of the Limitation Act, inasmuch as its object is to obtain money in order to pay off the judgment-debtor. *LACHMAN v. THONDI RAM.*

[V-64]

(57). —————.] *Deposition—Talbana.* On the 10th January, 1880, application for execution of a decree was made. On the 29th April the decree-holder was ordered to deposit the *talbana* which he did on the 10th May and on the same day the court ordered proclamations to issue fixing the sale of the judgment-debtor's property for the 21st June, 1880. On the 10th July, 1880, the case was struck off. The present application was made on the 30th January, 1883. *Held* that it was within time for depositing the necessary fees, &c., was a "step in aid of execution." *BARMHA NAND v. SARBISHWARA NAND.*

[III-247]

(58). —————.] *Application to be paid sale proceeds.* An application by a decree-holder to be paid the proceeds of a sale of property in execution of the decree is a "step in aid of execution" of the decree within the meaning of No. 179 (4), sch. ii, of Act XV of 1877 (Limitation Act). *PARAN SINGH v. JAWAHIR SINGH AND OTHERS.*

[IV-118]

(59). —————.] *Application to take money deposited.* *Held* that an application by the decree-holder to obtain money deposited in his favor by the judgment-debtor in payment of an instalment decree, and the taking of the money by the decree-holder were steps

ACT XV OF 1877, Art. 179, cl. (4).—
(continued.)

in aid of execution within the meaning of cl. (4) of No. 179, sch. ii, of Act XV of 1879. *KISHORI LAL v. SHAM KARAN AND ANOTHER.*

[II-184]

(60). —————.] *Application to recover costs.* An application to recover costs awarded by a decree for possession of immoveable property is a "step in aid of execution" of such decree within the meaning of sch. ii, art. 179, of the Limitation Act. *NARAIN AND OTHERS v. GOKAL.*

[VIII-95]

(61). —————.] *Oral application for the issue of a notification of sale.* *Held* that an oral application for the issue of a fresh notification of sale for which oral application was granted by the Court was a "step in aid of execution" of decree within the meaning of art. 179 (4) sch. ii, of the Limitation Act, so as to save limitation. *KHAWAN SINGH AND OTHERS v. DAYARAM AND OTHERS.*

[II-169]

(62). —————.] *Application under s. 206, C. P. C., for the amendment of a decree.*—The granting of an application to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holders; nor in such an application a "step in aid of execution" within the meaning of art. 179, sch. ii, of the Limitation Act. *Kishen Sahai v. The Collector of Allahabad (I. L. R., 4 All., 137)* distinguished. *KALU RAI AND OTHERS v. FAHIMAN AND OTHERS.*

[XI-32]

DAYA KISHEN v. NANHI BEGAM AND OTHERS.

[XIII-43]

See also

TARSI RAM v. MAN SINGH AND OTHERS.

[VI-156]

MUHAMMAD SULEMAN KHAN v. MUHAMMAD YAR KHAN AND OTHERS.

[XIV-191]

(63). —————.] *Held* that an application to the Court executing a decree to review an order which it had made directing the decree-holders to amend an application for execution which they had presented was not an application to take a "step in aid of execution," within the meaning of Act No. XV of 1877, sch. ii, art. 179. *Balkishen Das v. Bedmati Kuar (I. L. R., 20 Calc., 388); Pandarinath Bapuji v. Lilachand Hatibhai (I. L. R., 13 Bom., 237) and Gopal Sah v. Janki Koer (I. L. R., 23 Calc., 217)* referred to. *BAKHTAWAR MAL AND OTHERS v. SHAFI MUHAMMAD AND ANOTHER.*

[XVI-152]

ACT XV OF 1877, Art. 179, cl. (5).—(continued.)

(64.) Art. 179, cl. (5).—*Issuing notice—Fresh limitation.*] The fact that an application for execution of his decree by a decree-holder may be abandoned after the issue of the notice prescribed by s. 248 of the Code of Civil Procedure will not deprive him of the benefit to be derived from the issue of that notice under art. 179, cl. (5) of sch. ii, of Act No. XV of 1877. Under that clause it is the issuing of a notice under s. 248 of the Code of Civil Procedure which gives a fresh period of limitation, and it is immaterial whether the proceeding is subsequently abandoned or not. *PARMESHRI DAS AND ANOTHER v. BAIJ NATH.*

[XIV-96

(65.) —————.] The issuing of a notice under s. 248, C. P. C., gives a fresh starting point for limitation under art. 179, cl. (5), whether such notice was issued on a valid or invalid application for execution. *DHONKAL SINGH v. PHAKKAR SINGH AND OTHERS.*

[XIII-36

(66.) —————“Date of issuing notice” (Act IX of 1871.)] *Held* that the words “date of issuing notice” in cl. 5, art. 167, sch. ii, of Act No. IX of 1871, mean the date on which the order directing the issue of the notice is signed by the Court. *UDIT NARAIN v. RAM PARTAB SINGH.*

[I-120

(67.) —————.] Under art. 179, clause 5 of sch. ii, of the Limitation Act, “the date of issuing notice under the Code of Civil Procedure, section 248” is the date on which the Court orders that such notice should issue, and not the date on which notice actually does issue. *BALDEO AND ANOTHER v. T. B. HARRISON.*

[X-244

(68.) Art. 179, cl. (6).—*Certain date.*] The decree in this case passed in accordance with a compromise, was dated the 26th February, 1879. The compromise provided that the money decreed should be paid within eight years. The decree directed that “a decree in accordance with the compromise should be passed.” It did not specifically mention the period within which the money should be paid. *Held* that time began to run from the date of the decree and it became time-barred after three years. *LALTA PRASAD v. SHEO SAHAI AND ANOTHER.*

[V-193

(69.) —————.] A decree provided that “if the judgment-debtor paid off the whole amount at the end of *Jeth*, 1283 *Fasli*, no interest should be charged; that if he paid one moiety at the close of *Jeth*, 1283 *Fasli* and the other moiety at the same period in 1284, he should pay interest at 6 annas *per cent*; that in case of default in respect of the first and second

ACT XV OF 1877, Art. 179, cl. (6).—(continued.)

instalments, *i. e.*, after *Jeth*, 1284 *Fasli* (25th June, 1877,) the decree-holder be entitled to recover the whole amount at one rupee *per cent* interest.” The decree was passed on 12th April, 1875. On the 3rd September, 1879, the appellant applied for execution of the whole decree. *Held* that the terms of the decree regulating the rate of interest payable thereunder with reference to certain dates could not be deemed a direction for payment by the Court on certain dates in the sense of art. 179 (6) of Act XV of 1877 that the limitation began to run from the date of the decree and was time-barred. *BAL KISHEN v. FARHAT HUSAIN.*

[II-53

(70.) —————*Instalment decree.*]

See ss. 19 and 20, No. (1).

(71.) —————*Default—Limitation.*] A decree passed against the defendant in a suit, and dated the 13th March, 1877, directed that “the plaintiff should recover the decree money by instalments, agreeably to the terms of the deed of compromise, and he, in case of default, should recover in a lump sum.” The compromise mentioned in the decree provided that the amount in dispute should be paid in ten instalments, from 1284 to 1294 *Fasli*, the first to be paid on the 27th May, 1877, (1284 *Fasli*), and the remaining nine instalments on *Jath Purnamashi* of each succeeding *Fasli* year. On the 1st September, 1883, the decree-holders applied for execution of the decree, alleging that the first four instalments had been paid, but not any of the succeeding instalments, and they claimed to recover, under the terms of the decree, the fifth and all the remaining instalments in a lump sum. The judgment-debtors contended that the application was barred by limitation, as they had not paid a single instalment, and more than three years had elapsed from the date of the first default; and that, even if the first four instalments had been paid, such payments could not be recognised by the Court as they had not been certified. *Held*, reversing the decision of the lower appellate Court, that if the four annual instalments had not been paid under the decree, the execution of the decree was barred by limitation. *ZAHUR KHAN AND ANOTHER v. BAKHTAWAR AND OTHERS.*

[V-26

(72.) —————*Waiver—Certification under s. 256, C. P. C.*] An application for execution of a decree payable by instalments was resisted by the judgment-debtor as barred by limitation on the ground that nothing had been paid under the decree, and that the application was made more than three years after the first instalment fell due. The decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards, and that the appli-

ACT XV OF 1877, Art. 179, cl. (6).—(continued.)

cation was in time, having been made within three years from the date when the second instalment was due. *Held* that the decree-holder could not raise this plea, as the payment in question had not been certified to the Court executing the decree, and therefore could not, under s. 258 of the Civil Procedure Code, be recognized. *Sham Lal v. Kanahia Lal* (I. L. R., 4 All., 316) and *Zakur Husain v. Bakhthawar* (I. L. R., 7 All., 317) not followed. MITHU LAL AND OTHERS *v.* KHAIRATI LAL.

[X-79

(73).—A decree, dated the 20th January, 1874, directed that the defendant should pay the plaintiff Rs. 700 in equal annual instalments in six years without interest; that in the event of default in the payment of any instalment the plaintiff might take out execution in respect of such instalment; and that on the expiration of six years the plaintiff should be entitled to interest on all unpaid instalments at the rate of one rupee *per cent. per mensem*. The judgment-debtor did not pay any instalments and the decree-holder applied for execution of the decree within three years from the expiration of the term of six years. The judgment-debtor objected that execution of the decree was barred by limitation. The lower Court disallowed this objection, holding on the construction of the terms of the decree that the decree directed payment of its amount on the expiration of six years and the application for execution being made within three years from the expiration of that period was therefore within time. In second appeal the judgment-debtor again contended that execution of the decree was barred by limitation. The Court *observed* that under No. 179 (6), sch. ii, of Act XV of 1877, the limitation for the recovery of each instalment was three years from the date on which it was payable. The decree did not make the amount of the decree that might remain unsatisfied payable after the expiry of six years; it only directed that interest on the unsatisfied amount (that is whatever might be legally claimable) should be exigible. The amount of the first three instalments had become barred by limitation, but the decree-holder was entitled to recover the balance with interest at one rupee *per cent. per mensem* from the expiry of six years dating from the date of the decree. CHEDU GIR *v.* CHOTU PANDA.

[I-171

(74).—[. *L* obtained a decree against *U*, dated the 24th September, 1867, for possession of a certain estate subject to this provision, *viz.*, that if *U* paid in cash in the treasury of the Court, year by year for *L*'s maintenance, so long as she might live, an allowance of Rs. 18 *per mensem*, in three instalments of Rs. 60 each, the decree for possession should not be executed, but if default were made in payment of three such instalments, *L*

ACT XV OF 1877, Art. 179, cl. (6).—(continued.)

should be entitled to delivery of possession of such estate. The first default was made on the 18th January, 1874, but *L* waived the benefit of the provision. A fresh default was made, and on the 23rd January, 1880, *L* applied for possession of such estate. *Held* that the provisions of column 3, art. 75, sch. ii, of Act XV of 1877, were not applicable to this case, but art. 179, (6) of that schedule contained the law which must govern it; and, the date upon which such decree became capable of execution for possession being the 18th January, 1874, the date of the first complete default, the application of the 23rd January, 1880, was barred by limitation. UGRA NATH *v.* LAGANMANI.

[I-174

(75).—[Waiver—Limitation.] A decree for the payment of money directed that an amount less than the amount sued for should be paid by instalments, and that if default were made in payment of one instalment, the amount sued for should be payable. Default having been made the decree-holder, on the 7th May, 1877, applied for execution of the decree for the larger amount. It appeared that at this time, although the instalments had not been paid regularly, the decree-holder had received in full all the instalments which had fallen due excepting the instalment falling due in the previous September, that is September, 1876, of which he had received only a part. The application of the 7th May, 1877, was struck off the file. The decree-holder subsequently accepted the remaining instalments, which were paid on due dates. On the 28th August, 1878, the decree-holder applied for payment of an instalment which had been paid into Court. On the 8th September, 1881, the decree-holder applied for execution of the decree for the larger amount payable thereunder in case of default, with reference to the default, in respect of the instalment for September, 1876. The Court refused to allow execution to issue for such amount, but allowed it to issue for the balance of the instalment for September, 1876.

Per Oldfield, J.—That the acceptance by the decree-holder of the instalments falling due after September, 1876, notwithstanding default had been made in respect of the instalment for September, 1876, amounted to a waiver of his right to execute the decree for the larger amount payable thereunder in case of default, and by such waiver he was estopped from recovering such larger amount in execution of the decree. *Mumford v. Peal* (I. L. R., 2 All., 857) and *Gyan Chund v. Jawahur* (N.-W. P., H. C. Rep., 1870, p. 83) referred to.

Per Straight, J.—That, having by his application of the 7th May, 1877, sought to execute the decree for the larger amount payable thereunder in case of default in payment of the instalments of the smaller amount, the decree-holder was not competent afterwards to

ACT XV OF 1877, Art. 179, cl. (6).—(continued).

seek to execute the decree in respect of such instalments; that therefore his application of the 28th August, 1878, was not a step in aid of execution of the decree in the shape in which he had previously sought execution, from the date of which limitation could be computed; and that consequently his application of the 8th September, 1881, was barred by limitation.

Per Curiam.—That the decree-holder was not entitled to recover the balances of the instalment for September, 1876, regard being had to the limitation prescribed by No. 179 (6), sch. ii, of the Limitation Act, 1877. **RADHA PRASAD SINGH v. BHAGWAN RAI AND OTHERS.**

[III-33]

ACT I OF 1878 (Opium.)

ss. 3 & 9.—*Chandu.* Held that a person illegally manufacturing or preparing *chandu* was, with reference to ss. 3 and 9 of Act I of 1878, guilty of an offence under s. 9 of the Act. **EMPRESS v. GANESHI AND ANOTHER.**

[IV-213]

s. 9.—*Commitment to Session's Court.* Held that, inasmuch as a conviction of an offence punishable under Act No. I of 1878 must be by a Magistrate, a Magistrate taking cognizance of such an offence has no power to commit to the Court of Session. *Indrobee Thaba* (1. *W. R. Cr. R.*, 5) and *Regina v. Donoghue* (5 *Mad. H. C. Rep.*, 277) referred to. **QUEEN-EMPRESS v. SCHADE AND ANOTHER.**

[XVII-115]

s. 19.—*Magistrate—Power to search.* Held (following the analogy of section 65 of the Code of Criminal Procedure,) that a Magistrate who has the power to issue a search warrant has the power himself to search. **EMPRESS v. GANESHI AND ANOTHER.**

[IV-213]

ACT VII OF 1878 (Forests).

ss. 54 & 58.—*High Court's power of revision.* No order confiscating forest-produce which is the property of Government in respect of which a forest offence has been committed is necessary or can be made. All that need be done is to direct a forest officer to take charge of such forest produce. An order directing the confiscation of forest produce not belonging to Government, in respect of which a forest offence has been committed, can only be made at the time the offender is convicted. The High Court is competent under s. 297 of Act X of 1872, to revise an order made by a District Judge under s. 58 of the Forests Act, 1878, on appeal from the order of a Magistrate made under s. 54 of that Act, the jurisdiction of the High Court under s. 297 of Act X of 1872 not being expressly taken away by section 58 of the Forests Act. **EMPRESS v. NATHU KHAN.**

[II-93]

Act XI OF 1878 (Arms).

(1). s. 19.—*Unlawful possession of arms—Gun lent to servant for shooting.* One H, an indigo-planter, who was licensed to carry a gun, lent one of his Mohammedan servants his gun, telling him to go and shoot some game with it. Being found in possession of the gun while carrying out his master's orders, such servant was convicted by the District Magistrate, under Act XI of 1878, for carrying arms without a license, and the gun was confiscated. The Sessions Judge referred the case to the High Court. Held that, under the circumstances, such conviction was bad, and the gun should not have been confiscated. *In re HURBLEY,*

[I-7]

(2).—*Mere carrying arms.* The expression "going armed" as used in s. 19 of Act XI of 1878, was not intended to render penal the mere act of carrying arms unless there was some sort of intention of using the arms should occasion arise. **QUEEN-EMPRESS v. ALEXANDER WILLIAM.**

[XI-208]

(3).—*Where a person is found carrying arms apparently in contravention of the provisions of the Arms Act it must be presumed, in the absence of proof to the contrary, that he is carrying such arms with the intention of using them should an opportunity of using them arise.* *Queen-Empress v. Alexander William* (*W. N.*, 1891, p. 208) explained and approved. **QUEEN-EMPRESS v. BHURE.**

[XII-221]

(4).—*The mere temporary possession without a license of arms for purposes other than their use as such, as, for instance, where a servant is carrying his master's gun to a blacksmith for repairs, or where a blacksmith has a gun left with him for repairs, is not an offence within the meaning of s. 19 of the Indian Arms Act, 1878.* *Queen-Empress v. Alexander William* (*W. N.*, 1891, p. 208) and *Queen-Empress v. Bhure* (*W. N.*, 1892, p. 221) referred to. **QUEEN EMPRESS v. TOTA RAM AND OTHERS.**

[XIV-82]

(5).—*Unlawful possession of arms—Joint Hindu family.* Where proceedings under the Indian Arms Act, 1878, in respect of the unlawful possession of arms are taken against a member of a joint Hindu family not being the head of such joint family and arms are found in a common room of the joint family house it is incumbent upon the prosecution to give good evidence that such arms are in the exclusive possession and control of the particular member of the joint family who is sought to be charged with their possession. **QUEEN-EMPRESS v. SANGAM LAL.**

[XIII-48]

ACT XI OF 1878.—(continued.)

s. 25.—*Search warrant.*] When a Magistrate issues a search warrant under s. 25 of Act XI of 1878, it is necessary that he should record the grounds of his belief that the person against whom the warrant is issued has in possession arms, ammunition or military stores for an unlawful purpose. *QUEEN-EMPRESS v. SANGAM LAL.*

[XIII-48]

ACT XVII OF 1878 (Ferries Northern India.)

s. 2.—cl. (ii.) Of Regulation VI of 1819 having impliedly invested District Magistrates and Joint Magistrates with the power of granting exemptions from payment of tolls for the use of public ferries, an order made by a District Magistrate under that clause declaring certain persons to be exempt from payment of tolls for the use of a particular public ferry is a valid order under s. 2 of Act XVII of 1878. *BUDH RAM RAI AND OTHERS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

[XI-135]

ACT I OF 1879 (Stamps.)

(1). s. 3, (4) cl. (b).—“*Attested by a witness.*”] Held that a document by which the executant promised to pay to the person named therein a certain sum of money on a certain date with interest was not “attested by a witness” within the meaning of cl. (b) of sub-s. 4, s. 3, of Act No. I of 1879, merely by reason of its bearing on the face of it a statement by the scribe of the document that the document was correct and was written by his pen. *REFERENCE UNDER ACT I OF 1879, s. 49.*

[XV-61]

(2). s. 3, (17).—*Receipt.—Memorandum of sugarcane juice supplied.*] The defendant in a suit on a bond set up as a defence that the bond had been paid in part in sugarcane juice, and as evidence of this fact produced a document called a “*sarkhat*” alleged to be signed by the plaintiff, acknowledging the receipt of sugarcane juice, the price of which exceeded Rs. 20. There was nothing in this document which showed that the sugarcane juice had been received in part satisfaction of the bond. Held that the document was not a “receipt” within the meaning of the Stamp Act, 1879, but a memorandum of sugarcane juice supplied, and required no stamp. *DEBI PRASAD v. RUPU*

[IV-72]

(1). s. 3 (4) cl. c. & (13) & s. 7.—*Bond.—Mortgage—Instrument coming within several descriptions.*] The instrument to which this reference relates was in the following terms. “I (G.S.) borrowed Rs. 25 as earnest money from S.C. on the condition that I will supply 21 maunds of *rab* at the rate of 9 annas *per maund*. To secure the money I hypothecate

ACT I OF 1879, s. 3 (4) cl. c. & (13) & s. 7, —(continued.)

the produce of a certain field.” Held that the document was a bond as defined in s. 3, sub-section (4) C. of Act I of 1879, and also a mortgage-deed as defined in sub-section (13) of the same section. The stamp duty in either case is 4 annas (arts. 13 and 44.) The stamp duty chargeable is therefore annas four (s. 7.) *IN THE MATTER OF GAJRAJ SINGH.*

[VII-190]

(2). s. 3 (12 & 13) & s. 7.—*Lease—Mortgage—Instrument coming within several descriptions.*] Where a *zamindar* leased certain land in his village to some cultivators at a rent of Rs. 365 *per annum* in cash and of certain cart loads of straw and grass by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the other articles, it was held that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, cl. 13 of Act No. I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. *Ex-parte Hill (I. L. R., 8 Calc., 258)* referred to. *REFERENCE UNDER THE STAMP ACT 1879, s. 49.*

[XIV-204]

s. 7.—*Instrument executed jointly by two persons.*] Held that when an instrument is otherwise properly stamped it does not become otherwise for the simple fact that it was executed jointly by two persons and dealt with as a single matter. *WILLAYATI v. PIR BAKSH.*

[IV-318]

s. 9.—*Rules framed under—Promissory notes.*] The effect of notification No. 2955 of the 1st December, 1882, amending the rules made by the Governor-General in Council under s. 9 of the Stamp Act (I of 1879) and published in notification No. 1288 of the 3rd March, 1882, is not to prohibit all promissory notes except those chargeable with a duty of 6, 10 or 12 annas being written on impressed sheets bearing the word “*hundi*.” A rule which says that certain promissory notes may be written on paper bearing the word “*hundi*,” can not be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word “*hundi*.” A promissory note for an amount not exceeding Rs. 200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, is duly stamped if written on an impressed sheet of the value of two annas, though that impressed sheet bears the word “*hundi*.” *RADHA BAI v. NATHU RAM.*

[X-238]

s. 10.—*Adhesive stamp—Impressed stamp.*] This was a suit on three promissory notes pay-

ACT I OF 1879, s. 10.—(continued.)

able on demand. They were therefore chargeable under sch. I, art. 11 (a) of the Stamp Act and might have been legally stamped with an adhesive stamp of one anna. They were however written on papers bearing an impressed stamp for a larger amount and stamped as *hundi* paper. The lower Court held they were not duly stamped and were therefore not admissible in evidence. Held that though under s. 10, Stamp Act, these instruments might have been stamped with an adhesive stamp, the converse proposition does not necessarily follow namely that having been stamped as *hundi* they were stamped improperly. They were therefore admissible in evidence. **SADIK ALI v. RANI KUAKE DAI AND ANTHEP.**

[V-317]

s. 25.—*Award.*] By an award a sum of Rs. 5 *per mensem* was made payable to a certain person, but without any mention whether the sum was secured or intended to be secured to the heirs or representatives of the person to whom it was payable. Held that the award ought to be stamped as a document securing an annuity under s. 25 cl (c) of Act No. I of 1879. REFERENCE UNDER ACT NO. X OF 1879, s. 49.

[XVI-197]

(1). s. 34.—*Production of unstamped document.*] Where a Court has occasion to admit a previously unstamped document in evidence upon payment of a penalty under s. 34 and the following sections of the Act No. I of 1879, it is necessary that the original instrument should be before the Court. **KALLU v. HALKI.**

[XVI-68]

(2). ———*Transfer by endorsement—Award.*] On the 17th September, 1866, G gave Z an usufructuary mortgage of certain immoveable property to secure the repayment of Rs. 7,101 purporting to be advanced by Z. As a fact only Rs. 2,301 of that amount were actually advanced by Z, the balance, Rs. 4,800, being advanced by R. In 1868, Z sold the mortgagee's interest in the deed of mortgage to R for Rs. 2,301, the transfer being by endorsement and not being stamped. In April 1869, G transferred a portion of the mortgaged property to A. In September, 1869, R sued to have such transfer set aside, claiming in virtue of the deed of mortgage and the transfer endorsed thereon. On the 23rd September, 1871, the Court of first instance refused to receive the transfer by endorsement in evidence and to proceed with the suit, because such transfer was not stamped. On the 26th April, 1872, Z executed a stamped transfer of the mortgagee's interest in the deed of mortgage in favour of R. R, treating the order of the 23rd September, 1871, as an interlocutory one, presented the instrument of the 26th April, 1872, to the Court, and prayed that it would proceed with the suit. The Court proceeded with the suit and gave R a decree. This decree was reversed by the Court of first appeal on the ground that that instrument did

ACT I OF 1879, s. 34.—(continued.)

not cure the defect of the transfer by endorsement, and that the order of the 23rd September, 1871, was final. The decree of the Court of first appeal was affirmed by the High Court in June, 1873. Thereupon R made a criminal charge against Z of cheating in respect of the transfer by endorsement. This charge was eventually dropped, and was followed by a reference to arbitration by R and Z. According to the agreement to refer, which was dated the 17th August, 1874, the dispute between the parties was whether R should return the deed of mortgage to Z, and Z return the Rs. 2,301 to R or not. The arbitrators made an award, which was dated the 18th August, 1874, which directed, *inter alia*, that R should return the deed of mortgage to Z, and Z return the Rs. 2,331 to R. The deed was returned to Z, but the money was not returned to R. In 1875, Z applied under Regulation 17 of 1866 to foreclose the mortgage. In 1880, the mortgage having been foreclosed, S, as Z's representative, sued for proprietary possession of the mortgaged property. The lower Courts held that all the acts of R and Z subsequent to the disposal of R's suit of 1869 were fraudulent and collusive, and done with a view to evade the Stamp Law, and the person actually interested in the deed of mortgage was R, and not S, and on this ground, as well as on other grounds dismissed S's suit.

Per STRAIGHT, J.—That the transfer by endorsement of the deed of mortgage, notwithstanding such transfer was not stamped, transferred to R the mortgagee's interest in the deed; that such interest could not be re-transferred to Z except by a formal instrument stamped according to law, inasmuch as any other mode of retransfer would leave Z under the same disabilities as regards the Stamp Law as R, as any suit instituted by Z would, strictly speaking, be based, not on the deed of mortgage, but on the retransfer; and that therefore, under these circumstances, and having regard to the fact that Z had not returned the Rs. 2,301 to R actually; though not ostensibly, based his suit upon a re-transfer of the mortgagee's interest in the deed of mortgage, which was not stamped, and for which he had not given any consideration, and consequently his suit was not maintainable. Also that the award could not alter the effect of the transfer by endorsement.

Per MAHMOOD, J.—That the lower Courts were not justified in their findings as to the fraudulent and collusive nature of the acts of R and Z after the disposal of R's suit of 1869, or in finding that the person actually interested in the deed of mortgage was R, and not Z, such findings being based upon pure conjectures. That the unstamped transfer by endorsement was inadmissible to show that Z had transferred his interest in the deed of mortgage to R, whether R or the mortgagors wished to use it in order to show that fact, and consequently Z must be still regarded as the person interested in the deed and S was therefore entitled to

ACT I OF 1879, s. 34.—(continued.)

maintain the suit. **SHANKER LAL v. SUKHRANI AND OTHERS.**

[II-108]

(3.)—*Unstamped entry in account book.* On the 24th July, 1875, the accounts between the plaintiffs and the defendant were stated and a balance of Rs. 200 was found to be due to the plaintiffs. The defendant agreed to pay Rs. 500 in 5 years in annual instalments of Rs. 100. This transaction was noted in the account book of the plaintiffs and the defendants affixed their signature to the entry. In this suit based upon the entry in the account book, the plaintiff claimed the 2nd, 3rd, 4th and 5th instalments, alleging that the causes of action arose on the 23rd July, 1877, 1878, 1879, and 1880 respectively. The lower appellate Court held that, as the memorandum sued upon was not admissible in evidence, being unstamped, the suit was barred by limitation. *Held* that the decision of the lower Court was right. The plaintiff sued upon a document which was not admissible in evidence. The liability of the defendant could only be brought within the period of three years from the date of the institution of the suit by the terms of this document, and it was clear that the debt could not be proved *aliunde*. **DUNGAR MAL AND OTHERS v. GOPAL.**

[I-108]

(4.)—*Promissory Note—Acknowledgment.* The plaintiff sold and delivered certain goods to the defendant. The defendant gave the plaintiff in respect of the price of such goods, the following instrument.—“Agra, 14th November, 1877. Due to K, cloth merchant, the sum of Rs. 200 only to be paid next January, 1878.” The instrument was stamped with a one anna adhesive stamp. *Held* that although such instrument was not admissible in evidence as a promissory note, as it was insufficiently stamped, it was nevertheless admissible as proof of an acknowledgment of such debt. **KANHYA LAL v. STOWEL.**

[I-49]

(5.)—*Stamped as hundi.* *Held* that a promissory note which might have been legally stamped with an adhesive stamp of one anna, but which was written on papers bearing an impressed stamp for a larger amount and stamped as *hundi* paper was not inadmissible in evidence on that ground. **SADIK ALI v. RAM KOMAR DAS.**

[V-317]

(1).—**s. 34, Prov. (1).—Mortgage by conditional sale—Penalty—Practice.** This was a suit for possession of certain lands on the basis of a *sulehnama* filed in the execution of a decree held by the plaintiff against the defendant. The *sulehnama* provided that in consideration of an eleven months time allowed to the judgment-

ACT I OF 1879, s. 34, prov. (1).—(continued.)

debtor, he was to pay the decretal amount Rs. 35-8 on a fixed date and in case of default with interest at Rs. 2 per cent. *per mensem* from the date of the *sulehnama*. It further provided that in case of default the decree-holder might take possession of 5 *bighas* 10 *biswas* of land which was hypothecated as a security for the payment of the money. The defendant having failed to pay the money on the date fixed in the *sulehnama*, the plaintiff applied, in the execution department for possession of the land as stipulated but his application was rejected; hence this regular suit. The pleas raised in defence material for the purposes of this report were:—That the application embodying the *sulehnama* was simply made for the purpose of postponing the sale and gaining time, that the contract was never intended to be enforced; that the document was insufficiently stamped with a stamp of one anna. Both the lower Courts held that the suit was not maintainable on the ground that the decree had not been superseded by any new contract capable of enforcement by suit and that the rights of the parties must be governed by the decree. The lower appellate Court further held that the petition was not admissible as evidence of a contract of mortgage, not being stamped according to law.

Held (by a majority of the Full Bench) that it was clear from the plaint and pleadings that the plaintiffs set up against the defendants a contract reduced to writing and did not base their suit on an oral contract between the parties antecedent to the *sulehnama* and only recited or referred to therein. It was equally clear that this document by its terms purported to create a contingent possessory lien on the defendant's property and was thus a deed of conditional transfer by way of mortgage and should have been stamped as such. The document was therefore not admissible in evidence. *Held* further that the Court was not inclined to depart from the general practice in such cases, which is, that ordinarily an appellate Court will not direct the reception of an unstamped document to which the provisions of s. 34 of Act. I of 1879 apply, unless the amount of stamp duty and prescribed penalty has been tendered when the admissibility of the document in evidence was first challenged and the document was on this ground rejected—(*Champabati v. Bibi Jiban*, (I. L. R., 4 Calc. 215); (*Gour Prasad v. Nand Lal* (7 W. R., 2, 439); and (*Ramkrishna Gopal v. Vithu Sevaji*, (10 Bom., H. C. Rep., 441) followed. The appeal must therefore be dismissed.

Held (by Oldfield, J.) that the petition containing the *sulehnama* was evidence of the agreement to mortgage but was not the instrument embodying the contract itself and was not therefore open to objection under the Stamp Act; and as the actual effect of the arrangement between the parties was to supersede the decree by entering into a fresh contract the appeal and the plaintiff's claim should be decreed.

ACT I OF 1879, s. 34, Prov. (1).—(continued.)

Held (by Stuart. C. J.) that the agreement was an entirely new contract which had superseded the decree and that the present suit brought thereupon was a perfectly good suit, but that the plaintiff must make good the deficiency in stamp. **RUP CHAND v. THAKUR DIAL.**

[III-93]

(7.) **s. 34, Prov. (3).—Instrument executed by two persons.** *Held* that where an instrument is otherwise properly stamped it does not become otherwise for the simple fact that it was executed jointly by two persons and dealt with as a single matter. *Held* further that even if the stamp was insufficient if the instrument was admitted in evidence in the lower Court it could not be called in question in the appellate Court. **WILAITI v. PIR BAKHSH.**

[IV-318]

HARDEO DAS v. PARBATI.

[VII-94]

s. 37.—Held that a certificate by the Collector under s. 37 of the stamp Act, that the document is *duly stamped* is binding on the Courts and is conclusive on the point. **AGAR CHAND AND ANOTHER v. BALAK RAI AND OTHERS.**

[VII-21]

s. 41.—Penalty—Fresh suit—Costs. The plaintiffs in this case claimed to recover from the defendant the amount of stamp duty and penalty for insufficient stamping which they had paid in respect of certain instrument. It appeared that the plaintiffs had sued the defendant on the instrument in question, and had been compelled in the course of that suit, to pay the duty and penalty which the defendant was bound by law to pay. The lower Court dismissed the suit on the ground that the amount paid as penalty, &c., was a part of the costs of the former case and could not be recovered by a separate suit. *Held* that s. 41 of Act I of 1879 certainly does not prohibit the suit; indeed the words "any certificate granted in respect of such instrument under s. 39 shall be conclusive evidence of the matters therein specified" seem to indicate the possibility of such a suit; nor can the penalty mentioned in s. 41 be regarded as strictly within the designation of costs. **GOPAL DAS AND OTHERS v. MASUD KHAN.**

[III-211]

s. 51.—Held that the Collector himself is the officer and no other, to whom power is given by law to make inquiries into applications for allowance for spoiled stamps under the Stamp Act, to take evidence on oath in reference thereto, and to grant or refuse such applications and he cannot delegate his authorities in the matter. **EMPRESS v. NIAZALI AND OTHERS.**

[II 161]

ACT I OF 1879, —(continued.)

(1.) **s. 61.—Dishonest intention.** *Held* that to constitute an offence under s. 61 of Act I of 1879 a dishonest intention must be made out. **EMPRESS v. CHUNNI LAL AND ANOTHER.**

[III-239]

(2). —————. *B. S.*, a *Bania*, was convicted by a Magistrate of the abetment of an offence under s. 61 of Act I of 1879, by reason that his account-book contained an acknowledgment of balance due, signed by a debtor to which acknowledgment no stamp had been affixed. The accused pleaded ignorance as to the fact of the one-anna stamp being required and thus distinctly raised an issue as to the intention to evade duty. This plea was not considered by the Magistrate. *Held* that the conviction was perfectly legal but the amount of fine inflicted was excessive. A Magistrate is bound to consider the question of fraudulent intent with a view to determining the extent of fine to be inflicted. The punishment was reduced to a fine of Rs. 5. **EMPRESS v. BAHADUR SINGH.**

[V-30]

(3). —————. *Receiving unstamped instrument—Abetment.—Proof.* *Held* that where there is no evidence of conspiracy, a person receiving an insufficiently stamped instrument can not be convicted of "abetting by conspiracy the execution of the instrument on an insufficiently stamped paper" under ss. 40 and 109, P. C. and s. 61 of the Stamp Act, for conspiracy cannot be inferred from the mere fact of acceptance. **EMPRESS v. GOPAL DAS.**

[III-145]

(4). —————. *In* this case a bond for Rs. 45 was drawn out by *G* on plane paper and was executed by *K* in favor of *B*. The Deputy Magistrate convicted the obligor under s. 61 and the scribe under s. 67, of Act I of 1879 and the obligee under s. 109 of the Indian Penal Code, and s. 61 of the Stamp Act. *B*, the obligee applied for revision. *Held* that the mere acceptance of an unstamped instrument was not an abetment of its execution and as there was no other evidence of abetment the conviction must be set aside. **EMPRESS v. BHAIKON.**

[IV-37]

(5). —————. *A* debtor having paid a sum of money to his creditor accepted from the latter an unstamped receipt, promising to affix a stamp thereto. *Held* that this did not constitute abetment within the meaning of s. 107 of the Penal Code of the offence of making an unstamped receipt. *Empress v. Bahadur Singh*, (W. N. 1885, p. 31) distinguished. *Empress v. Janki* (I. L. R., 7 Bom., 82) and *Empress v. Bhairon* (W. N., 1884, p. 37) referred to. **EMPRESS v. MITTHU LAL**

[V-317]

ACT I OF 1879, s. 61.—(continued.)

(6). ————*Unstamped receipt—Agent—Volunteer.*] One *S* was the lessee of one *K*. In answer to a suit brought by *K* against *S* in respect of the contract *S* produced a number of unstamped receipts for sums over Rs. 20. One of these was given by the applicant *A* on behalf of *K*. *A* was therefore charged of an offence under s. 61 (Stamp Act). *A* pleaded in his defence that the receipt was one for the payment of money *without consideration* (as he, the applicant being only a volunteer for *K* had got no consideration for the receipt) and therefore exempted from stamp duty under sch. ii, art. 15 (b) of the Stamp Act. *Held* that *A* must be taken to have acted as an agent for *K* and the receipt was not exempted from stamp duty and that the conviction of *A* was therefore good. *EMPRESS v. ASHUTOSH.*

[V-266]

ss. 61 & 62.—*Cancellation of stamp—Sanction.*] *RA* through his nephew sent his salary bill to the Moradabad Treasury for payment. The one anna receipt stamp affixed to the bill was not cancelled. The matter was reported to the Collector who instituted a prosecution under s. 62 of Act I of 1879. The accused was convicted of an offence under s. 62. The Sessions Judge altered the finding to a conviction under s. 109 of the Penal Code read with ss. 11 and 62 of the Stamp Act. *Held* that the offence committed was one under s. 61 of the Stamp Act but that as no sanction was given under s. 69 of the Stamp Act, the conviction was bad and must be set aside. *Held* further that the accused did not contemplate the commission of any offence. *EMPRESS v. RAHAT ALI KHAN.*

[VII-5]

s. 64.—*Held* that to bring an instrument within the terms of s. 64, Stamp Act, four points are necessary and must co-exist or else the instrument is not liable. (1) The debt must exceed Rs. 20. (2) The instrument must be signed by or on behalf of the debtor. (3) In order to supply evidence of a debt. (4) The instrument must have been left with the creditor. *EMPRESS v. BANSIDHAR.*

[IV-164]

s. 68.—The sale of Court fee stamps without a licence is not an offence. *EMPRESS v. JALLU.*

[II-23]

(1.) s. 69.—*Sanction.*]

See ss. 61 and 62.

(2). ————.] The prisoner in this case was convicted by the District Magistrate of an offence under s. 61 of the Stamp Act but the prosecution was not instituted with the sanction of the Collector. *Held* that this was an irregularity and not a mere technical one, because the prosecution could not be conducted by the officer granting the sanction (if sanc-

ACT I OF 1879, s. 69.—(continued.)

tion had been granted), Conviction was therefore quashed. *EMPRESS v. DEO SAHAI.*

[III-98]

(1.) Sch. i, Art. 1.—*Acknowledgment.*] The question whether or not an allusion to a debt contained in a letter from a debtor to his creditor amounts to an acknowledgment of the debt within the meaning of art. 1, sch. i, of the Indian Stamp Act, 1879, is a question in each case of the intention of the writer. Hence, where, such a letter, written *ante litem motam*, before limitation, in respect of the debt, had expired, and at a time when other evidence of the date was subsisting was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation under the provisions of s. 19 of the Indian Limitation Act, 1877:—*held* that the said letter was not inadmissible in evidence by reason of its not having been stamped. *BISHAMBAR NATH v. NAND KISHORE AND OTHERS.*

[XII-234]

(2). ————.] The plaintiff in this suit claimed the balance found to be due to him from the defendants on accounts settled between them. The entry of the balance found to be due in the plaintiff's account-book was neither written nor signed by nor on behalf of the defendants; neither was such entry stamped. The Court of first instance holding that such entry should have been stamped under Act I of 1879, sch. i, No. (1), and that being unstamped it was not admissible in evidence, dismissed the suit. The plaintiff applied to the High Court for revision. *Held* that such entry not being written or signed by or on behalf of the defendants, was not "an acknowledgment of a debt" within the meaning of art. 1, sch. i, of Act I of 1879, nor would it save limitation under s. 19 of Act XV of 1877. The Court of first instance should not have dismissed the suit, but should have permitted the plaintiff to prove his claim *aliunde*, of course taking care not to allow him to recover any item or items outside the period of three years. *MAHPAL SINGH v. MOHESH SINGH AND ANOTHER.*

[I-87]

(3). ————*Promissory Note (Act XVIII of 1869).*] The plaintiff sold and delivered certain goods to the defendant. The defendant gave to the plaintiff, in respect of the price of such goods, the following instrument:—"Agra, 14th November, 1877. Due to *K*, cloth-merchant, the sum of Rs. 200 only to be paid next January, 1878." This instrument was stamped with a *one anna* adhesive stamp. The plaintiff claimed in the present suit from the defendant Rs. 200, and interest on that amount at twelve per cent. per annum, from the 14th November, 1877, to the date of suit. *Held* by Stuart, C. J., Pearson J., Oldfield, J., and Straight J., treating the suit as one for a debt, that, although such instrument was not admissi-

ACT I OF 1879, sch. i, art. 1.—(continued.)

ble in evidence as a promissory note, as it was insufficiently stamped, it was nevertheless admissible as proof of an acknowledgment of such debt.

Per SPANKIE, J.—Treating the suit as based upon a promissory note, that such instrument being insufficiently stamped, was not admissible in evidence. **KANHAIYA LAL v. STOWELL.**

[I-49]

(4). —————. *A* sued *B*, for Rs. 21-3, relying on an entry in his account-book, signed by *B* to the following effect:—"Out of Rs. 22-3, due to *A* by my late brother *X*, I have paid Re. 1, the balance will be paid by instalments." The entry bore a stamp of one anna. *Held* that the entry was an acknowledgment on proper stamp and not of the nature of a promissory note payable otherwise than on demand and which as such should have borne a stamp of two annas. **BANDA HUSAIN v. YAWAR HUSAIN.**

[III-127]

Sch. i, Art. 13 (c).—*Security bond called for by Court.* *Held* by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties, (a) an *advalorem* stamp under the Stamp Act, art. 13, sch. i, and (b) a Court-fee of eight annas under the Court fees Act, art. 6, sch. ii. **KULWANTA v. MAHABIR PRASAD AND ANOTHER.**

[VIII-281]

Sch. i, Art. 21.—*Conveyance containing no valuation.* One of the defendants in answer to a suit for the recovery of possession of certain land produced a document of which the following is a translation:—"We Hanuman Singh and Kalka Singh do hereby grant to Nandan Ram Misir as *shankhalap* the plot called Rae Chanda consisting of one bigha land and two *mahwa* trees in grove called Satti. We shall take no rent thereof; while the grantee is to avail it for (his) whole life. Any one of our family will have no right to interfere afterwards. Given this Asarh Badi 2nd, 1274 Fasli, Sambat 1924, (corresponding to the 19th June, 1867.)" The document when produced bore a stamp of 2 annas only. On objection being taken by the plaintiff that this document was insufficiently stamped a reference was made through the District Judge to the High Court. *Held* that the document must be construed as a conveyance on the face of which no value appears, and as such, should have been stamped with a stamp of the value of Rs. 50. **LACHMAN SINGH v. ISHRI SINGH AND ANOTHER.**

[XI-65]

Sch. i, Art. 22.—*Held* that a copy of an order passed by a Municipal Board on a petition presented to it and certified as a true copy by the Secretary to the Board, came within art. 22

ACT I OF 1879, sch. i, art. 22.—(continued.)

of the first schedule to the Indian stamp Act, 1879, and required to be stamped. The Secretary of a Municipal Board is a public officer within the meaning of art. 22 of sch. i to Act I of 1879 for the purposes indicated therein. **IN THE MATTER OF THE PETITION OF SUBHAN.**

[XVII-61]

(1). **Sch. i, Art. 50.**—*Acknowledgment.*

See sch. i, No. (1).

(2). —————. *Promissory note.*

See sch. i, art. 1, No. (4).

Sch. ii, Art. 2 (a).—*Receipt—Memorandum of sugarcane juice supplied.*—*See* s. 3, No. (2).

Sch. ii, Art. 12 (b).—*Bond executed by sureties of an officer.* The question in this case was whether a bond executed by the sureties of an officer of Government to secure the due execution of his office and the due accounting by him of "public moneys, deposits, notes, stamp-paper, postage labels, or other property" of the Government committed to his charge was or was not exempted from stamp duty by the provisions of art. 12 (b) of sch. ii of Act I of 1879, regard being had to the words "or other property."

Per Stuart, C. J., that such bond was one to secure the "due execution of an office" and the "due accounting for money received by virtue thereof," and nothing more, as the words "or other property" must be taken to mean property of the same kind as previously mentioned and therefore "money" or the like of money, and such bond was therefore exempted from stamp duty by the provisions of art. 12 (b) of sch. ii of Act I of 1879.

Per OLDFIELD, J., that inasmuch as the words in art. 12 (b) of sch. ii of Act I of 1879, "or the due accounting for money received by virtue thereof" should be regarded as mere surplusage, and the "due execution of an office" and the due accounting for money received by virtue thereof" be considered one and the same thing, and as the due accounting for property received by him by virtue of his office was the "due execution of his office" by the officer in this case, such bond was one for the "due execution of an office" and was therefore exempted from stamp duty.

Per SPANKIE, J., and STRAIGHT, J., that, inasmuch as the words in art. 12 (b) of sch. ii of Act I of 1879 could not be regarded as mere surplusage, and there was a distinction drawn by the Legislature between the "due execution of an office" and the "due accounting for money received by virtue thereof," such bond was not one for the "due execution of an office," and being one for the due accounting for "property" it was not one for the due accounting for "money," and therefore it was not exempted from stamp duty. **STAMP REFERENCE.**

[I-74]

Sch. ii, Art. 13.—*Kabuliyat.* By the term "cultivator" in No. 13, sch. ii of the Stamp Act

ACT I OF 1879, sch. ii. art. 13.—(continued.)

1879, only those persons are connoted who actually cultivate the soil themselves or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock. The class of husbandmen or actual agriculturists is meant; not farmers, middlemen, or lessees, even though cultivation may be carried on to some extent by such persons in the area covered by their lease. *Held* therefore, where the land, the subject of a *kabuliyat* (counterpart of a lease) was for a large part not cultivable or susceptible of being treated as a "cultivator's" holding in any legitimate sense of that word, that such *kabuliyat* was not exempted from stamp duty under art. 13 (c), sch. ii of the Stamp Act, 1879. STAMP REFERENCE.

[III-113]

(1.) Sch. ii, Art. 15 (b).—*Receipt-Given by counsel.* A receipt given by counsel for a sum above Rs. 20 and paid to him as a fee for professional services is exempt from stamp duty. STAMP REFERENCE FROM THE BOARD OF REVENUE, N.-W. P., AND OUDH.

[XIV-12]

(2).—*Agent—Volunteer.*

See s. 61, No. (6.)

ACT XIII OF 1879 (Civil Courts, Oudh).

s. 27.—A decree, dismissing a suit for dissolution of marriage made by the Judicial Commissioner of Oudh, exercising the powers of a District Judge under Act XIII of 1879, and the Divorce Act, 1869, is appealable to the High Court for the N.-W. P., *MORGAN v. MORGAN*.

[II-86]

ACT XIV OF 1879 (Hackney-carriage Act)

s. 9.—*Summary and not exclusive remedy.* Section 9 of Act No. XIV of 1879 is merely intended to provide a simple and summary means of settling disputes between the hirers and letters of hackney carriages, and parties are not thereby excluded from having recourse to the Civil Courts. *RAHIM BAKHSI v. P. C. WHEELER*.

[XIII-203]

ACT XVIII OF 1879 (Legal Practitioners.)

(1.) s. 12.—*Conviction—Report for dismissal—Right to go behind conviction.* A District Judge reported to the High Court for orders the case of a pleader who had been convicted of cheating under s. 417 of the Penal Code, and who, in the opinion of the District Judge, was unfit to be allowed to practice. Upon the hearing of the case, counsel was permitted to go behind the conviction in order to show that the acts of the pleader did not amount at law to the offence of cheating. IN THE MATTER OF DURGA

ACT XVIII OF 1879, s. 12.—(continued.)
CHARAN, PLEADER.

[V-48]

(2.)—*_____*. A vakil practising in the High Court was convicted by a Court of Session of the offence punishable under s. 471 of the Indian Penal Code, and the conviction was affirmed by the High Court on appeal. The vakil was subsequently called upon to show cause why he should not in consequence of such conviction be struck off the roll of vakils of the Court. On appearance in answer to this rule it was held that the vakil was not entitled to question the propriety in law or in fact of the conviction, but that it was open to him to show, if he could, that his conduct in the matter in respect of which he had been convicted was not such as to render him an unfit person to be retained on the roll of vakils of the Court. IN THE MATTER OF RAJENDRO NATH MUKERJI.

[XVI-20]

ss. 13 and 14.—*Transfer.* Section 13 of Act XVIII of 1879 does not empower the High Court to direct the transfer of proceedings taken in or by a Court subordinate to it against a pleader for unprofessional conduct before such subordinate Court. Whether or no the High Court has power under any other law to transfer such proceedings as those above mentioned, it is desirable that the Court before which the unprofessional conduct is alleged to have occurred should itself investigate the case, and the High Court would not without very special cause order a transfer of such proceedings. IN THE MATTER OF THE PETITION OF PIRTHI NATH.

[XIII-33]

s. 14.—Observations on the duties of pleaders with reference to the execution of *vakalat-namas* in their favour. IN THE MATTER OF A PLEADDR.

[XII-78]

ss. 27–29.—*Agreement between pleader and client.* Ss. 27, 28, and 29 of the Legal Practitioners Act (XVIII of 1879) do not relate to an arrangement or agreement made between a litigant and his own pleader as to the receipt of his fees which are actually allowed upon taxation. They do not provide as to matters which relate to the opposite party, or the fees that he has to pay to the legal practitioner of the opposite party, but provide what, as between the pleader and his client shall be the method in which certain special arrangements are to be entered into. They make provision for agreements between pleaders and their clients which relate to the payment of remuneration in excess of and a part from the amount allowed in the taxation; and were framed upon the principle which regards with jealous scrutiny contracts brought about by persons holding positions of active confidence towards others, such as a pleader necessarily occupies in reference to his client.

ACT XVIII OF 1879, ss. 27-29—(continued.)

They were intended to protect necessitous, improvident or careless litigants from being taken advantage of by unscrupulous legal advisers. *Rama v. Kunji* (I. L. R., 9 Mad., 375) approved and followed. *RAZI-UD-DIN v. KARIM BAKHSI*.

[X-36]

(1). s. 32.—*Renewal of certificate.*] A Mukhtar was reported to the High Court for practising without a certificate. It was found that he had in fact practised for some years without renewing his certificate; but also that he had apparently paid to his clerk year by year the amounts requisite for the purchase of stamps on renewed certificates, though he never ascertained for himself whether the certificates actually had been renewed. The Courts before which he practised also had not observed that the Mukhtar's certificate had not been renewed. Under these circumstances the High Court fined the Mukhtar an amount equivalent to the stamp duty on his certificates for the years during which his certificates should have been renewed and were not. *IN THE MATTER OF A MUKHTAR*.

[XVII-8]

(2).———*Jurisdiction.*] Two pleaders and a mukhtar authorized to practise in the Courts of the Cawnpore district were convicted and fined by the Magistrate of the Farukhabad district, under s. 32 of Act XVIII of 1879, for practising in the Court of a Deputy Magistrate of Kanauj in contravention of the provisions of s. 10. *Held* that the Deputy Magistrate at Kanauj and not the Deputy Magistrate of Farukhabad was competent to proceed under s. 32. The conviction therefore must be set aside. *EMPRESS v. GOPAL SINGH, AND OTHERS*.

[II-67]

s. 36.—*Touts.*] In taking action under s. 36 of Act No. XVIII of 1879, as amended by s. 4 of Act No. XI of 1896, the High Court, after recording evidence which proved to the satisfaction of the Court that certain persons habitually acted as touts, called upon such persons to show cause on a date fixed why they should not be dealt with according to the provisions of the section referred to above. The persons so called upon were invited to give any evidence they could produce to rebut the presumption that they habitually acted as touts, and they were also permitted to give evidence on oath on their own behalf if they wished to do so. *IN THE MATTER OF KUAR BAHADUR AND OTHERS*.

[XVI-107]

ACT V OF 1881 (Probate).

Application for probate—Issue raised as to the title of testator—Practice.] It is not the duty of a Court, entertaining an application for grant of probate to consider any issue as to the title of the testator to the property

ACT V OF 1881.—(continued.)

with which the will propounded purports to deal, or as to what disposing power the testator may have possessed over such property. *Behary Lal Sandyal v. Juggo Mohun Gossain* (I. L. R., 4 Calc. 1), *Hormusji Navroji v. Bai Dhanbaiji Jamsetji Dosabhai* (I. L. R., 12 Bom., 164), *Arunamoyi Dasi v. Mohendra Nath Wadadar* (I. L. R., 20 Calc. 888) and *Barot Parshotam Kalu v. Bai Muli* (I. L. R., 18 Bom., 749) referred to. *Tharp v. Macdonald* (L. R., 3 P. D., 76) and *Annoda Sundari Dasi v. Jugutmoni Dabi* (6 C. L. R., 176) distinguished. *BIRJ NATH DE AND ANOTHER v. CHANDAR MOHAN BANERJI*.

[XVII-106]

(1).—s. 2 (Proviso)—*Suit without obtaining probate.*] A donee or executor under a will to which Act No. V of 1881 applies is not precluded from filing a suit as such donee or executor by reason of his not having taken out probate of the will. *THAKURAIN v. RAM CHARAN*.

[XV-87]

(2).———.] Save where the Hindu Wills Act, 1870, is in force, it is not obligatory on a Hindu claiming under a will to obtain probate of the will before instituting his claim. *Krishna Kinkur Roy v. Panchuram Mundul* (I. L. R., 17 Calc., 272) and *Thakurain v. Ram Charan* (*Weekly Notes*, 1895, p. 87) follow. *KANHAIYA LAL AND OTHERS v. MUNNI*.

[XVI-44]

s. 9.—*Application for probate.—By executor.*] Although under s. 85 of Act No. V of 1881, it is within the discretion of the Court to refuse to grant an application for letters of administration, no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. *Heera Coomar Sircar v. Doorga Moni Dasi* (I. L. R., 21, Calc. 195) referred to. *PRAN NATH GHOSE v. JADU NATH BHATTACHARJI*.

[XVIII-14]

s. 50.—*Grant of administration—Revocation—Fresh application.*]—Where a grant of letters of administration made by a District Judge had been revoked under the provisions of s. 50 of Act No. V of 1881, it was *held* that, the cause of revocation being removed, the Judge had jurisdiction to entertain a fresh application for the same object. *BRIJ LAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL*.

[XVII-213]

s. 55.—*Grant of probate—Notice to next of kin—Practice.*] This was an application to the High Court for probate of the will of one J M deceased. The testator's estate consisted of personal property valued at about Rs. 26,000. The sole legatee under the will was a friend of the testator residing in India. The due execution of the will was proved. *Per* Spankie, Oldfield and Straight, J.J., that it was not incumbent on the Court to suspend the grant of probate until

ACT V OF 1881, s. 55.—(continued.)

notice of the application had been given to the relatives (if any) of the testator in the English and Irish newspapers. Per Stuart, C. J., that probate should not be granted until such notice had been given and its publication proved. In **THE GOODS OF JAMES MCCONNERS, DECEASED.**

[I-56]

s. 66.—*Application not subscribed*] Where an application for probate was not subscribed by the applicant in the manner provided by s. 66 of Act No. V of 1881, it was *held* that this defect was fatal to the application, and also that it was too late in appeal to return the application for amendment. **Brindaban Chand v. Umrao Chand** (W. N. 1893, p. 166) referred to. **MATHURA AND OTHERS v. DHORANDHAR SINGH,**

[XIV-55]

s. 67.—*Verification.*] The requirements of s. 67 of Act No. V of 1881 are imperative and an application for probate made under that Act which is not verified in the manner prescribed by s. 67 must be treated in the same manner as an unverified plaint in a suit. **BINDRABAN CHAND AND ANOTHER v. UMRAO CHAND,**

[XIII-166]

s. 69.—*Grant of Probate. Notice to next of kin.—Practice.*]

See s. 55.

s. 83 and Chapter v.—*Procedure.*] The only procedure recognized by law for obtaining letters of administration in the Court of a District Judge, as regards cases covered by that Act, is by application under Chapter V of Act No. V of 1881, and when such application is contested the procedure prescribed by s. 83 of the said Act is to be followed. Where a District Judge refused to try issues laid down by his predecessor in the matter of a contested application for letters of administration, on the ground that to try the issues so fixed "would amount to trying the whole case as a regular suit."—*Held*, on appeal to the High Court, that the issues must be remanded for disposal according to law with reference to s. 83 of Act No. V of 1881. **CHIRANJI LAL v. BANSIDHAR,**

[XIII-162]

ACT XII OF 1881 (N.-W. P. Rent.)

(1). s. 2.—*Retrospective effect—Usufructuary mortgage—Auction-sale* (Act XVIII of 1873.)] One *H* executed an usufructuary mortgage in favor of *K* on the 2nd of August, 1869, and it has been found that he put him in entire possession of all his *sir* land in the village. On the 20th November, 1876, in the course of certain execution proceedings, the *zamindari* rights of *H* were sold by auction and were purchased by *W*.

Held (Per Mahmood, J.) that *H* by the operation of s. 7 of Act XVIII of 1873 became

ACT XII OF 1881, s. 2.—(continued.)

an exproprietary tenant of the land belonging to him at the time of the sale of the 20th November, 1876, and that neither the preamble nor s. 1 of the Act contained any saving clause which could justify the interpretation that all the conditions included in a usufructuary mortgage are to be exempted from the operation of the Act or of s. 7 in particular, merely because the mortgage was a subsisting one.

(Per Tyrrell J.) That in 1876, by reason of the execution sale, other *sir* rights and interests of *H*, mortgaged by him in 1869, as such, went out of existence, and assumed a different character; that over that tenure in its altered character the plaintiff, though he still had his mortgage charge, had not, in the existing state of the law, a right to physical possession of the actual land; and that, subject to this new right of *H*, the plaintiff retained his mortgage charge of 1869 over the *zamindari* interests in the portion of the land acquired by *H*'s vendees. **KARAMAT KHAN v. SAMI-UD-DIN AND OTHERS.**

[VI-83]

(2).—(Act XVIII of 1873.)] *Held* that a mortgage of an occupancy holding is invalid even though such mortgage may have been executed before the coming into force of Act No. XVIII of 1873. **NANHU v. CHATARJIT.**

[XII-59]

(3).—Attachment—Auction-sale.] *Held* that a land holder, who had attached the occupancy right of an occupancy tenant in certain land in execution of a decree before Act XII of 1881 came into force, was not entitled under s. 2 of that Act to bring such right to sale after that Act came into force, that section not saving the right of a landholder to bring such a right to sale in execution of a decree, and s. 9 of that Act expressly prohibiting the sale of such a right in execution of a decree. **NAIKRAM SINGH v. MURLIDHAR AND ANOTHER.**

[II-41]

SHITAB KHAN v. AJUDHIA PRASAD AND ANOTHER.

[II-117]

(4).—Conditional sale—Foreclosure.] The occupancy tenant of certain land before the N.-W. P. Rent Act (XII of 1881) came into force, mortgaged his rights to his *zamindars* by a deed of conditional sale. The *zamindars* sued the heirs of the conditional vendee for foreclosure and possession of the mortgaged property. *Held* by the Full Bench that the terms of the judgment of the Full Bench in **Naikram Singh v. Murlidhar** (I. L. R., 4 All., 371) were directly applicable to the case, and that the transaction of mortgage, which was subsequently to become a sale, was not a transaction to which s. 2 of the Rent Act applied.

ACT XII OF 1881, s. 2.—(continued.)

because the sale would not have effect till after the Act came into operation. *MURLI RAI AND OTHERS v. LEDRI AND ANOTHER.*

[V-246]

See also

SURAJ BAKHSH AND OTHERS v. AJUDHIA PRASAD.

[IV-160]

(5).—*Auctionsale—Confirmation.* Held that the sale by auction of an occupancy right could not be confirmed after Act XII of 1881 had come into force though the sale was held before that Act came into force. *Umrao Begam v. The Land Mortgage Bank of India, (I. L. R., 2 All., 451)* and *Kundan v. Gulab (W. N. 1881, p. 53)* referred to. *HIRA SINGH v. UMRAO SINGH.*

[II-45]

(1). s. 3 (1A).—*Tenant.* Held that persons to whom s. 4 of Act XII of 1881 is applicable are tenants within the meaning of the term as defined in the Act. *JAI GOPAL AND OTHERS v. RADHA PRASAD SINGH AND OTHERS.*

[XIV-81]

(2). s. 3 (2).—*Rent—Fruit on trees.* The plaintiff sued in a Court of Revenue to recover "Rs. 98 principal, and Rs. 28-11-9, interest, total Rs. 126-11-9 balance of contract money from 21st March, 1879, to 1st September, 1881, in respect of produce of gardens and scattered trees situate within the limits of the "Allahabad Cantonments." The Judge of such Revenue Court being doubtful whether the suit was cognizable in a Revenue Court, the case was referred to the High Court under s. 205 (a) of Act XII of 1881. The Revenue Court made the following order in the matter. "B is a contractor of the fruits of trees situate within the limits of the Allahabad Cantonments: on an inspection of the *habuliyat* executed by the aforesaid contractor and the evidence of D H a Cantonment servant it appears that the contract with the defendant was not made in respect of any particular land with the area, number, or name of the field specified, but the terms of the contract were that the defendant was entitled to the fruits of all trees, the property of Government situate within the limits of the Allahabad Cantonments, and that he should pay to the plaintiff the contract money, which in fact is the value of the produce of the trees in this case. I doubt whether such a claim can be instituted in a Revenue Court under s. 93 (a) of Act XII of 1881; and the reason of my doubt is that the money for recovery whereof this suit is instituted does not come within the definition of 'rent' as given in s. 3 (2) of the said Act, inasmuch as this money is not due from the defendant in respect of any holding, or use or occupation of any land, but it is only the value of the fruit of trees sold to the defendant, nor does this

ACT XII OF 1881, s. 3 (2).—(continued.)

contract money come within the definition of rent on account of rights of pasturage, forest rights, fisheries, &c., as mentioned in s. 93 (a) of the aforesaid Act; under these circumstances a reference under s. 205 (a), Act XII of 1881, to the High Court through the Collector, as to whether or not this suit is cognizable by a Revenue Court seems desirable." The Court was of opinion that this suit did not fall under clause (a), s. 93, of Act XII of 1881, but that the agreement was in the nature of a contract, an action for the breach of which was cognizable in the Small Cause Court. *THE SECRETARY OF STATE FOR INDIA v. BINDRA BAN.*

I-162

(3).—*Share of fruit or wood deliverable by the occupant of a grove of trees to the landholder is rent within the meaning of the Rent Act.* *BADRI PRASAD v. BHIM SEN AND OTHERS.*

[XIII-1]

(4).—*Services for use of land.* Held (*Per* OLDFIELD J.) that the definition of the term rent in s. 3 of the Rent Act was intended to include services or labour rendered for the use of the land.

(*Per* MAHMOOD, J.) that the services connected with the land in the present case, which were of a mimic nature did not constitute "rent" and the word "render" in s. 3 of the Act does not include or imply the rendering of services or labour. *WARIS ALI v. MUHAMMAD ISMAIL AND OTHERS.*

[VI-221]

(5). s. 3 (4).—*Sir-land—Bighadam tenure (Act XVIII of 1873.).* This was a suit by an auction-purchaser for possession of a 15 bighas 3 biswas of land. It was resisted by the defendants on the ground that the land was their *sir*, and that after the sale, they had acquired a right of occupancy as exproprietary tenants. The lower appellate Court allowed the contention of the defendants and dismissed the suit on the sole ground that the *mahal* in which the land was situated was held *bighadam*. Held that all lands held by a co-sharer in estates to which the *bighadam* tenure extended were not necessarily his *sir*, under clause (c) of s. 3 of Act XVIII of 1873. It might be that there was no *sir* land at all within the plot or again a portion of it might be *sir* land under any one of the clauses of that section and the rest simply the proprietary lands of the defendants. *SUKHRAM v. JAWAHIR AND OTHERS.*

[I-80]

(6).—*Settlement (Act XVIII of 1873.).* Held that the question whether land held by a person whose proprietary rights in a *mahal* had been sold in execution of a decree while Act XVIII of 1873 was in force was held by him as *sir* at the time

ACT XII OF 1881, s. 3 (4).—(continued.)

of such sale must be determined by that Act. Land recorded as *sir* during the progress of a settlement of the district in which it is situate is not "*sir* land" as defined in s. 3 (4) (a) of Act XVIII of 1873 (N.-W. P. Rent Act.) Such land does not become "*sir* lands" within the meaning of that definition until the settlement is closed and confirmed. Where a person, whose proprietary rights in a *mahal*, have been sold in execution of a decree, alleges that land held by him at the time of such sale was held as *sir*, the burden of proof lies on him. **HARIDAS AND ANOTHER v. GHANSHAM NARAIN.**

[IV-77]

(7).—*Cultivation—Land under water.*] *Held* that where land was recorded as the "*sir*" of the defendants, the mere circumstance that from time to time or for a period of time it was under water and could not be cultivated could not alter its character. **DWARKA PRASAD AND ANOTHER v. BEHARI LAL.**

[VI-219]

s. 5.—*Fixed rate of rent—Service for use of land.*] *Held* that "rent" may mean and include, under s. 3 of Act XII of 1881, service rendered by a tenant on account of his holding; but the term "fixed rate of rent" in s. 5 is not applicable to the case where rent is rendered by way of service, uncertain in kind and extent so as to constitute a tenancy at fixed rates. Consequently a tenant who holds land in lieu of wages has no transferable interest therein and his rights and interests can not be sold in execution of a decree against him. **DWARKA DAS AND ANOTHER v. DEOKI NANDAN.**

[II-60]

(1). s. 7.—*Retrospective effect.—Usufructuary mortgage.—Auction-sale (Act XVIII of 1873).*]

See s. 2, No. (1).

(2).—*"Lose or part"—Whole interest.*] In order that the provisions of s. 7 of Act No. XII of 1881, may come into operation, it is not necessary that the *zamindar* should lose or part with proprietary rights in respect of the whole of his interest in the *mahal*. **BHAWANI PRASAD AND ANOTHER v. GHULAM MUHAMMAD AND OTHERS.**

[XVI-12]

(3).—*Usufructuary mortgage.*] A *zamindar* who makes a usufructuary mortgage of his *zamindari* including his *sir* land does not so "lose or part" with his proprietary rights within the meaning of s. 7 of Act No. XII of 1881, as to become an exproprietary tenant of his *sir* land. **Bhagwan Singh v. Murlid Singh (I. L. R., 1 All., 459)** and **Indar Sen v. Naubat Singh (I. L. R., 7 All. 553)** referred to, and the judgments of the majority of the Court in the latter case

ACT XII OF 1881, s. 7.—(continued.)

approved. **Khiali Ram v. Nathu Lal (I. L. R., 15 All., 219)** and **Jarao Bibi v. Kifayat Ali Khan (W. N. 1893, p. 177)** also referred to. **MADHO BHARTHI v. BARTI SINGH AND OTHERS.**

[XIV-110]

Per Contra:—

INDAR SEN AND ANOTHER v. NAUBAT SINGH AND OTHERS.

[V-108]

(4).—*Partition.*] *Held* that *sir* land of one sharer included on partition in the *mahal* assigned to another sharer is to be treated in the same way as *sir* land is dealt with after its proprietor has lost his proprietary right therein. In both cases alike the right of exproprietary tenancy comes by force of law into existence. **PETITION OF RAM PRASAD AND OTHERS v. DINA KUAR.**

[II-121]

(5).—*Agreement to relinquish sir land.*] By a mutual agreement entered into between the parties to a private partition of certain villages held by them jointly the parties agreed that, if either party at the time of the partition was holding *sir* land in a village which upon partition fell into the share of the other party, he would relinquish his rights in such *sir* land in favour of the party into whose share the said village had fallen. *Held* that under such private partition the holder of the *sir* land becomes, on partition being effected, an exproprietary tenant in respect of the land previously held by him as *sir* and that consequently the agreement to relinquish his rights in such land was not enforceable in law. *Held* also that s. 125 of Act No. XIX of 1873 does not apply to a partition by private agreement. **Gaya Singh v. Udit Singh (I. L. R., 13 All., 396)** referred to. **Ram Prasad v. Dina Kuar (I. L. R., 4 All., 515)** dissented from by Knox and Banerji, J. J. **KASHI PRASAD v. KEDAR NATH SAHU AND OTHERS.**

[XVIII-47]

(6).—*"Held as sir."*] *Held* that the word "*held*" in s. 7 of Act XII of 1881, must not be rigidly construed to refer to manual or physical holding, but land possessed and belonging to a person as his *sir*, and that for the purposes of that section the possession of a mortgagee was that of the mortgagor. **TULSHI AND OTHERS v. RADHA KISHAN.**

[VI-74]

KARAMAT KHAN v. SAMI-UD-DIN AND OTHERS.

[VI-83]

(7).—*Limitation.*] *Held* that an expropriator not asserting his right as such for four or five years does not thereby lose his right; for there is no such provision either in the limitation

ACT XII OF 1881, s. 7.—(continued.)

or the Rent Act. TULSHI AND OTHERS *v.* RADHA KISHAN.

[VI-74]

(8).—*Usufructuary mortgage—Auction-sale (Act XVIII of 1873).* In this appeal the plaintiff claimed proprietary right, and also exproprietary right by redemption of mortgage. In 1872, the plaintiff gave a usufructuary mortgage of his proprietary and exproprietary rights in a certain village for twelve years. In 1874 the mortgagee under a money decree sold up the rights of the mortgagor in the village. Held that the exproprietary right of the mortgagor was also lost with the proprietary right, as the mortgage was given before Act XVIII of 1873, (Rent Act) came into force. *BIRAM SINGH v. NEKRAM AND OTHERS.*

[V-278]

(9).—*Auction sale of sir—Passes proprietary right alone (Act XVIII of 1873).* A mortgaged a certain share with *sir* land to B. The mortgage was one by conditional sale. Subsequently B, the mortgagee, got a decree under a *sulehnama*, declaring the conditional sale to have become absolute, and giving him possession of the "share in suit." This was a suit by the assignee of the mortgagee, for possession of the *sir* lands and for mesne profits, on the allegation that he had been wrongfully dispossessed by A from the *sir* lands. Held that what was conveyed by the decree and the *sulehnama* was the "share in suit" and not the exproprietary holding, as in construing them they should be so interpreted as not to abrogate the provisions of s. 9 of the Rent Act. *SHEOBARUT RAI AND ANOTHER v. RAM RAI AND ANOTHER.*

[IV-273]

(10).—*(Act XVIII of 1873).* When certain parcels of *sir* land which had been hypothecated along with other land under the same instrument were sold with such other land in execution of a decree obtained on the hypothecation bond;—Held that such sale passed only the proprietary rights in the *sir* land. The exproprietary rights of the mortgagor in the *sir* land could not be affected thereby. *GHANSHAM DAS AND ANOTHER v. SHEO MANGAL SINGH.*

[XI-150]

(11).—*[A decree upon a bond hypothecating a zamindari share did not, nor did the bond itself, specifically mention the judgment-debtor's sir land. The decree holder applied for execution by sale of certain lands held by the judgment-debtor as sir; but the application did not pray for the sale of the zamindari share of the judgment-debtor. Held that the decree-holder was, under the decree, entitled to bring the sir land to sale, but that such sale would pass only the zamindari rights of the judgment-debtor in the sir land]*

ACT XII OF 1881, s. 7.—(continued.)

and would not defeat the exproprietary rights which, under s. 7 of the N.-W. P. Rent Act (XII of 1881), would vest in him immediately on transfer of the *zamindari* rights. *PAYAG SINGH v. NURUL HASAN KHAN.*

[X-5]

(12).—*Trees on exproprietary holding.* Held, by the Full Bench, that an expropriator who under s. 7 of Act XII of 1881 gets occupancy rights in his *sir* land, obtains analogous rights in trees upon such *sir* land. *JUGAL v. DEOKI NANDAN.*

[VI-320]

AJUDHIA NATH AND OTHERS *v.* SITAL.

[I-30]

DEOKI NANDAN *v.* DHIAN SINGH.

[VI-192]

(13).—*Sale of sir land apart from share—Validity.* Held by Petheram, C. J., and Straight, Oldfield and Brodhurst, J.J., that the question whether the proprietary rights of a co-sharer in the *sir* of a *mahal* are distinct and separate from the proprietary rights in the *mahal* itself, so as to enable the owner of one share to sell and give possession of his *sir* alone as against his co-sharers, must be determined with reference to the tenure and conditions under which land is held in the *mahal* by the co-parceners, to be ascertained in each case.

Per PETHERAM, C. J., and STRAIGHT, OLD-FIELD, J.J.—In *zamindari* tenures in which the whole land is held and managed in common a co-sharer cannot convey his right of occupancy in the *sir* as something distinct from his proprietary rights in the *mahal*. In *pattidari* tenures in which the lands are divided and held in severalty, each proprietor managing his own lands, there may be lands which come within the classification of *sir* given in the Rent Act, but they would not seem to be on a different footing from any other land held in severalty by a proprietor.

Per BRODHURST, J.—So long as a person is the sole proprietor of a *mahal*, he is not restrained by any law from effecting a sale of his proprietary rights in his *sir* land, even though he retains possession of the whole of the other lands of the *mahal*.

Per MAHMOOD, J.—That the proprietary rights of a joint co-sharer in his *sir* land form an essential part of his rights in the *mahal*, that such proprietary rights in the *sir* land may be sold but that the purchaser under such a sale could not obtain any such possession as would operate in defeasance of the expropriatory right in such *sir* land conferred by s. 7 and secured by s. 9 of the Rent Act. *Sahib Ram v. Kishen Singh*, (W. N. 1882, p. 192) *Hazari Lal v. Ugrah Rai*, (W. N. 1884, p. 103), *Gulab Rai v. Indar Singh* (I. L. R. 6 All. 54) and *Tirmal Singh v. Bhola Singh* (W. N. 1884, p. 169),

ACT XII OF 1881, s. 7.—(continued.)

referred to. SITAL PRASAD AND ANOTHER v. AMTUL BIBI AND ANOTHER.

[V-185]

(14) ———Sale of *ex-proprietary right in sir with proprietary right—Validity.*] The words of s. 7 of the N.-W. P. Rent Act, "shall have a right of occupancy in the land held by him as *sir*" are intended by operation of law to confer upon the proprietor who has sold his proprietary rights in a *mahal*, irrespective of whether he claims it or not, the status of an occupancy tenant, to whom the prohibition of s. 9 will apply. *Held*, therefore, that where a proprietor in a *mahal* holding *sir* land, who is selling his proprietary rights, at the same time transfers all his rights, actual, vested or contingent in such *sir* land, such transfer is one of his right of occupancy in such *sir* land, and as such is prohibited by s. 9 of the N.-W. P. Rent Act. GULAB RAI v. INDAR SINGH.

[III-207]

(15) ———Suit for possession of *ex-proprietary holding sold—Equity.*] A sale of proprietary rights and interests in a *mahal* purported to include the vendor's interest in his *sir* land, and he expressly stipulated that he would not claim occupancy rights in the *sir*. Subsequently he sued for possession of the *sir* as an *ex-proprietary* tenant, in reference to s. 7 of Act XII of 1881. *Held* that inasmuch as the plaintiff asked for possession without tendering that portion of the purchase money which was the price of the interest in the *sir*, it would be violating every principle of equity and good conscience to decree the claim. FASIH-UD-DIN v. KARAMAT-ULLAH AND ANOTHER.

[VIII-123]

KARAMAT AND OTHERS v. BALAM DAS AND ANOTHER.

[II-20]

(16) ———Usufructuary mortgage of *sir—Validity.*] The principles of the ruling in *Khiali Ram v. Nathu Lal* (I. L. R., 15 All., 219) apply equally to the case of a usufructuary mortgage made by a *zamindar*. Hence where a *zamindar* made a usufructuary mortgage of certain land in the occupation of tenants:—*Held* that the making of such mortgage was not *ultra vires* of the *zamindar*, and that the mortgagee was competent to sue in a civil Court for a declaration of his rights under the mortgage. JARAO BAI v. KIFAYAT ALI KHAN AND ANOTHER.

[XIII-177]

(1) s. 8.—Twelve years occupation—Submerged land (Act XVIII of 1873).] A tenant who has occupied or cultivated alluvial land, whenever such land was capable of occupation or cultivation for twelve years, acquires by such occupation or cultivation a right of occupancy in such land. LACHMAN PRASAD v. BAL SINGH.

[I-170]

ACT XII OF 1881, s. 8.—(continued.)

(2). ———Grazing land.] *Held* that where land had been held for grazing purposes and had subsequently been brought under cultivation without any fresh contract between the landlord and tenant, a right of occupancy began to accrue from the year in which cultivation began, not from the year in which the land was taken for grazing purposes. Musammat Saidunnissa Begam v. Niaz Ali (L. R., Vol. III, p. 6) and Goordial and another v. Ram Dui and another (N. W. P. H. C. Rep. 1866, p. 15) referred to. DEBI DAS v. TOTI.

[XIII-20]

(3). ———Sir land—Mortgage.] Where land, originally the *sir* of a proprietor, has been transferred to a mortgagee, and has in his hands lost its character of *sir*, and has been leased to a tenant on the usual conditions of a tenancy, which otherwise do not bar the acquisition of a right of occupancy in the land, such a right will be acquired by twelve years' occupancy under s. 8 of the Rent Act. In 1846, B mortgaged a share in a village, together with certain land which was recorded as his *sir*; and which was so described in the deed of mortgage. After the mortgage, it ceased to be recorded as his *sir* and was recorded as land held by tenants in the same way as other lands in the estate. In 1857 it was leased to S, and in 1863 to H, and from 1863 to 1882 remained in the possession of the last mentioned lessee. In 1882 B redeemed the mortgage, and subsequently brought a suit against H to establish that the land was his *sir* and for possession of it. *Held* by the Full Bench that there being nothing in the terms of the mortgage-deed to indicate that the land was transferred to the mortgagee to be held as *sir*, and the land having ceased to be recorded as the *sir* of the proprietor, and not having been leased as the *sir* of the lessor, it had not retained its character as *sir* when the defendant's tenancy commenced, so as to prevent him from acquiring a right of occupancy therein under the provision of s. 8 of the Rent Act.

Per MAHMOOD, J. that there is nothing in the law to prevent a *zamindar* from relinquishing his rights in *sir* land and converting it into land held by ordinary tenants; that the mortgage deed of 1846 showed that the *sir* right in the land in suit had been relinquished by the mortgagor; and that the *sir* land once relinquished by the *zamindar* ceases to have that character, and can not prevent the accrual of the occupancy rights within the meaning either of s. 6 of Act X of 1859 or of s. 8 of Act XII of 1881. The right of occupancy conferred by the Legislature upon cultivators of more than twelve years' standing is a right wholly independent of the wishes either of the *zamindar* or his mortgagee in possession, and when, the cultivator acquires such a right, it can not be taken as in the nature of a grant from either of them. The right of occupancy may thus be acquired during the curren-

ACT XII OF 1881, s. 8.—(continued)

cy of a usufructuary mortgage and during the period of the mortgagee's possession of the *zamindari* rights, and the *zamindar* upon redeeming the mortgage cannot disturb the possession of such occupancy tenants on the ground that, when he mortgaged the *zamindari*, it was free of such occupancy tenures. *Heero v. Dhonee* (N.W.-P. H. C. Rep. 1870 p. 129) referred to. *HARPAL v. BAL GOBIND AND ANOTHER*.

[V-184]

(4).—Occupancy holding—Grove.] Held that the purchaser of a grove of trees belonging to a tenant is not, in the absence of a specific contract to the contrary, liable to be ejected from the land upon which the grove stands by notice of ejectment under s. 36 of the Rent Act, on the ground that he has not acquired a right of occupancy under s. 8 of the Act. *BADRI PRASAD v. BHIM SEN AND OTHERS*.

[XIII-1]

(1). s. 9.—Tenant at fixed rate—Ancestral property.] A decree was made against a Hindu governed by the law of the Mitakshara, for money which he had criminally misappropriated. The transferee by sale of the decree brought to sale in execution thereof the judgment-debtor's right of occupancy in certain land as a tenant at fixed rates. The judgment-debtor's two sons brought a suit against the purchaser to recover two-thirds of the holding. Held that the right of occupancy at fixed rates in such land was ancestral property that is property in which under Hindu law the sons took a vested interest by birth. *MAHABIR PRASAD AND ANOTHER v. BASDEO SINGH*.

[IV-47]

(2).—Occupancy holding—"Transfer in execution"—Suit for sale (Act XVIII of 1873).] Held that where there were no co-sharers in the occupancy right held by (B) a judgment-debtor to whom the right of occupancy could be legally transferred under s. 9 of the Rent Act, a suit to bring the occupancy right to sale in execution of a decree, was not maintainable as against the *zamindar*. *DURGA PRASAD v. GOKAL CHAND*.

[I-31]

(3).—Foreclosure (Act XVIII of 1873).] A, a tenant mortgaged by conditional sale his tenancy to B, before Act XVIII of 1873 came into force but the foreclosure proceedings were taken after it had come into force. This was a suit by the mortgagee for possession of the land against the *zamindar*. Held that the transfer was illegal under s. 9 and could not be given effect to. *SURAJ BAKSH AND OTHERS v. AJUDHIA PRASAD*.

[IV-160]

ACT XII OF 1881, s. 9.—(continued.)

See also

MURLI RAI AND OTHERS v. LEDRI AND ANOTHER.

[V-246]

(4).—Application to set aside sale of (Act XVIII of 1873).] A certain occupancy holding was put up for sale in execution of a decree and was purchased by a person other than the *zamindar* or a co-sharer in such holding. The judgment-debtor applied to have the sale set aside on the ground that, in accepting a bid from such a person, the officer conducting the sale had conducted it irregularly. Held that although the auction-purchaser's title might be challengeable by the *zamindar* or co-sharer in the holding, it was impossible to hold that the officer conducting the sale was guilty of an irregularity in accepting his bids. It was no part of that officer's duty to ascertain, before accepting the auction purchaser's bid, whether he was a co-sharer in the holding or a *zamindar* or not. Nor could it be contended that the sale should not have been held at all, because the provisions of s. 9 of Act XVIII of 1873 might operate to prevent the acquisition of a good title by other purchasers than co-sharers in the right sold. *KUNDAN AND ANOTHER v. GULAB*.

[I-40]

(5).—Permission to bid (Act XVIII of 1873).] Held that though a land-holder may, in execution of a decree for money against an occupancy tenant of his, cause the occupancy right of his judgment-debtor to be attached and sold, permission to him to bid for and purchase such property could not be granted as he fell without the category of competent purchasers as specified in s. 9 of Act XVIII of 1873. *MUHAMMAD HUSAIN AND OTHERS v. GOPAL SINGH*.

[I-129]

(6).—Occupancy holding—Transfer in execution—Retrospective effect.] The right of the appellant as exproprietary tenant of certain land was attached in execution of a decree on the 22nd February, 1881, before Act XII of 1881 came into force, but the sale of such right took place after that Act came into force. The lower Court held that the sale proceedings being a part and in continuance of the attachment proceedings of the 22nd February, 1881, were not affected by s. 9 of Act XII of 1881 and confirmed the sale of such right. The Court (Straight and Brodhurst, J. J.) held that, following *Naikram Singh v. Murlidhar* (W. N. 1882, p. 41), the sale must be set aside. *SHITAB KHAN v. AJUDHIA PRASAD AND ANOTHER*.

[II-117]

NAIKRAM SINGH v. MURLIDHAR AND ANOTHER.

[II-41]

ACT XII OF 1881, s. 9—(continued.)

(7). ————— *Mortgage—Sale.* There can be no decree for sale under a simple mortgage of a right of occupancy. *LALTA DAI v. BHAWANI.*

[XIV-37]

(8). ————— *Right of purchase.* *A.*, an occupancy-tenant to whom the second and third paragraphs of s. 9 of Act No. XII of 1881 applied, gave a simple mortgage of his occupancy holding to one *S.* During the continuance of the mortgage *A.* died and his sons surrendered the occupancy-holding to the *zamindar*. *S.* then brought a suit for sale on his mortgage, obtained a decree, had the mortgaged property sold and purchased it himself. On suit by the *zamindar*, who had not been made a party to any of the previous proceedings, against *S.* for recovery of the holding, it was held that *S.* took nothing by his purchase under the decree obtained as above described and that the *zamindar* was entitled to recovery. *SUKRU v. TAFAZZUL HUSAIN KHAN.*

[XIV-130]

(9). ————— *Held* that a usufructuary mortgagee of *sir*-land cannot resist a suit for ejectment from the *sir*-lands, brought by a prior simple mortgagee who had obtained a decree on such simple mortgage, caused the *sir*-land to be sold in execution of the decree and purchased it himself, no matter whether the original owner of the *sir*-land, could or could not resist such suit. *MOMIN ALI v. LALTA PRASAD.*

[II-4]

(10). ————— *Private transfer—Kabuliyat—Covenant to relinquish.* *K.*, the occupancy tenant of certain land, to whom the land-holder had granted a lease thereof for a certain term, gave the latter a *kabuliyat* containing the following clause:—"On the expiration of the term the landholders shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself." *K.* died before the expiration of the lease, and was succeeded by his sons. On the expiration of the lease the landholder sued *K.*'s sons in the Civil Court for possession of the land, claiming under the *kabuliyat*.

Per CURIAM:—That whatever might have been the effect of the *kabuliyat* as regards *K.*, it could not defeat the rights of his sons, who had become by inheritance co-sharers in the right of occupancy or had succeeded thereto under the provisions of the Rent Act.

Per TYRRELL, J.:—That a relinquishment by an occupancy-tenant of his holding is not a "transfer" within the meaning of s. 9 of the Rent Act. *LALJI, AND ANOTHER v. UMRAN.*

[II-196]

ACT XII OF 1881, s. 9—(continued.)

(11). ————— *Held* that the defendant, who was a tenant with a right of occupancy in the land cultivated and held by him, executed a *kabuliat* in respect of the said land in favour of the plaintiffs (his landlords, agreeing that on the expiry of the term fixed in the *kabuliat* he should have no claim to retain) possession of the cultivatory holding, but that he should give it up. Plaintiffs sued for ejectment of the defendant on the basis of the agreement, and obtained a decree from the lower appellate Court. On second appeal by the defendant. *Held* that inasmuch as the plaintiffs sought to enforce the covenant contained in the *kabuliat* in such a manner as to extinguish the rights of occupancy found upon the facts of the case to have been acquired by the defendant in the land in suit, such suit must fail, as opposed to the policy of the law as shown in the provisions of s. 9 of the Rent Act (Act XII of 1881.) *KAURI THAKURAI v. GANGA NARAIN LAL AND OTHERS.*

[VIII-239]

(12). ————— *Mutation of names.* The lessee of certain land presented a petition to the Revenue Court praying that his heir's name might be entered in the revenue papers instead of his own. In accordance with this petition the names of the heirs were recorded. *Held* that it was a transfer and a good cause to the *zamindar* to have it declared null and to sue for ejectment of the defendant. *SHAMBHU NARAIN SINGH v. JAGAT SINGH AND OTHERS.*

[VI-305]

(13). ————— *Lease.* *Held* that a lease was not a transfer within the meaning of s. 9 of Act XII of 1881. *KHAMANI RAM v. SUNDAR.*

[XIII-9]

KUNJ BEHARI AND ANOTHER v. KINLOCK.

[I-11]

(14). ————— *Held* that a lease was not a transfer within the meaning of s. 9 of Act XII of 1881, and the term for which the lease has been granted is immaterial. *MAHESH SINGH v. GANESH DUBE AND ANOTHER.*

[XIII-130]

KHIALI RAM v. NATHU LAL AND OTHERS.

[XIII-125]

HAJI HEDAYAT ULLAH v. RAM NEWAZ RAI.

[II-80]

Per contra:—

JHARAN SINGH v. SHADI RAM AND ANOTHER

[IX-145]

WALI MUHAMMAD AND OTHERS v. RAGHU-BAR.

[IX-145]

ACT XII OF 1881, s. 9.—(continued.)

NAGPAL *v.* SITAL PURI AND ANOTHER

[X-3

ABADI HUSAIN *v.* JURAWAN LAL AND OTHERS.

[V-290

(15). ———— [usufructuary mortgage.] Held that a mortgage with possession stands on the same footing as a lease. KHIALI RAM *v.* NATHU LAL AND OTHERS.

[XIII-125

Per contra:—

GANGA DIN AND ANOTHER *v.* DHURANDHAR SINGH.

[III-89

HIRDAI *v.* JAINTI PRASAD.

[III-104

WAJIHA BIBI AND ANOTHER *v.* ABHMAN SINGH AND OTHERS.

[III-166

USAF KHAN AND OTHERS *v.* SARVAN AND OTHERS.

[XI-141

NANHU *v.* CHATAR JIT.

[XII-59

(16). ———— [Equity of redemption.] A, an occupancy tenant, mortgaged his holdings to B; and afterwards transferred the equity of redemption to C. C brought this suit for redemption of the holding. Held that he transfer to C being in contravention of the Rent Act, s. 9, the suit must be dismissed. BISHEN CHAND *v.* BENI PRASAD.

[VI-148

(17). ———— [Private transfer—Simple mortgage (Act XVIII of 1873.)] Held by the Full Bench (Mahmood, J. dissenting) that an hypothecation by an occupancy tenant of his right of occupancy was not a "transfer" within the meaning of s. 9 of the N.-W. P. Rent Act, 1873. BADRI NATH, AND ANOTHER *v.* PARBAT AND ANOTHER. GOPAL PANDDASY *v.* PARSOTAME.

[II-128

(18). ———— [Right of transferee.] A the transferee of occupancy rights in certain fields brought this suit for possession over the same against the vendor and one B who claimed some of the fields as belonging to his holding. The vendors did not defend the suit. Held that the transfer being contrary to the provisions of s. 9 of the Rent Act it was void *ab-initio* and the suit was not maintainable even as against B, though he was not the *zemindar*. PHALLI *v.* MATABADAL.

[III-7

ACT XII OF 1881, s. 9.—(continued.)

(19). ———— Held in a suit brought by the landlord for arrears of rent, that the defendants who were the purchasers of certain ex-proprietary holding, must be regarded as tenants at will and not ex-proprietary tenants. JAGANNATH PRASAD *v.* SADHO AND ANOTHER.

[II-54

(20). ———— [Consent of *zemindar*.] Held that the sale of occupancy rights were not void when made with the consent of the *zemindar*. (Mahmood, J. *per contra*.) DURGA AND ANOTHER *v.* JHINGURI AND OTHERS.

[V-135

(21). ———— Where a land-holder with knowledge of an alienation accepts rent from the alienee he is as much bound by the alienation as if he had expressly assented to it. RAGHUBAR SINGH *v.* KEDAR NATH.

[XII-107

(22). ———— X, an occupancy tenant, mortgaged his holding to B and gave him possession. Shortly after he relinquished his holding. The *zemindar* A then sued to set aside the mortgage. It appeared that A had accepted at least one instalment of rent from B. Held that the mortgage was perfectly legal. That the subsequent relinquishment could not affect the mortgage. That B was entitled to remain in possession so long as X survived and the mortgage was not redeemed. ALTAH HASAN *v.* DULA RAM.

[II-138

(23). ———— [Trees on such holding.] The presumption of law and the general rule is that property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself. *Fageer Soonar v. Khuderun* (N.-W. P. H. C. Rep. 1870, p. 251); *Ajudhia Nath v. Sital* (I. L. R., 3 All., 567); *Abdool Rohoman v. Data Ram Bashee*, (W. R. Jan, July 1864; p. 367) referred to. Also *Ruttonji Edulji Shet v. The Collector of Tanna* (11 Moo., I. A. 295). KASIM MIAN AND ANOTHER *v.* BANDA HUSAIN AND OTHERS.

[III-169

IMDAD KHATUN AND OTHERS *v.* BHAGIRATH.

[VIII-32

AJUDHIA NATH AND OTHERS *v.* SITAL.

[I-30

JHAGARU *v.* SHAMSHERE KHAN AND ANOTHER.

[I-20

(24). ———— [Sale.] A purchaser of proprietary rights in *zemindari* property at a sale in execution of a decree for

ACT XII OF 1881, s. 9—(continued.)

money held by himself applied in execution of the decree for the attachment and sale of certain trees growing on the judgment-debtor's exproprietary holding. *Held* by the Full Bench with reference to the provisions of ss. 7 and 9 of Act XII of 1881, (N.-W. P. Rent Act) that the trees were not liable to attachment and sale in execution of the decree.

Per STRAIGHT, J.—When a proprietor sells his rights and becomes entitled, under s. 7 of the Rent Act, to the rights of an ex-proprietary tenant, he holds all rights in the land, *qua* such tenant, which he formerly held in his character as proprietor, and paying rent in his capacity as tenant. Where there are trees upon the *sir* land held by him at the time when he lost his proprietary rights, neither the purchaser of those rights nor he himself can cut down or sell them *in invitum* to each other. Short of cutting the trees down, he has the same right to enjoy the trees as he originally had. *JUGAL v. DEOKI NANDAN.*

[VI-320]

AJUDHIA NATH AND OTHERS *v.* SITAL.

[I-30]

DEOKINANDAN *v.* DHIAN SINGH.

[VI-192]

(25.) ————— *Right of purchaser.* *A* the proprietor of certain land let it to *B*, for the purpose of being converted into a grove. *B* planted the trees and after having acquired a right of occupancy in the grove, mortgaged it to *C*. *C* brought a suit on the mortgage-deed, obtained a decree, in execution of which the rights and interests of *B* in the grove were sold and purchased by *C*. Thereupon *A* brought the present suit against *B* and *C* for possession of the grove. *Held* that the trees passed to *C* which alone could be sold in execution of a decree and purchased by a stranger, and not the occupancy right. *Held* further that so long as the trees stood and *B* paid the rent, he remained the tenant of the land. *SARDAR SINGH AND OTHERS v. MADARA AND ANOTHER.*

[III-2]

(26.) ————— *An occupancy tenant, whose orange trees planted with the land-holder's consent had been sold in execution of a decree against him, made a collusive resignation of his land to the land-holder, who thereupon sued the purchaser and the occupancy tenant for possession of the land with or without the trees. Held* that as the purchase did not involve a transfer of the tenancy of the land in the sense of s. 9 of the N.-W. P. Rent Act, nor any change in the relations between the land-holder and the occupancy tenant such as was prohibited by that law, the land-holder was not entitled to posses-

ACT XII OF 1881, s. 9—(continued.)

sion of the land. *LALMAN v. MANNU LAL AND ANOTHER.*

[III-175]

(27.) ————— *Held* that the purchaser from the tenant and planter of a grove acquired no occupancy right or tenant right in the grove, held by his vendor, but he had a right to the trees standing on the land. *AMIN-UD-DIN AND ANOTHER v. SRIPAL.*

[III-2]

(28.) ————— *Right to replant.* The plaintiffs in this suit are *zamindars* and the defendants are occupiers of grove land in the village. The defendants had planted some new trees in place of the old ones, and the plaintiff's suit was to get them removed. The defendant's right to replant was not deemed but it was contended that the new plants were planted a long time after the removal of the old ones. *Held* that the delay could not take away their rights. *AZMAT-ULLAH KHAN AND ANOTHER v. MANGNI RAM AND OTHERS.*

[VI-138]

(29.) ————— *Succession.* *A* and *B* were brothers jointly holding an occupancy tenancy. *A* died, and the holding was for sometime held jointly by *B* and *A's* two daughters. The latter subsequently had their names entered in respect of certain lands amounting to half the entire holding, as their exclusive occupancy tenure. *B* sued them for joint possession to the extent of a one-third share in these lands by right of inheritance from *A*. The lower appellate Court, without entering into the merits, dismissed the suit as untenable, on the ground that the plaintiff's proper remedy was a suit for partition and separate possession of his share; and that if the present suit were decreed, the plaintiff, under s. 9 of the N.-W. P. Rent Act (XII of 1881), might possibly succeed to the whole of the moiety in possession of the defendants, while they would have no reciprocal right to the moiety of which he alleged himself to be already in possession. *Held* that the lower appellate Court had taken an erroneous view of the case, and should have dealt with and decided it upon the merits. *YADAN KHAN v. JASIMA BIBI AND ANOTHER.*

[X-6]

(30.) ————— *Succession—Collateral—Sister's son—Brother's son—Cosharer (Act XVIII of 1873.)* *Held* (by Pearson and Straight, J. J.) that the sister's son of a deceased occupancy tenant who has been a cosharer with such occupancy tenant has a right of inheritance under s. 9 of Act XVIII of 1873, in preference to a brother's son of such occupancy tenant. *BALDEO v. JUGAL KISHORE AND ANOTHER.*

[I-2]

ACT XII OF 1881, s. 9.—(continued.)

(31). ————— Collateral—Sister's son.] On the death of an occupancy tenant he was succeeded in possession of the occupancy holding by his widow. On the widow's death the holding was recorded in the name of L the sister's son of her deceased husband. L had shared in the cultivation of the holding with both the former tenants. Held that in the absence of any nearer collateral the occupancy holding legally devolved upon L within the meaning of s. 9 of Act XII of 1881. *LEKHA v. MAKHAN LAL AND OTHERS.*

[XV-92]

(32). ————— Co-sharer.] Held that the proviso to s. 9 of the Rent Act, 1881, is intended to apply to such collaterals only who are actually sharing in the cultivation of the occupancy holding at the time of the deceased tenant's death. Collateral relationship does not, *per se*, give the right to inherit. *NAWAL KISHORE AND ANOTHER v. KALANDAR BAKHSI.*

[IV-51]

(33). —————] Held that a declaratory suit under s. 42 of the Specific Relief Act by a reversioner, not a joint tenant with the widow, and who did not share in the cultivation with the husband of the widow does not lie. *NAIPAL v. BACHANI.*

[VI-140]

(34). —————] Where a collateral relative claims to be entitled to succeed to an occupancy holding on the death of the occupancy tenant without direct heirs it is incumbent on him to prove, both that he is the heir according to the law to which he is subject, and also that he shared in the cultivation of the occupancy holding during the lifetime of the deceased occupancy tenant. But *non-sequitur* that if there is a more remote collateral who was a sharer in the cultivation of the occupancy holding, he is entitled to succeed in preference to a nearer collateral who did not so share in the cultivation. *Badri Das v. Debri Das (W. N., 1888, p. 200)* referred to. *SHANKAR LAL AND OTHERS v. DALIP SINGH.*

[XIV-194]

(35). ————— Direct heir.] This was a suit brought by the plaintiff to have his right as ex-proprietary tenant declared in respect of a 7 *bigha* 19 *biswas* of land in respect of which he alleged that his maternal grandfather F C had originally been the ex-proprietary tenant. The suit was resisted by a collateral relative of F C who alleged to have shared in the cultivation with F C. Held that the latter part of s. 9 of Act XII of 1881 did not entitle a collateral relative who has taken part in the cultivation of the land to the ex-proprietary right to the land as against a direct heir

ACT XII OF 1877, s. 9.—(continued.)

such as the plaintiff was. *BADRI DAS v. DEB DAS.*

[VIII-200]

s. 12—Agreement—Registration—Recorded before *kanungo*. (Act XVIII of 1873).] The plaintiff sued the defendant an occupancy tenant, for arrears of rent at an enhanced rate, alleging that he had agreed in writing to the enhancement of his rent. The plaintiff did not produce any written agreement, but called the *patwari*, who deposed that the defendant's rent had been enhanced with his consent; and he produced his diary in which he had noted that the rents of some 50 or 60 tenants of the plaintiff, including the defendant, had been enhanced with their consent, and that they had given the plaintiff *kabuliyats*. The *kabuliyat* was not produced and it appeared that it had not been registered. Held that the enhancement has not been proved according to the provisions of s. 12 of Act XVIII of 1873. The alleged written agreement is not forthcoming, but it is admittedly not registered, and there is no evidence to show it was recorded before the *patwari* of the village or *kanungo*. Indeed no such assertion is made. *ARJUN RAI v. RAJA SHIMBHU NARAIN SINGH.*

[I-166]

s. 19.—Tenant at fixed rate.—Liability to pay rent.] A tenant at fixed rates is liable to pay rent at the rate fixed, irrespective of whether his holding has become larger or smaller from natural causes, unless and until such rent has been altered in consequence of an order on an application under section 191 of Act No. XII of 1881. A tenant at fixed rates cannot plead in answer to a suit for payment of the fixed rate rent, a local custom by which the rent of a tenant is *ipso facto* proportionately decreased if the extent of his holding has become less by diluvion. *RADHA PRASAD SINGH v. BALDEO MISR.*

[XIII-29]

s. 29—Lease for term exceeding settlement—Cause of action. (Act XVIII of 1873).] This was a suit for the cancellation of certain leases so far as their terms exceeded the term of settlement. Held that with reference to the terms of s. 29 of Act XVIII of 1873, the plaintiff's cause of action had not yet arisen. *NAGAR MAL v. MACPHERSON.*

[I-66]

(1). s. 30.—“Revenue”—Actual dispossession.] Held that the words in s. 30 (b), of Act XII of 1881, “to resume such grants” cannot be held to include or imply the actual dispossession of the grantee or ex-grantee from his holding. The resumption of a grant mentioned in the section implies merely the resumption by the proprietor of the full exercise of his proprietary rights, a portion of which, namely, the right to

ACT XII OF 1881, s. 30.—(continued.)

collect rent, had been for a period in abeyance.
HUSAIN BAKSH v. ZAINAB BIBI.

[XIV-92]

(2). ———— *Rent free grant—Services—Rent.*
Held by Oldfield J. that land granted free from payment of any rent on condition that the grantee should perform certain services as a mimic did not constitute a rent-free grant within the meaning of s. 30 of Act XII of 1881, as the term "rent" included services. **Mahmood, J.**
Per contra. **WARIS ALI v. MUHAMMAD ISMAIL AND OTHERS.**

[VI-221]

(3). ———— *Burden of proof.* Application for revision of an order passed by the Commissioner of the Agra Division, in a case of resumption a rent free grant, under s. 95 (c), Act XII of 1881. *Held* that where persons who under the law would (if their claims were good) have been entitled to be settled with and recorded as proprietors, but who have remained recorded as mere tenants or at the best as holding mere *zamindari* grants, resist an application for resumption of the grants, it is for them to prove, if they allege it, that the grant was made before the 1st December, 1790, not for the land-holder to prove, as a preliminary to his application being entertained, that the grant was made after that date. **Radhī v. Court of Wards (L. R., Vol. 1, p. 184)** overruled. **DUMMAR SINGH AND OTHERS, v. KHUSHAL SINGH.**

[XIII-193]

(1). s. 31 — *Relinquishment—Submerged land.* Act No. XII of 1881, and the Acts of a like nature which preceded it assume that a tenancy of agricultural lands once entered upon continues until determined by effluxion of time, or by mutual consent, or in one of the ways provided for by statutory enactment, but mere non-payment of rent does not of itself determine the tenancy. Hence where the lands of certain tenants became submerged by the action of a river and the tenants, though they ceased to pay rent during the period of the submergence, made no overt indication of their intention to relinquish the said land, but on the contrary, on the river again shifting its course, laid claim to lands which had emerged and which they alleged to be identical with their former holding; it was *held* that there had been no relinquishment. **MAZHAR RAI AND OTHERS v. RAMGAT SINGH AND ANOTHER.**

[XVI-56]

(2). ———— *Ex-proprietary tenant.* Though an exproprietary tenant cannot transfer his rights as such for a consideration, there is nothing to prevent his voluntarily relinquishing those rights. **GAYA SINGH AND OTHERS v. UDIT SINGH.**

[XI-140]

ACT XII OF 1881, s. 31.—(continued.)

(3). ———— .] Though a covenant in a deed of sale of a *mahal* that the vendor should surrender immediate possession of the *sir* land would be void by reason of s. 7 of Act No. XII of 1881, there is nothing to prevent such vendor subsequently relinquishing such exproprietary rights to the *zamindar*. Certain *zamindars* having sold their proprietary rights in a *mahal* subsequently surrendered to the vendees their exproprietary holding and gave them possession. After the vendees had been thus in possession for several years the vendors sued them for the recovery of the expropriatory holding. *Held* that the acts of the vendors as above mentioned amounted to a relinquishment of their expropriatory rights within the meaning of s. 31 of Act No. XII of 1881, and that they could not recover possession. **Indar Sen v. Naubat Singh (I. L. R., 7 All., 847)** and **Khiali Ram v. Nathu Lal (I. L. R., 15 All., 219)** referred to. **KUAR SEN AND ANOTHER v. DARRO KUAR AND OTHERS.**

[XIII-182]

(4). ———— *Writing.*
Semble that a relinquishment made under s. 31 of Act XII of 1881 in order to be a valid relinquishment must be in writing. **Rai Singh v. Vansittart (W. N. 1889, p. 3)** doubted. **ENAYAT-ULLAH KHAN AND ANOTHER v. JAILAL.**

[XVIII-31]

*Per contra:—***RAI SINGH v. VANSITTART.**

[IX-3]

(1). s. 34, c. (1) — *Act detrimental to the land—Illegal transfer.* The plaintiff, in this case a *zamindar*, sued the heirs of an occupancy tenant, who had transferred his holding and the persons to whom it had been transferred (i) to set aside the transfer and (ii) to obtain possession of the property. *Held* that the lower Courts had rightly granted the first relief and rejected the other as they had no jurisdiction to grant that other. **GOKAL DAS v. HIKMAT ALI AND OTHERS.**

[V-271]

(2). ———— *Application to eject transferee.* A plaintiff is not entitled to a decree in his suit unless, by proof or admission or default of pleading, he shows that when he instituted that suit he was entitled to a decree. One *K C*, a *zamindar*, sued in a Court of Revenue to recover an occupancy holding from one *B S*, his occupancy tenant, and that tenant's transferee, *G S*, to whom, by a transfer which was inoperative under s. 9 of Act XII of 1881, *B S* had purported to make over his occupancy holding. The occupancy tenant died after the suit was filed, but before he had received notice of it, and the transferee being in sole possession of the occupancy holding defended the suit. *Held*, under the above circum-

ACT XII OF 1881, s. 34 c. (1).—(continued.)

stances, that the *zamindar's* suit must fail, inasmuch as at the time when it was filed he was not entitled to immediate possession of the occupancy holding. *GULZAR SINGH v. KALYAN CHAND.*

[XIII-170]

(3).—Lease.]

Held that the mere making of a lease by an occupancy tenant of his holding is not a cause of forfeiture of such holding. *Madho Lal v. Sheo Prasad Misr (I. L. R., 12 All., 419)*, referred to. *JANKI v. BALDEO SINGH.*

[XI-191]

(1).—Usu-

fructuary mortgage.] *Held* that a usufructuary mortgage by an occupancy tenant of his holding though invalid, was not an act detrimental to the land or inconsistent with the purpose for which the land was let, so as to entitle the *zamindar* to eject him for such act. *SHEOBARAN RAI AND OTHERS v. RANDIN RAI AND OTHERS.*

[VI-145]

MADHO LAL AND ANOTHER v. SHEO PRASAD MISR AND OTHERS.

[X-162]

FATIMA BEGAM v. HANSI.

[VII-29]

DEBI PRASAD v. HARADAYAL.

[V-205]

(5).—Erection

of cowshed.] An occupancy tenant building on a portion of his holding a shed for the accommodation of his cattle used for agricultural purposes and for the herd employed, to take care of them, and a wall enclosing such shed, does not commit an act detrimental to the land or inconsistent with the purposes for which it was let, within the meaning of s. 93 (b) of the N. W. P. Rent Act (XII of 1881).

Per MAHMOOD, J.—In cases of doubt in the application of s. 93 (b) of the Rent Act, the section should be construed strictly in favour of the tenure and against the forfeiture. The ruling in *Debi Prasad v. Har Dayal. (I. L. R., 7 All. 693)* explained. *HEMRAJ AND OTHERS v. DAMMAR SINGH.*

[VIII-120]

(6).—Construction of pukka well (Act XVIII of 1873).

Held (by Pearson and Straight, JJ.) that before a decree can be given to the plaintiff in a suit brought under s. 93 (b) of the Rent Act, 1873, for ejectment of a tenant by reason of his having constructed a *pukka* well in his holding it is necessary to find that the construction of the well was detrimental to the land in his occupation or inconsistent with the purpose for which

ACT XII OF 1881, s. 34 c. (1).—(continued.)

the land was let. *BASI v. NASIR ALI AND ANOTHER.*

[I-2]

(7).—Plant-

ing trees.] A tenant planted trees on one of the plots of land comprising his holding, an act which rendered him liable to ejectment. He paid rent, not in respect of each plot of land, but in respect of the entire holding. *Held* that he was liable to ejectment, not merely from the plot on which he had planted the trees, but from his entire holding. *BHOLAI v. RAM SINGH.*

[I-140]

(8).—Denial of title.]

Where in a suit by a land-holder for ejectment of his tenants from certain lands on the ground of certain erections constructed by the latter, the defendants denied the plaintiff's title, and asserted a proprietary right in the land, *held* that such denial not being the cause of action in the suit, it would not be right, at the stage of second appeal, to enforce upon them the forfeiture of their tenancy because of such denial. *MAZHAR HUSAIN AND OTHERS v. RAHMAT-UL-LAH AND OTHERS.*

[IX-154]

(1). s. 35.—*Execution of decree—Tenant ejected under s. 35.*] *Held* that the ejectment of a tenant under s. 35 of the Rent Act, on the ground that a decree for arrears of rent remains unsatisfied against him, does not debar the decree-holder from proceeding under Chapter VII of the Act to recover the money from the judgment-debtor. *FATEH SINGH AND OTHERS v. KARIM-UL-LA KHAN.*

[XIII-217]

(2).—Part payment of rent—Discretion of Court.]

Held that under s. 35 of the Rent Act, the payment into Court of part of an unsatisfied decree does not entitle a tenant to retain possession of part of his holding. *Held* also that the discretion to order ejectment given to the Collector or Assistant Collector in the final clause of s. 35 is to be exercised only for good and sufficient reasons, which must appear in the record of the case. *SALIG RAM v. RAM DYAL AND OTHERS.*

[XIII-9]

(1). s. 36.—*Estoppel.*] The service of a notice of ejectment under s. 36 of Act No. XII of 1881 is, as between the person who causes such notice to be served and the person on whom it is served, a conclusive admission by the former of the existence between them of the relationship of landlord and tenant. *BALDEO SINGH AND ANOTHER v. IMDAD ALI AND ANOTHER.*

[XIII-93]

ACT XII OF 1881, s. 36—(continued.)

(2).—[*Decree for rent.*] A lease was executed by Z in favor of U for the year 1280 *Fasli*. Under the lease Z obtained a decree against U for one year's rent. In 1835 *Fasli* Z served a notice of ejectment on U, but the Revenue Court decided against him, holding that there was no valid lease. The present suit for rent was therefore instituted. *Held* that the claim must be decreed. The previous decree for rent had established the relation of tenant and landlord between the parties and the remarks of the Revenue Court in the notice sent do not affect the relation of the parties. *TIKA RAM v. UDEY SINGH*.

[VII-28]

(1). s. 39.—[*Limitation—Service of notice.*] *Held* that the fact that in an application under s. 39 of the Rent Act, inquiry had been commenced and evidence taken regarding the merits of a claim to a right of occupancy did not preclude the Court from dismissing the application on the ground that it was barred by time. *Held* also that the Court was competent in an application under s. 39 to inquire whether the notice of ejectment had been duly served under s. 38 and the report as to service duly considered in accordance with ss. 80-82 of the Civil Procedure Code. *GHIRAO PATHAK v. SURESH DATT*.

[XIII-18]

(2).—[*Applicability of s. 5 of Act XV of 1877 to application under this Act.*] *Held* that s. 5 of Act XV of 1877 applies to applications under Act XII of 1881, and that therefore when the period prescribed for an application expires on a day when the Court is closed, the application may be presented when the Court re-opens. *PEM KUNWAR v. INURAT KUNWAR*.

[XIII-117]

(3).—[*Land held in lieu of services—Onus—Decree of Civil Court.*] *Held* that a landlord who seeks to eject the occupant of land by notice under s. 36 of the Rent Act, on the ground that the latter holds the land for services rendered in lieu of rent, must prove the agreement to this effect between him and the occupant. *Held* also that a mere declaratory decree for proprietary title to land obtained from the Civil Courts against a person who had set up a plea of adverse proprietary possession, under s. 82 of the Land Revenue Act, does not necessarily entitle the decree-holder to oust the occupant through the Revenue Courts by means of a notice under s. 36 of the Rent Act. *IMAM BANDI BEGAM v. HANUMAN RAM*.

[XIII-188]

(4).—[*Ejectment—Onus.*] Appeal from an order passed by the Commissioner of the Rohilkhand Division, in a case of contesting notice of ejectment under s. 39, Act No. XII of 1881. *Held* that when in answer to a tenant's application contesting a notice of ejectment under s. 36 of the Rent Act his landlord comes into

ACT XII OF 1881 s. 39,—(continued.)

Court pleading that the tenant's tenancy has determined, it is for the landlord to prove that the tenancy has determined, not for the tenant to show that it has not. *Main Singh v. Raja Muhammad Mumtaz Ali Khan* (W. N., 1893, p. 118) referred to. *MUHAMMAD MASUD HASAN KHAN v. RAGHOBAR*.

[XIII-192]

(5).—[*—*] *Held* with reference to the ruling in the case of *Karamat Ali v. Behari Lal*, (*Board's Selected Decisions*, Vol. III, page 33,) that a land-holder is not debarred from ejecting a tenant under ss. 36-40 of the Rent Act, from fields upon which he has not a right of occupancy, by the fact that the fields are held at a lump rent along with other fields upon which the tenant has acquired a right of occupancy. *GUPAT RAI v. BISHESHAR RAI AND OTHERS*.

[XIII-7]

s. 41.—[*Authorized to remain in occupation.*] *Held* that when, after the completion of ejectment proceedings under s. 40 of the Rent Act, a tenant enters into an agreement fixing the rent and naming the period when use of the land for the purpose of gathering in the standing crops, but not of preparing it for another harvest, shall cease, such agreement cannot reasonably within the meaning of s. 41 of the Act be treated as an authorization to continue in possession of the old tenancy. It creates a new tenancy for the period specified in it, if it creates a tenancy at all; and there is no reason why, if the tenant refuses to quit the land in accordance with his agreement as to occupation, the landlord should not, if he so pleases, then proceed against him by another notice under s. 36. *MAHADEO PRASAD SINGH AND OTHERS v. SHEOMANDIL*.

[XIII-187]

(1). s. 42.—[*"Growing crop."*] *Held* that the term "growing crops" used in s. 42 of the Rent Act includes rose and jasmine plants as well as the flowers they bear, and that a tenant is entitled to have the price of such plants estimated under that section with reference to their age, condition and prospective flower producing capability. *ABDUL BAKI AND ANOTHER v. MATHURA PRASAD*.

[XIII-24]

(2). s. 42 (c).—[*Assessment of price.*] *Held* that where a landholder having ejected a tenant upon whose holding there are growing crops, applies under s. 42, cl. (c) of Act No. XII of 1881, for assessment of the price, he is bound by the assessment which the Revenue Court may make and cannot afterwards refuse to pay the price so fixed. *SHAM LAL v. CHOKHE*.

[XVI-179]

SHAM LAL v. CHOKHE.

[XVII-102]

ACT XII OF 1881, —(continued).

s. 44.—“Improvement” — *Enclosure for house.*] A tenant with the consent of the *zemindar* constructed on his land a square bamboo frame with mud walls for his house. After eight years the *zemindar* wanted to turn him out and to get back his land. *Held* that the house being not a valuable building (not being worth more than Rs. 2) and the defendant not having acquired any right by adverse possession the *zemindar* is entitled to turn him ousted. *GOPI v. BISHESHAR.*

[V-100]

s. 48.—*Receipt.*] *Held* that the object of section 48 is to insure that a tenant gets a receipt for the full amount he pays specifying the period or crop on account of which it is acknowledged to have been received. It does not require that the receipt shall specify the period or crop on account of which the payer claims that the rent is paid. *BHAGWAN SINGH v. LACHMAN.*

[XIII-19]

(1) s. 56.—“*Rent payable in respect of such land.*”] The first paragraph of section 56 of Act No. XII of 1881, applies not only where there is rent in arrear due from the cultivator to his landlord, but also where rent is accruing due in respect of the period during which the produce was being grown. Hence where any one except the landlord wishes to bring to sale the produce of a cultivator, he must, in order to avoid the prohibition contained in s. 56 of Act No. XII of 1881, tender to the immediate landlord of the cultivator the amount, if any, for which the landlord might on the next ensuing sale day distrain the produce for arrears of rent. *JAGAN NATH PRASAD v. BHIKA RAM AND ANOTHER.*

[XIII-122]

(2) —————. *A* in execution of a decree (not for arrears of rent) against *B* his tenant attached the crops of the land. *B* applied to the Court executing the decree that the rents due from the defendant in respect of the land should be first deducted from the sale proceeds and the remainder be taken in satisfaction of the decree, for otherwise, the rent remaining due, he might be ejected for arrears of rent, basing his application on the rule of law that standing crops are deemed to be hypothecated for the rent of the land. *Held* that the rule refers only to the rent then payable in respect of such land and not for arrears of rent and that this was a provision for the benefit of the landlord and not of the tenant, and therefore the tenant could not insist upon the landlord to do so. *NAIK RAM SINGH v. MURLI SINGH.*

[V-262]

(3).—“*Produce of land.*”—*Trees.*] *Held* that trees are not “the produce of the land”

ACT XII OF 1881, s. 56.—(continued.)

within the meaning of s. 56, N.-W. P. Rent Act XII, 1881. *BECHAI LAL v. TIKA.*

[IV-135]

KHAMAN SINGH v. BALA BAKHSH AND ANOTHER.

[IV-152]

(4).—*Zemindar's lien (Act XVIII of 1881).*] *Held* that the distrainer and purchaser of a tenant's crops on which the *zemindar* has a lien for his rent, who had knowledge of such lien is liable to the landholders in a suit for damages. *SHERE SINGH v. KURI MAL.*

[II-51]

(5).— —————.] This was a suit on behalf of a *zemindar A* for arrears of rent by enforcement of lien on the produce of the land under cultivation, against *C* and *D* the tenants, and *B* the purchaser with notice of the lien of the produce of such land at a sale in execution of decrees which *B* held against *C* and *D*. *B* defended the suit on the ground that the lien under s. 56 of Act No. XVII of 1873, existed only so long as the produce remained in the possession of the tenant. *Held* in revision that *B* was liable for the claim. *In re* THE PETITION OF *IMAM-UN-NISSA v. LIAKAT HUSAIN.*

[I-1]

s. 57. (b) and (d)—*Distress.*] *A* and *X* jointly owned a *patti* of a *partidari mahal*, and jointly cultivated certain land as their *sir* in the *patti*. *X*'s share in the *patti* was sold and he became an expropriator in respect of the *sir* land. Subsequently the revenue having fallen due, *A*'s share was farmed to *B* and he also became an expropriator in respect of the *sir* land. *A* and *X* continued the joint cultivation of the land. *B* having distrained the joint crop for arrears of rent against *A*, *A* sued *B* under s. 93 (f) of Act XII of 1881 to contest the legality of the distress. *Held* that s. 57 (b) and (d) of the Rent Act has no bearing on the case and the distress was perfectly legal. *JANKI PRASAD v. PARSHAN SINGH, AND ANOTHER.*

[II-136]

s. 71.—“*Person*”—*Tenant.*] Application for the revision of an order passed by the Assistant Collector of Shahjahanpore in a case of illegal distraint under s. 93 (f), Act XII of 1881. *Held* that in a suit to contest distraint brought under s. 71 of Act XII of 1881, it is not necessary that the plaintiff be a tenant or cultivator. *AZIM-ULLAH v. NAJIN-UD-DIN.*

[XIII-16]

s. 84.—*Question to be decided by Revenue Court—Civil suit.*] The only question which a Revenue Court has power to determine under s. 84 or s. 148 of the N.-W. P. Rent Act is, whether the plaintiff or the intervenor has received the rent of the land before and

ACT XII OF 1881, s. 84.—(continued.)

up to the date when the plaintiff alleges that his right to sue accrued. A decision of the Revenue Court upon such question has not the effect of *res-judicata* in a subsequent suit in the Civil Court for declaration of the plaintiff's title to and for possession of, the land in respect of which the rent was claimed. The last paragraphs of those sections have not the effect of abridging the ordinary period of limitation provided for suits for declaration of title to and possession of immoveable property; but only show that a suit for declaration of the plaintiff's right to receive the particular rent refused by the Revenue Court must be instituted within one year from the date of the Revenue Court's decision. **GANGA PRASAD AND ANOTHER v. BALDEO RAM AND OTHERS.**

[VIII-62]

(1) s. 93.—*Jurisdiction—Suit for rent—Against lessee.* Held that a suit for arrears of rent against a lessee was cognizable by the Revenue Court and not by the Civil Court. **NAGAR MAL v. MACPHERSON.**

[I-66]

(2.)—*Against lessee and surety.* This was a suit by a lessor against a lessee and two other persons who had jointly guaranteed the payment of the rent by the lessee, for arrears of rent, by enforcement of lien expressly created by the sureties on their houses. The suit was brought in the Court of the Munsif of Moradabad. The house of one of the sureties was not situate within the district of Moradabad. Held that the suit as against the lessee was cognizable by the Revenue and not by the Civil Courts and that this part of the claim which sought to enforce lien in respect of property situate out of the district must also be dismissed. But the suit should be decreed against the other surety. **KARIM BAKHSI AND OTHERS v. BITHUL DAS AND OTHERS.**

[II-132]

(3.)—*Against heir of tenant.* An occupancy tenant in possession who has accepted the occupancy holding is liable to be sued for arrears of rent not barred by limitation which accrued in the life-time of the person from whom the right of occupancy has devolved upon him. The suit above referred to is exclusively cognizable by a Court of Revenue. So held by the Full Bench, Mahmood, J. dissentiate. The following cases were referred to:—By Edge, C. J.: *Jyeberkash v. Shew Purshad* (N.-W. P. S. D. A. Rep. 1864, Vol. I, p. 230); *Mata Deen Doobey v. Chundee Deen Doobey*; (N.-W. P. H. C. Rep. 1874, p. 118); *Mata Deen v. Chundee Deen* (N.-W. P. H. C. Rep. 1870, p. 45); *Wazir Muhammad v. Amanat Khan* (W. N. 1883, p. 172); *Bhikhan Khan v. Ratan Kuar* (I. L. R., 1 All., 512); *Ahmad-ud-din Khan v. Majlis Rai*, (I. L. R., 5 All., 438. By Knox, J.: *Ashootosh*

ACT XII OF 1881, s. 93.—(continued.)

Chuckerbutty v. Bane Madhub Mookerjee (Revenue, Civil and Criminal Reporter, Vol. 1, p. 26); *Benod Behary Mookhopadhyaya v. Beer Narain Roy* (ib., p. 46); and *Hossein Ali Beg v. Ashraf Ali Beg* (N.-W. P. S. D. A. Rep. 1865, p. 221) By Mahmood, J.: *Gopal Pandey v. Parasatom Das* (I. L. R., 5 All., 121); *Mahadeo Singh v. Bachu Singh* (I. L. R., 11 All., 224); *Waris Ali v. Muhammad Ismail* (I. L. R., 8 All., 552) and *Ahmad-ud-din Khan v. Majlis Rai* (I. L. R., 5 All., 438). **LEKHRAJ SINGH v. RAI SINGH AND ANOTHER.**

[XII-143]

(4.)—*By and against heirs of lessor and lessee.* Held that at suit by the heirs of the lessor of a village against the heir of the original lessee for arrears of rent due on the lease was not cognizable by the Revenue Courts. **TIRBENI SAHAI AND ANOTHER v. SHAIKH HUSAIN AND OTHERS.**

[III-59]

(5.)—*By assignee of land-holder.* A suit by the person to whom a land-holder has assigned rents payable to him by tenants, for the recovery of the money so assigned, is a suit cognizable in the Civil Courts and not in the Revenue. **GANGA PRASAD v. CHANDRAWATI AND ANOTHER.**

[IV-356]

(6.)—*Land partly agricultural, partly not.* Where under the same lease a large quantity of agricultural land in villages near Benares and small piece of land (apparently waste land) in the city of Benares was let at one common rent, without any apportionment of such rent in the lease it was held that a suit on such lease for recovery of rent would lie in a Court of Revenue. **THE MAHARAJA OF BENARES v. LACHMI NARAIN.**

[XIV-166]

(7.)—*Fruit on trees.*
See s. 3, No. 2.

(8.)—*Suit to set aside auction-sale.* The respondent obtained an *ex-parte* decree against the appellant, in his capacity as superintendent of a mosque for arrears of rent due from him in that capacity, on account of the mosque. Certain trees belonging to the mosque were attached and sold in execution of that decree. The respondent applied to the Revenue Court which made the decree to have the case re-opened, but his application was refused. He thereupon brought the present suit in the Civil Court against the respondent, the decree-holder and against the auction purchaser of the trees, to set aside the auction-sale. The lower appellate Court held that, inasmuch as the object of the suit was to obtain the cancellation of the decree for rent, and as the question whether the rent was payable was a question not cognizable in the Civil Courts, the suit was not cognizable in the Civil Courts, and dismissed

ACT XII OF 1881, s. 93.—(continued.)

it. *Held* that the suit could not be entertained, and the lower appellate Court had properly recorded the grounds upon which it failed. *MUMTAZ ALI v. GANGA JALI*.

[I-55]

(9).—[*Suit for rent—Rent not determined.*] Although a claim for rent is not properly entertainable by a Rent Court unless such rent has been fixed by contract between the parties or has been assessed in the manner provided by the Revenue or Rent Act, nevertheless when such a claim comes before a District Judge in appeal, it is competent to him, though he might not decree the claim *sub-nomine* rent, to award to the plaintiff compensation for the use of his land by the defendant. *RANJIT SINGH v. DIWAN SINGH*.

[IX-175]

BRIJBawan SINGH AND OTHERS v. MEHDI ALI AND OTHERS.

[VII-140]

See also

RAI KISHEN v. HARSARUP.

[III-20]

DHYAN RAI v. THAKUR RAI.

[II-138]

(10).—[*Held* that no suit for arrears of rent can be maintained against an exproprietary tenant until the rent rate on the land has been judicially determined by a competent Court (*S. A. No. 914 of 79 decided on the 2nd July, 1880*) followed. *JOKHU v. ALAM SINGH*.

[II-25]

PETITION OF RAM PRASAD AND OTHERS v. DINA KUAR.

[II-121]

(11).—[*Held* that except where there has been an arrangement or agreement between the parties, a landholder cannot sue his exproprietary tenant for rent until as a condition precedent, he or the tenant has obtained a determination of the amount thereof, either by application to the Settlement Officer under s. 14, or to the Revenue Court under cl. (1), s. 95, of the Rent Act or it has been fixed by the Collector or Assistant Collector according to s. 190 of Act XIX of 1873. A Revenue Court cannot entertain a suit for determination of the rate of rent but only on an application. *PHULAHRA v. JEOLAL SINGH*.

[III-203]

SHEO PRASAD v. BENI SINGH.

[XII-56]

(12).—[*An* application was made in the Revenue Court under s. 95 (1) of the N.-W.-P. Rent Act (XII of

ACT XII OF 1881, s. 93.—(continued.)

1881), by the purchaser of proprietary rights in a *mahal*, for determination of the rent payable by his vendors, who had become, under s. 7, his exproprietary tenants in respect of the land they had previously held as *sir*. The Revenue Court, by an order dated the 18th February, 1884, fixed the rent at a particular sum, payable annually, after making the deduction of four *annas* in the *rupee* required by s. 7 of the Rent Act. In May 1884, the purchaser sued the exproprietary tenants to recover from them arrears of rent at the sum so fixed, for a period of three years prior to the Revenue Court's order. *Held*, by the Full Bench, that the plaintiff was entitled to recover arrears of rent for the years in suit at the amount determined by the Revenue Court's order of the 18th February, 1884, subject to any question of limitation that might arise. *MAHADEO PRASAD v. MATHURA AND OTHERS*.

[VI-52]

(13).—[*Held* that before a plaintiff can succeed in a suit to recover arrears of rent, he must take proceedings in the proper Court and have the rent determined. *ISHRI SINGH v. LALA SINGH AND OTHERS*.

[VII-155]

(14).—[*This* suit was brought to recover arrears of rent for 1289 to 1292 *Fasli*. The plaintiff prior to the institution of this suit had treated the defendant as a trespasser, but by a decree of the Civil Court the tenant right of the defendant was established. No rent however was fixed until March 1884 either by private contract or by the Revenue Court. *Held* that the claim for rent prior to the 1st July, 1884, should be dismissed and that due after it should be decreed. There may be an implied contract on defendant's part to pay rent when he occupied the land, but this Court cannot decree any amount as arrears due until the rent payable has been fixed by a competent Court and this Court is not competent to fix it. *RADHA PRASAD SINGH v. JUGAL DAS*.

[VII-12]

(15).—[*If* a land holder wishes to get rent from a tenant of his agricultural land he must, during the continuance of the tenancy, either come to an agreement with the tenant as to the rent to be paid or get the rent fixed by means of an application under Act XII of 1881. If no rent has been fixed, the landholder cannot, after the determination of the tenancy, sue his *quondam* tenant in a Civil Court for damages for the use and occupation of the land. *Ram Prasad v. Dina Kuar* (I. L. R., 4 All., 515), *Radha Prasad Singh v. Jugal Das* (I. L. R., 19 All., 185) and *Debi Singh v. Jhanno Kuar* (I. L. R., 16 All., 209) referred to. *Brijbawan Singh v. Mehdi Ali* (W. N. 1887, p. 140) and *Ranjit*

ACT XII OF 1881, s. 93.—(continued).

Singh v. Diwan Singh (W. N. 1889, p. 175) overruled. *DEBI SINGH v. MUHAMMAD ISMAIL KHAN*.

[XVIII-38]

(16). ———— Agreement to pay rent—Agent.] On the death of an ex-proprietary tenant, who had paid no rent for the holding to the *zemindar* up to the date of his death, the eldest of his three sons, one of whom was a minor, agreed to pay to the *zemindar* for the last half of 1286 *Fasli*: Rs. 150-4 and for 1287 *Fasli*: Rs. 309, on account of the land; and this arrangement was recorded by the *patwari* in his diary. The *zemindar* sued the three brothers to recover the amount due under this agreement. The Court of first instance held that although the eldest brother was for all practical purposes the family manager, yet as he was not duly authorized by his brothers to make the arrangement on their behalf, the contract was binding upon himself alone. It decreed the claim against him but dismissed it against the other brothers. The lower appellate Court dismissed the suit totally. Held that the eldest brother was bound by the contract and the decree of the first Court should be restored. *LACHMAN SINGH v. INDARJIT*.

[I-94]

(17). ———— Set off.] A Court of Revenue cannot entertain a claim to a set off unless such claim, if made the subject of a suit, would fall within its jurisdiction. Held that in a suit in a Court of Revenue by a *lambar-dar* to recover rent the defendant was not competent to plead as a set off that certain arrears of *malikana* were due to him by the plaintiff. *BENI MADHO v. GAYA PRASAD*.

[XIII-168]

(18). ———— Liability of representative—Extent of.] Held that the legal representatives of a deceased tenant at fixed rates who had died leaving the rent payable by him in arrears were liable for payment of such arrears to the extent of the assets of the tenant which had come into their hands, and that this liability was not affected by the question whether or not they took over the tenancy of the deceased themselves. *Lekhraj Singh v. Rai Singh* (I. L. R., 14 All., 381) referred to. *THE MAHARAJA OF BENARES v. DALJIT SINGH AND OTHERS*.

[XVII-88]

(19). ———— Sub-proprietor—Tenant.] B was one of the sub-proprietors of a certain village. He also held certain land in the village for which he paid rent directly to the chief proprietor. Both the rights of B were put up for sale in execution of a decree and purchased, the former by R, and the latter by I. I brought this suit against R in the Revenue Court for rent in respect of the land purchased by him. Held that as B as a sub-proprietor in the village had no right against himself as tenant of such land, there was no relation of landlord and tenant

ACT XII OF 1881, s. 93.—(continued.)

between I and R and the suit was not maintainable. *ISHRI SINGH AND ANOTHER v. RUP NATH*.

[III-86]

(20). ———— Tenant at fixed rate.]

See s. 19.

(21). s. 93 (b).—Jurisdiction—Suit to eject—Tenant for waste.] A suit by a *zamindar* against a tenant for ejectment on the ground that the tenant had by planting certain trees on his holding committed acts inconsistent with the purposes for which the land was let, and for restoration of the land to its former condition is a suit cognizable exclusively by a Revenue Court. *Gangadhar v. Zahurriya* (I. L. R., 8 All., 446) distinguished. *CHET RAM v. KOKLA*.

[XII-45]

(22). ———— Mortgage.] A mortgage by an occupancy tenant under which the mortgagee gets possession of the occupancy holding is not an act detrimental to the land or inconsistent with the purpose for which the land was let within the meaning of s. 93, cl. (b) of the N.-W. P. Rent Act; but it is *ultra vires* of the occupancy tenant according to section 9 of the same Act. Where therefore the *zemindars* sued to eject the representatives of a mortgagee in possession of an occupancy holding, held that the suit was in fact a suit for the ejectment of a mere trespasser and as such was cognizable by the Civil Courts. *Debi Saran Lal v. Debi Saran Upadhia* (I. L. R., 6 All., 378) approved. *MADHO LAL AND ANOTHER v. SHEO PRASAD MISR AND OTHERS*.

[X-162]

(23). ———— Vendee.] Held that a suit by a land-holder against the vendees of his occupancy tenant for their ejectment lay in the Civil Court as against a trespasser. *JOKHU RAM AND ANOTHER v. HAR SHANKAR PRASAD SINGH AND OTHERS*.

[VI-75]

(24). ———— Sub-lessee and his lessor.] Two occupancy tenants granted a *zar-i-peshgi* lease of their occupancy holding to one R L for a term of sixteen years. R L sublet the holding for a term slightly less than his own. The sub-lessees made default in payment of rent. R L distrained their crops. Thereupon the original lessors intervened claiming the crops as theirs. The question of the distraint having been decided by the Court of Revenue against him, R L then brought a suit in a Civil Court asking for ejectment of both his lessors and his lessees and to be put into actual possession himself. Held that the plaintiff was precluded by reason of the lease granted by him the term of which had not expired from obtaining actual possession, unless the sub-lessees were ejected, which could only be done through the Court of Revenue. But the plaintiff was entitled to a decree declaring his

ACT XII OF 1881, s. 93 (b).—(continued.)
title as *zar-i-peshgi* lessee and putting him into possession of the rents and profits of the holding as *zar-i-peshgi* lessee, the decree for possession to be executed under s. 264, C. P. C. **SITA RAM AND OTHERS v. RAM LAL.**

[XVI-162]

(25). ———— *Suit to contest order of ejectment.* An occupancy tenant, who had been ejected, under ss. 34 and 93 (b) of the North-Western Provinces Rent Act, on the ground that he had committed an act mentioned in those sections, which rendered him liable to ejectment, sued in the Civil Court for a declaration of his right of occupancy and to have the decree of the Revenue Court directing his ejectment declared of no effect, on the ground that his act was not one of those rendering him liable to ejectment, being another by local custom. *Held* that the questions of the plaintiff's liability to ejectment on account of the act in question, being a matter the cognizance of which was limited to the Revenue Courts and the decision of the Revenue Court against him having become final, the plaintiff's suit was barred by s. 13 of the Civil Procedure Code. **Raj Bahadur v. Birmha Singh, (I. L. R., 3 All., 85)** distinguished. **RADHA PRASAD SINGH v. SALIK RAI.**

[III-10]

(26). ———— *A brought a suit for the ejectment of B under s. 93 (b). The suit was decreed by the Revenue Court. B therefore brought this suit in the Civil Court for a declaration that he occupied the land in question as orchard land with all the rights which an occupier of orchard land usually has. Held that the Civil Courts had no jurisdiction to try the suit.* **INDARJIT SINGH v. GUR PRASAD.**

[III-73]

(27). ———— *Act detrimental to the land.]*

See s. 34, cl. (1) Nos. (1) to (8).

(28). s. 93 (c).—*Ejectment of lessee.—Cancellation of lease.* *Held* that reading cl. (c) of s. 93 of Act XII of 1881 in conjunction with ss. 34 and 35 of the same Act, it is clear that no suit will lie for ejectment of a tenant by cancellation of his lease for non-payment of rent, but that when a decree for arrears of rent has been obtained the procedure mentioned in ss. 34 and 35 above referred to must be followed. **RAJBANSI KUAR AND ANOTHER v. PHEKU MISR.**

[II-191]

(29). s. 93 (cc).—*Jurisdiction.—Suit for the removal of trees from occupancy holding.* *Held* that a suit by a land-holder for the removal of certain trees planted by the defendants upon land held by them as the plaintiff's occupancy tenants was cognizable by the Civil and

ACT XII OF 1881, s. 93 (cc).—(continued.)
not by the Revenue Court. *Deodat Tiwari v. Gopi Misr (W. N. 1882, p. 102)* referred to. **GANGADHAR AND ANOTHER, v. ZAHURRIYA AND OTHER.**

[VI-210]

(30). ———— *(Act XVIII of 1873.)* *Held* that a suit by the *Zemindar* against a tenant at fixed rates for the demolition of a house erected on the occupancy holding and to have certain trees thereon removed was not cognizable by the Civil Courts. **DEODAT TIWARI v. GOPI MISR.**

[II-102]

Per contra:—

PROSANNO MAI DEBI v. MANSA.

[VI-248]

(31). ———— *Demolition of well.—Consent.* Where an occupancy tenant, apparently without the consent of his *zemindar*, constructed a *pak-ha* well on his occupancy holding, *held* that the *zemindar* was not competent to sue for the demolition of the well. **Raj Bahadur v. Birmha Singh (I. L. R., 3 All., 85)** followed. **MUHAMMAD RAZA KHAN AND ANOTHER v. DALIP.**

[XII-103]

(34). ———— *Suit for damages.—Vendee of occupancy holding.* *A*, an occupancy tenant sold his holding to *B* and gave him possession. *C*, the land-holder, brought a suit for cancellation of the sale-deed and for recovery of possession and he succeeded. He then brought another suit against *B* for damages for the period *B* was in possession under the sale-deed. *Held* that whatever his rights may be against *A* he could not sue *B* for damages. **BANNO BIBI v. MATHURA SINGH.**

[VI-72]

(35). ———— *Measure of.* *A*, an occupancy tenant, sold his tenure to *B* and put him in possession. *C*, the *zemindar*, brought a suit and obtained a decree against *B* for possession and mesne profits. *Held* that the measure of damages in a case like this (against a trespasser) is not what the *zemindar* might have received if the land were in the possession of the defendant, but what is the market value of the land for the purpose of leasing. **MATUKDHARI SINGH v. ALI NAQI AND OTHERS.**

[VII-242]

(34). s. 93 (d).—*Jurisdiction.—Suit by sub-tenant to recover rent paid to lessee.* *A* was the lessee from the proprietor of certain land. *B*, the tenant, and *C*, the sub-tenant or *shikmi*. *C* in whose possession the land was paid Rs. 33-4-0 as the rent for the land to *A* (the lessee) *B* (the tenant) afterwards sued *C* for this amount as rent due to him and obtained a decree. *C* then brought this suit against *A* and *B* to recover

ACT XII OF 1881, s. 93 (d).—(continued.)

the money he had paid to *A* (lessee). *Held* that the suit was cognizable by the Civil Court, it not being covered by s. 93, cl. (d) of the Rent Act because *C* was not a tenant within the meaning of s. 93, Rent Act, but a sub-tenant. **GANGA AND OTHERS v. MAKHU LAL AND ANOTHER.**

[IV-356]

(35). s. 93 (f)—*Jurisdiction.* The plaintiff attached and sold in execution of a decree certain trees which the auction purchaser in his turn re-transferred to the plaintiff for valuable consideration. Subsequently, the judgment-debtors having vacated the land on which the trees were situated, and another tenant being in possession of the land, the defendants, *zamindars*, purporting to act under Chapter III of the Rent Act, attached the trees, and, having brought them to sale, bought them in themselves. The plaintiff then came into Court and sued for a declaration of his proprietary title to the trees alleging his ignorance of the proceedings taken by the *zamindars*. *Held* that the plaintiff was entitled under the general Provisions of s. 11 of the Code of Civil Procedure to bring a suit of the nature above described in a Civil Court and that such a suit was not barred by s. 93 (f) or any other provision of the N.-W. P. Rent Act. **SHANKAR SAHAI v. DIN DIAL AND ANOTHER.**

[X-145]

(36). s. 93 (g)—*Jurisdiction—Suit by ex-lambardar (Act XVII of 1873).* *Held* that a suit by a co-sharer for money payable to him by another co-sharer for money paid by him for Government revenue as *lambardar*, where the plaintiff is at time of suit no longer *lambardar*, is cognizable in the Civil Courts and not in the Revenue Courts. *In re* PETITION OF ALI AHMAD v. BALDEO SINGH AND OTHERS.

[I-46]

(37).—*Suit by heir of lambardari against transferee of co-sharer.* *Held* that a suit against a co-sharer and the transferees of his share for arrears of Government revenue which became due before such transfer, the plaintiff claiming as a *lambardar* and as heir to the deceased *lambardar* during whose incumbency such arrears became due, was cognizable in the Revenue Courts. The principle laid down in *Bhikhan Khan v. Ratan Kuar*, (I. L. R., 1 All., 512) followed. **GAURIDAT AND ANOTHER v. WAZIR MUHAMMAD KHAN.**

[II-78]

(38).—*Against co-sharers.* *A* sued *B, C* and *D* in the Revenue Court for arrears of Government revenue paid by his father (a deceased *lambardar*) for the *rabi* of 1286 and *kharif* of 1287, under s. 193 (g) of Act XII of 1881. They had formerly sued the same persons for the *kharif* of 1286 *Fasli*. *C* and *D* were the auction purchasers of *B's* share.

ACT XII OF 1881, s. 93 (g).—(continued.)

They had purchased the share after the revenue for *kharif* 1286 *Fasli* had become due and before those for the two years sued for became due. The defendants pleaded that the suit was barred by s. 43, C. P. C. *Held* that the arrears of revenue for *kharif* 1286 was not due from *C* and *D*, and *B* could not be sued for the two latter years s. 43, C. P. C. did not apply. *Held* further, that the suit was not cognizable by the Revenue Court. **WAZIR MUHAMMAD v. AMANAT KHAN AND OTHERS.**

[III-172]

(39).—*By lambardar against mortgagee of co-sharer.* Where a *lambardar* brought a suit for arrears of land revenue payable by the proprietors against several defendants of whom some were co-sharers and others mortgagees in possession, *held* that such suit was one of the nature contemplated by s. 93 (g) of the North-Western Provinces Rent Act, 1881, and was cognizable by a Court of Revenue as against all the defendants. **LACHMAN SINGH v. GHASI AND OTHERS.**

[XIII-63]

(40).—*Onus—Diligence.* In a suit by a *lambardar* against a co-sharer to recover the co-sharer's portion of Government revenue paid by the *lambardar*, it lies upon the plaintiff to show that he had in his capacity of *lambardar* exercised due diligence in the collection of rents. **DHARAM PAL v. MADAN MOHAN.**

[XII-72]

(41).—*Suit against auction purchaser of co-sharer.* This was a suit by a *lambardar* against the auction purchaser of the *zemindari* interests of a co-sharer, for the arrears of revenue in respect of the years 1883 and 1884. It appears that the auction-sale held on the 27th November 1882 was not confirmed in his favor until the 18th June, 1883. *Held* that under the circumstances the plaintiff could not recover the arrears of revenue paid by the plaintiff for 1883, but that he could recover the arrears for 1884. **KHEM KARAN SINGH v. THAN SINGH.**

[VIII-248]

(42). s. 93 (h)—*Jurisdiction—Suit for rent wrongfully received.* *Held* that having regard to s. 11, C. P. C., a suit for the recovery of certain sums of money as the plaintiffs' share of rent alleged by them to have been wrongfully received by the defendants, their co-sharers, and in which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 (h) of Act XII of 1881. **MAHADEO SINGH AND OTHERS v. BACHU SINGH AND OTHERS.**

[IX-87]

(43).—*Suit on a quasi contract (Act XVIII of 1873).* The plaintiff stated that on the 24th April, 1877, the plaintiff had obtained a decree for possession of a moiety of a village

ACT XII OF 1881, s. 93 (h).—(continued.)

called *N* and for mesne profits, such decree being affirmed by the lower appellate Court on the 13th May, 1878, and by the High Court on the 4th February, 1879; that by an order dated the 5th April, 1880, he had been awarded Rs. 253-7-7 as the mesne profits for 1281-83 *Fasli* (October 1873—September 1879), that the defendant had wrongfully retained possession and made collections during 1284—1286 *Fasli* (October 1876—September 1879); that the plaintiff had obtained possession from the Court on the 14th June, 1878; and that he claimed Rs. 253-7-7, being the mesne profits for 1284—1286 *Fasli*. Held that the suit was cognizable in a Court of Small Causes, as one of *quasi* contract, for money had and received by the defendant for the use of the plaintiff, and that it did not fall within clause (h) of s. 93 of the Rent Act, 1873. **RAM LAL v. MUTTRA DAS.**

[I-109]

(43).—*Suit for settlement of accounts—Profits arising from zamindari property.* A suit for settlement of accounts is not exempted from the jurisdiction of the Civil Court merely because some of the items which must be dealt with in that suit happen to be profits arising from *zemindari* property. **ABIDUNNISA AND ANOTHER v. JAMAL ALI.**

[XVII-205]

(44).—*Suit for profits—For period prior to plaintiff was recorded co-sharer.* Held that a suit by a recorded co-sharer, to recover a share of profits of a *mahal*, under s. 93 (h) Rent Act, for years previous to that he was recorded as a co-sharer, was not cognizable by the Revenue Courts. **SHIB SINGH v. SITA RAM AND ANOTHER.**

[III-8]

(45).—*By heirs of cosharer.* *A* and *X* were the share-holders and *B* the *lambardar* and share-holder in a certain village. *X* died on the 5th of January, 1887, and her share of such land, together with the *sir* land and her jewels and other moveable property devolved upon *Y* and others, but the property in suit however remained in the possession of *B*. *Y* died in January 1878, leaving *A* as heir. *A* brought the present suit against *B* on the 3rd January, 1880, for the profits of the *zemindari* state for the years September, 1876, to September, 1879, and for the jewels and other moveable property, for possession of *sir* lands and for mesne profits. Held that the suit was cognizable by the Civil Courts and was not barred by time. **WALAYTI BEGAM v. ASHRAF KHAN AND OTHER.**

[I-56]

(46).—*Against heir of lambardar.* A suit by the heirs of a deceased co-sharer against the heirs of a deceased *lambardar* for money claimed as profits

ACT XII OF 1881, s. 93 (h).—(continued.)

due to the deceased co-sharer by the deceased *lambardar* is a suit which is cognizable in the Civil Courts and not the Revenue. *Mata Deen Doobey v. Chundee Deen Doobey* (N.-W. P. H. C. Rep. 1874, p. 118); *Mata Deen v. Chundee Deen* (N.-W. P. H. C. Rep. 1870, p. 54); and *Bhikhan Khan v. Ratan Kuar* (I. L. R., 1 All., 512) observed on by Stuart, C. J. Where a suit instituted in the Revenue Court is dismissed by the Court of first instance on the ground that it should have been instituted in the Civil Court, and the appellate Court affirms the decision of the first Court, the appellate Court should, under s. 208 of the N.-W. P. Rent Act, 1881, remand the case to the Civil Court competent to entertain it for disposal on the merits. **AHMAD-UD-DIN KHAN AND OTHERS v. MAJLIS RAI AND OTHER.**

[III-69]

(47).—*By assignee of cosharer.* There is no legal objection to a cosharer in a *mahal* assigning his share in the profits of such *mahal* to a stranger; nor is there any legal objection to the assignee suing in a Civil Court to recover such profits. *Chadammil Lal v. Kishen Lal* (Weekly Notes 1894, p. 17) approved. **BHAGWAN DAS v. BHAIJU MAL.**

[XIV-140]

(48).—*Against heir of lambardar.* Held that on the principles laid down in the High Court's ruling in *Lekhraj v. Rai Singh and another* (I. L. R., 14 All., 381) a suit for profits under s. 93 of the Rent Act brought by a recorded co-sharer against the heirs of a deceased *lambardar* can be heard and determined only in a Court of Revenue. **KIFAYAT ULLAH KHAN v. ALI BEGAM AND OTHERS.**

[XIII-102]

(49).—*Against lambardar—Substitution of names.* The death of a defendant in a suit under s. 93 (b) of Act XII of 1881, does not, with reference to s. 112 *A*, oust the jurisdiction of the Revenue Courts to decide such suit. *Jagan Nath v. Sital Pershad* (W. N. 1884, p. 349) re-considered. **RAM CHARAN v. BHOLA.**

[VIII-63]

Per contra:—

JAGANNATH v. SITAL PRASAD.

[IV-349]

(50).—*Against cosharer not a lambardar* (Act XVIII of 1873.) Held that there was nothing in the terms of s. 93, cl. (h) of Act XVIII of 1873 to warrant the conclusion that a suit for profits as described in that section could only be brought against a co-sharer who was also a *lambardar* and against no other co-sharer. **DURGA PRASAD v. DIP SINGH.**

[I-27]

ACT XII OF 1881, s. 93 (h).—(continued.)

(51).—*Recorded co-sharer.*
Held that in order to establish a right to sue under section 93 (h) Act XII of 1881, a person must be a recorded co-sharer at the time the profits for which he sues were due. He need not be a recorded co-sharer at the time of the institution of the suit. *Ghisa and others v. Saadat Ali and others* (Board's selected decisions for 1883-84, page 19) overruled. *BHAGWAN DAS v. BHAGWAN DAS.*

[XIII-1]

(52).—*Mutation of names.*
Held that where in a suit for profits, the plaintiff died during the pendency of the suit and the name of his son was brought on the record it was no ground for dismissing the suit that mutation of names had not been effected in favor of the son. *JAGANNATH v. SITAL PRASAD.*

[IV-349]

(53).—*Co-sharer—Possession.*
A, a recorded co-sharer of a certain *mahal*, sued *B*, the *lambardar*, for his share of the profits for 1283 *Fasli*. *B* pleaded that *A*, though a recorded co-sharer, had never received any profits. The Revenue Court finding that *A* was not in possession dismissed the suit. Subsequently *B* brought a suit in the Civil Court to have it declared that the whole *mahal* belonged to him and that *A* had no share in it. This suit was dismissed on the ground that if *B* was in possession he did not require a declaratory decree and if he was not he ought to have sued for the same. After this *A* brought this suit against *B* for her share of the profits of the *mahal* for the year 1288 *Fasli*. The suit was dismissed by the Courts below. *Held* that in the suit brought by *B* against *A* in the Civil Court it was conclusively found that *A* was in possession and moreover she is admittedly a co-sharer within the meaning of s. 93, cl. (h), of Act XII of 1881, and therefore entitled to recover from the *lambardar* her share of the profits. The suit must therefore be decreed. *CHAKKO BEGUM v. AIJAZ ALI.*

[II-208]

(54).—*"Recorded co-sharer."*
 The words "recorded co-sharers" in clause (h) of s. 93 of Act No. XII of 1881 do not mean any persons who happen to be recorded as co-sharers. They mean persons who at the time of the suit brought are not merely co-sharers, but are recorded as such. *AJUDHIA PRASAD AND ANOTHER v. NAND KISHORE AND ANOTHER.*

[XVI-87]

(55).—*Recorded co-sharer jointly recorded.* The mere circumstance of the names of the plaintiff and defendant being jointly recorded as co-sharers without specification of separate or fractional shares will not bar a suit under s. 93 (h) of the N.W.P. Rent Act (XII of 1881) nor does the fact of the

ACT XII OF 1881, s. 93 (h).—(continued.)

parties being members of a joint Hindu family prevent the plaintiff from maintaining such a suit. *Durga Prasad v. Dip Chand* (W. N. 1881, p. 27) and *Shib Shankar Lal v. Banarsi Das* (J. L. R. 7 All., 891) followed. *KHUSHALO v. RAM DAS.*

[IX-171]

(56).—*Held* that a co-sharer of a *mahal* whose share was recorded in "shamilat" with all the other *pattidars*, but was not specifically defined in the *kherwat* in a fractional or separate form, was a "recorded co-sharer" within the meaning of s. 93 (h) of the N.W. P. Rent Act (XII of 1881). *SHIB SHANKAR LAL v. BANARSI DAS.*

[V-287]

(52).—*Negligence—Onus.*
 In a suit under s. 93 (h) of Act XII of 1881 by a recorded co-sharer against a *lambardar* for his recorded share of the profits in which the plaintiff seeks to make the defendant liable under s. 209 not only for the profits which the latter has actually collected but for those which through gross negligence or misconduct he has omitted to collect, the burden of proving such negligence or misconduct rests in the first instance on the plaintiff. *MUHAMMAD INAYAT HUSAIN v. MUHAMMAD KARAMAT-UL-LAH.*

[X-131]

See also

*DHANAK SINGH AND OTHERS v. CHAIN SUKH.***[VI-1]***DURGIA AND ANOTHER v. UDAI RAM AND ANOTHER.***[VII-297]***GULAB v. FATEH CHAND AND ANOTHER.***[VI-32]**

(58).—*Personal liability.*
 The liability of a *lambardar* to pay to a co-sharer the profits which the *lambardar* did not collect through gross negligence is a personal liability and cannot be enforced against the *lambardar's* legal representative. *Gulab v. Fateh Chand*, (W. N. 1886, p. 32). *MURADUN-NISSA AND ANOTHER v. GHULAM SAJJAD.*

[XVII-197]

(59).—*Set off.* *M* brought this suit under s. 93 (h) of the Rent Act, against *U*, for profits of the years 1887-89, to which *U*, claimed to set off certain sums which he had spent upon the funeral expenses of *M's* husband. *Held* that the set off could not be allowed. *MULA KUAR v. ULFAT SINGH AND OTHERS.*

[VI-172]

ACT XII OF 1881 s. 93 (h).—(continued.)

(60).—Account.] This was a suit by the co-sharers against the *lambardar* under s. 93, cl. (h), for the years 1291 and 1292 *Fasli*. The defendants contended that arrears realized during those years in respect of previous years should not have been taken into account for the purpose of ascertaining the exact amount of the plaintiff's share of the profits. *Held* that the contention was without force. *NAND KISHORE v. RAM RATAN AND OTHERS.*

[VII-250]

(61).—"After the payment of Government revenue." S. 93 (h) of the N.-W. P. Rent Act. (XII of 1881) should be read as if the words "if any" were inserted after the words "Government revenue." Such cases as are recoverable as revenue probably come within the words "after payment of the Government revenue." *MADSOODAN DAS v. RAGHUNATH DAS.*

[IX-10]

(62).—"Recorded share." *Held* that in s. 93 (h) the term "recorded share" means the share represented in *annas* of a *rupee* or *biswas* of a *bigha* shown in the *khewat* as the measure of the recorded co-sharer's interest in the *patti*. *ROODUR SINGH v. LOCHAN SINGH.*

[XII-45]

(63).—"Agreement not to sue (Act XVIII of 1873.)" This was a suit by the recorded co-sharers of a certain estate against certain persons who acted as *lambardar* in respect thereof for their share of the profits for 1284 and 1285 *Fasli*. The parties were also partners in business. The suit was defended on the ground that by an agreement the father of the defendants and the plaintiffs mutually covenanted to set up an idol in a certain temple in a certain village, and to build a "*kunj*" at Mathura and that "until these two works should be completed, no partition should take place between them, but the property should be held, and the business of the firm be carried on, jointly, and that, when from the profits of the property or from money realized from the collection of debts due to the firm, the works should be completed, then either party should be competent to claim partition." *Held* that whether valid or invalid the agreement could not be pleaded in bar of the suit in the Revenue Court. *DAYA RAM AND ANOTHER v. FATEH RAM AND OTHERS.*

[I-107]

(64). s. 93 (I).—Jurisdiction.—Muafi holding.] *Held* that a suit brought by one sharer in a *muafi* holding against another sharer in that holding to recover his share of the revenue payable to the *muafidar* by the *zamindars* does not lie under s. 93, cl. (i) of the Rent Act. *ABDUL KARIM v. FAZAL AZIM.*

[XIII-102]

ACT XII OF 1881, s. 93 (k).—(continued)

(65). s. 93 (k).—Jurisdiction.] *Held* that a suit by a co-sharer in a *patti* against another co-sharer in the same *patti* the *patti* being jointly assessed, for money paid by the former as Government revenue payable by the latter was not cognizable in the Revenue Courts but in the Civil Courts. *DATA RAM v. SUKHRAM AND OTHERS.*

[I-59]

(1). s. 94.—Suit for ejectment.—Tenant—Cause of action (Act XVIII of 1873.)] This was a suit for ejectment of an occupancy tenant for having executed on the 20th July, 1878, a mortgage of his holding. Defendant, among other pleas, pleaded limitation as provided for in s. 94 of the Rent Act. *Held* that the date of the mortgage was not necessarily identical with the day on which the plaintiff's right to sue accrued in the sense of s. 94. It should be ascertained when plaintiff had notice of the mortgage. *WAJHA BIBI v. SUKHAJ SINGH.*

[II-2]

(2).—Tenant—Mortgagee.] The plaintiff, a *zamindar*, sued one *Ishri*, an occupancy tenant, for ejectment, and to that suit one *G D*, a mortgagee of the occupancy holding who had obtained a foreclosure decree against the occupancy tenant, got himself made a party defendant. The pleadings, however, were not amended and the suit proceeded to appeal before the District Judge. *Held* that under the above circumstances the suit was against *G D*, the intervening defendant, was of a civil nature and therefore subject to the ordinary rules of limitation as laid down in the Indian Limitation Act, and not to the special limitation prescribed by s. 94 of Act XII of 1881. *SI KISHUN v. ISHRI AND ANOTHER.*

[XII-73]

(3).—Mortgagee.] *Held* that a suit by the *zamindar* to eject the representative of a mortgagee in possession of an occupancy holding being in fact a suit for the ejectment of a mere trespasser, the mortgage being illegal, was cognizable by the Civil Courts and the rules of limitation appropriate to civil suits were to be applied thereto. *Debi Saran Lal v. Debi Saran Upadhia (I. L. R., 6 All., 378,)* approved. *MADHO LAL AND ANOTHER v. SHEO PRASAD MISR AND OTHERS.*

[X-162]

(4).—Suit under s. 93 (g).—Cause of action, (Act XVIII of 1873.)] A sued *B* for arrears of revenue under s. 93 (g) of Act XVIII of 1873. *Held* that under s. 94 of the Rent Act, limitation began to run from the day on which the revenue became due and not from the day on which *A* paid the revenue. *CHITAR MAL v. KUNDAN SINGH AND OTHERS.*

[II-114]

ACT XII OF 1881, s. 94.—(continued.)

(5).—[*Suit for profits.*] *B P* and others, the recorded co-sharers of a certain estate, sued *R* and others, the heirs of one *P S* a deceased *lambardar* and co-sharer, for their share of the profits for 1284-1286 *Fasli*. The defence was that *B P* and others, though recorded co-sharers, had never received a share of the profits. It appeared that the estate was originally owned by *P S* and *N R*. On his death, *N R* was succeeded by his son *S R* and other heirs, but these other heirs, from some of whom *B P* and others derive their title, never received any profits, nor did *B P* and others ever receive any thing after their purchase. *P S* and *N R* and after the death of the latter his son *S R*, had always divided the shares equally between them and had done so for more than fifteen years. As late as the year 1878, *S R* obtained a decree against *P S* for half the profits for 1282-1284 *Fasli*. *B P* and others did not intervene. Held that under the circumstances the suit of *B P* and others for profits had properly been dismissed as barred by limitation. *RUP RAM AND OTHERS v. BADRI PRASAD AND OTHERS*.

[I-107]

(6).—[] The mere circumstance that a co-sharer's name is recorded in the revenue papers will not prevent a suit by him for his share of profits being barred by limitation if in fact he has received no profits for more than twelve years prior to such suit. *Maksood Ali Khan v. Ghazeeooddeen* (*N.-W. P. H. C. Rep.* 1868, p. 158), and *Tulshi Singh v. Lachman Singh* (*W. N.* 1881, p. 20) followed. *MUHAMMAD HUSAIN v. BADRI PRASAD*.

[XV-88]

(7).—[*By recorded co-sharer against lambardar.*] The period of limitation applicable to a suit under s. 93, cl. (h) of Act XII of 1881, by a recorded co-sharer against the *lambardar* for recovery of his recorded share in the profits of the village is three years. *Dabee Deen v. Doorga Prasad* (*N.-W. P. H. C. Rep.* 1871, p. 49) and *Baldeo v. Ranjit* (*Weekly Notes* 1886, p. 144) followed. *ROODUR SINGH v. LOCHAN SINGH*.

[XII-45]

(8).—[*Cause of action* (Act XVIII of 1873).] Held that where by agreement or custom there is no date fixed for the payment of profits by a *lambardar* to a co-sharer, the share of a co-sharer becomes due for the purposes of limitation on the last day of the agricultural year as fixed by Acts XVIII and XIX of 1873, that is to say, the 30th of June, and not on the day on which revenue is payable to the Government. *Bhikhan Khan v. Ratan Kuar*, (*I. L. R.*, 1 *All.*, 512) followed. *DURGA PRASAD v. CHETA AND OTHERS*.

[I-71]

ACT XII OF 1881, s. 94.—(continued.)

(9).—[Held following the Full Bench ruling in *Bhikhan Khan v. Ratan Kuar* (*I. L. R.*, 1 *All.*, 512) that the share of a co-sharer of the profits of his *mahal* does not necessarily become "due" within the meaning of s. 94 of Act XVIII of 1873, the moment the fund from which it is eventually payable may have been realized, but becomes "due" to him as soon as, after the payment of Government revenue and village expenses, there is a divisible surplus in the hands of the Collector, unless by agreement or custom a special date is fixed for taking the accounts and dividing the profits, in which case any divisible surplus which may have accrued due prior to that date is due on that date. *BRIJ RATAN DAS AND ANOTHER v. SHEO SHANKAR*.

[I-153]

(10).—[*For settlement of accounts.*] With reference to the periods of limitation prescribed by s. 94 of Act No. XII of 1881, a suit for a share of the profits of a *mahal* does not become a suit for a settlement of accounts because in order that a Court may give the plaintiff a decree it is necessary for the Court to settle disputed items of credit or debit: but where the main object of the suit is to obtain a settlement of accounts between the plaintiff, recorded co-sharer, and the *lambardar*, or between such plaintiff, and one or more all of the co-sharers in the village, although the ulterior object of obtaining such statement of accounts may be that the plaintiff may obtain a decree for a share, if any, of the profits due to him, then the suit must be regarded as a suit for a settlement of accounts to which a period of one year's limitation applies. *ROHAN AND ANOTHER v. JAWALA PRASAD*.

[XIV-118]

(11).—[] Where one collecting co-sharer in a *mahal* sued other collecting co-sharers, not being *lambardars* of the *mahal* for a refund of profits which the plaintiff alleged the defendants to have collected over and above the shares which they were entitled to collect. Held by Tyrell and Knox J. J., that this was not a suit by a recorded co-sharer for a recorded share of the profits of a *mahal* within the meaning of the former portion of s. 93, cl. (h) of Act No. XII of 1881, but was a suit for a settlement of accounts within the meaning of the latter portion of the same clause; and that, such being the case the period of limitation applicable was that prescribed by the third paragraph of section 94 of the abovementioned Act. *Dabee Deen v. Doorga Pershad* (3 *N.-W. P. H. C. Rep.* 49) referred to by Tyrell, J.

Per BURKITT, J. contra - "The suit" "may be considered to be a suit for profits within meaning of the opening words of s. 93 (h) of the Rent Act, and cannot be considered to be a suit for "a settlement of accounts within the

ACT XII OF 1881, s. 84.—(continued.)

meaning of the concluding words of that clause." *Durga Prasad v. Dip Chand* (Weekly Notes 1888, p. 27) *Kushalo v. Ramdas* (Weekly Notes 1889, p. 171) *Dabee Deen v. Doorga Pershad* (3 N.W. P. H. C. Rep., 49) referred to. INDO v. INDO AND ANOTHER.

[XIII-214]

(12). —————.] *Held* that a suit for settlement of accounts against the collecting co-sharers, based on a balance sheet prepared and produced by the defendants could not be successfully defended by their asserting that some of the items entered on the balance sheet were for years previous to that for which they were entered, and therefore barred by time. BALDEO AND OTHERS v. RANJIT AND OTHERS.

[VI-144]

(1) s. 95 (a).—*Jurisdiction—Suit to establish lease.*] *Held* that a suit to establish a lease granted by the defendant was cognizable by the Civil Courts. CHAIT RAM v. HIRA.

[I-54]

(2). —————. *Suit to establish deed of relinquishment.*] *K* sold his proprietary rights in a *manza* to *B*. Six weeks afterwards, *K* executed a deed by which he relinquished in favor of *B* his rights as an exproprietary tenant in his *sir* land. Sometime after, *K* distrained the crops grown on the *sir* land by certain subtenants who, *K* alleged, held the land from him. *B* objected to the distraint. The Collector decided on appeal, that the deed of relinquishment was invalid and that therefore the distraint was lawfully made. Thereon *B* brought this suit in the Civil Court praying that his possession of the land should be maintained as a *khud kash* holding, that the deed of relinquishment should be established and that the decree of the Collector should be set aside. *Held* that the suit was not cognizable by the Civil Courts. *Indar Sen v. Naubat Singh* (I. L. R., 7 All., 847) referred to. BALDEO v. KUNDAN AND ANOTHER.

[XIII-27]

(3). —————. *Suit for declaration that a certain kabuliyat is a forgery.*] This was a suit in the Civil Court by a tenant for a declaration that a *kabuliyat* was a forgery. *Held* that the suit was cognizable by Civil Court. JAGRUP AND ANOTHER v. GAYA PRASAD AND OTHERS.

[IV-5.]

(4). —————. *That defendant is not tenant—Submerged land.*] *A*, the *zemindar* of a certain village, sued *B* (an occupancy tenant, to set aside an order made under s. 530 of the Criminal Procedure Code, declaring *B* to be in possession of certain land,

ACT XII OF 1881, s. 95 (a).—(continued.)

which had re-appeared from the Ganges, and to have it declared that he was in proprietary possession of the land; *A* based the claim on the allegation that by ancient custom, the tenant of the land did not pay rent for it while it was submerged and when it re-appeared, the *zemindar* became entitled to possession of it, the tenant's right abating. *Held* that even if the custom and the non-payment of rent was proved it would not be sufficient, for the custom could not override the express provision of the Rent Act. *Held* further that the suit was not cognizable by the Civil Courts looking to the provisions of s. 95 of Rent Act. KIRPAL RAI, AND OTHERS v. RADHA PRASAD SINGH.

[III-14]

(5). —————.] Plaintiff let certain land to *B* for cultivation. Subsequently plaintiff lessee caused a notice of ejectment to be served on the defendant. Defendant contested the notice on the ground that he was an occupancy tenant and this objection was allowed by the Revenue Courts. Plaintiff has thereupon brought this suit for possession of the land and for a declaration that defendant had no right to the land. *Held* that as the plaintiff admitted that the defendant was a tenant and as the only question before the Court actually was what was the nature of the defendant's tenancy the suit was not cognizable by the Civil Courts under section 95 of Act XII of 1881 and the claim for possession which was in different words a suit for ejectment was much the less cognizable. MAHARAJA OF BENARES v. ANGAN LUNIA.

[IV-275]

(6). —————. *That plaintiff is tenant.*] A suit in which the plaintiff claims, as the tenant of land, that he may be declared to be the tenant, and that the defendant, the land-holder, may be restrained from interfering with his right to the land as a tenant, and in which the defendant denies the relation between him and the plaintiff of land-holder and tenant, is not a suit which is exclusively cognizable in the Revenue Court. SHEODISHIT NARAIN SINGH AND ANOTHER v. RAMESHAR DAYAL AND ANOTHER.

[IV-323]

(7). —————. *That plaintiff is occupancy tenant.*] *Held* that a suit for a declaration that plaintiff is a tenant with a right of occupancy, and for possession, against defendant who denies the tenancy and has ejected the plaintiff as trespasser will be in the Civil Court. MAHBAL SINGH v. NANDAN SINGH AND ANOTHER.

[V-49]

(8). —————. *That defendant is not tenant's heir.*] One *N* was an occupancy tenant. On his death his widow *Y*, continued in occupation of the holding. After the

ACT XII OF 1881, s. 95 (a).—(continued.)

the death of *S*, one *S*, alleging herself to be the daughter of *N* and *S*, applied in the Revenue Court to have her name entered in the village papers as occupancy tenant of *N*'s holding in succession to him. The *zemindars* were made parties to this proceeding. The Court of Revenue decided in favor of the applicant *S*, and the *zemindar's* appeal was dismissed. *Held* that no suit would lie in a Civil Court on the part of the *zemindar* for a declaration that they and not *S* were entitled by possession of the occupancy holding in question, and that it should be declared that *S* was not the daughter of *N*. SUBARNI AND ANOTHER *v.* BHAGWAN KHAN AND OTHERS.

[VII-1

(9).—[A brought this suit in the Civil Court to eject *B* from certain land on the allegation that he was a mere trespasser. On the other hand *B* stated that he was a relative of *C* (who was admittedly the occupancy tenant of the land) and had cultivated the land jointly with him. *Held* that the suit was cognizable by the Civil Court. DAYA RAM *v.* UDAI SINGH AND ANOTHER.

[VII-298

(10).—[That defendant is sub-tenant.] The plaintiffs, alleging that they were the occupancy tenants of certain land, that they had sub-let its cultivation to the defendant, and that the defendant had denied their title and set up a claim to be the tenant-in-chief under the *zemindar*, sued in the Civil Court to establish the right they claimed to the land and for possession of the land. *Held*, that the cognizance of the suit in the Civil Court was not barred by ss. 93 and 95 of the N.-W. P. Rent Act. RIBBAN AND ANOTHER *v.* PARTAB SINGH.

[III-222

LALU AND ANOTHER *v.* SADIYA.

[II-62

PALAT KUARI AND OTHERS *v.* BHINAK KUARI

[I-26

(11).—[That plaintiff's tenant at fixed rates.] *Held* that a suit for a declaration that the plaintiffs were tenants at fixed rates and not occupancy tenants was not cognizable in the Civil Court. SADIK ALI AND OTHERS, *v.* LIAKAT ALI AND OTHERS.

[VII-214

BALDEO SAHAI *v.* BHOLA NATH AND OTHERS

[II-96

(12).—[That plaintiff is intermediate holder.] Persons to whom s. 4 of Act No. XII of 1881 is applicable are not outside the provisions of that Act, but are tenants within the definition of the term contained in the Act. *Held*, therefore, that a suit brought

ACT XII OF 1881, s. 95 (a).—(continued.)

by such persons against their *zemindars* for a declaration that an entry in the recent settlement that the plaintiffs were tenants at fixed rates instead of inferior proprietors would not lie in a Civil Court. JAI GOPAL AND OTHERS *v.* RADHA PRASAD SINGH AND OTHERS.

[XIV-81

(13).—[That defendant is tenant at will.] A suit for a declaration that the plaintiffs are the proprietors of a village, and the defendants are tenants thereof, at the will of the plaintiffs, and liable to have the rent enhanced at the will of the plaintiffs, is, as regards the claim for a declaration of right, cognizable in the Civil Courts, but not as regards the other claims, such claims raising questions under s. 95 (a) and (b), N.-W.-P. Rent Act, 1881, exclusively cognizable in the Revenue Court. ANTUA AND OTHERS *v.* GHULAM MUHAMMAD AND OTHERS.

[III-239

(14).—[That land was plaintiff's *sir*.] The defendants were admittedly tenants of the plaintiffs. Before the present suit was brought a final decision of the Revenue Courts had been obtained to the effect that they were occupancy tenants of the plaintiffs. The prayer in the plaint in the suit was as follows:—"That a declaratory decree be passed in plaintiff's favor and against the defendants in respect of 17 *bighas* 1 *biswa* 13 *dhurs* of *sir* land as per numbers given below, situated in *taluka* Unjar, pargana Garh, valued at Rs. 2,135 and it be declared that the land claimed is the plaintiff's *sir*, that the defendant's allegation and adverse possession set up by them in respect of the said land be held as null and void, and that the whole of the Court costs be allowed. That the judgment of the Revenue Court, so far as it is injurious to the plaintiffs rights be declared as set aside and of no effect. That it should also be decided, that the defendant's possession is as sub-tenant's (*asami shikmi*) under a settlement for a short period which in no way injuriously affects our *sir* land." The Court of first instance (the Subordinate Judge) dismissed the plaintiff's suit; but on appeal the District Judge reversed the finding of the Subordinate Judge. The defendants then appealed to the High Court and the case came before the Chief Justice and Brodhurst, J., by whom it was referred, on the question of jurisdiction, to the Full Bench. Before the Full Bench the case was argued on the sole point of whether the suit was maintainable in a Civil Court as a suit for a declaration that the land in question was the plaintiff's *sir*, the other prayers in the plaint being withdrawn. *Held* by the Full Bench that the Court had no jurisdiction to hear the appeal; the cognizance of such a suit by a Civil Court being barred by section 95, cl (a) of Act XII of 1881.

ACT XII OF 1881, s. 95 (a).—(continued.)

Per STRAIGHT, J.—The suit might also be considered as one to set aside orders passed by a Settlement Officer, and as such, the cognizance thereof by a Civil Court was barred by section 241 of Act XIX of 1873.

Per MAHMOOD, J.—Section 42 of Act I of 1877 would also be a bar to the cognizance of the suit. **MAHESH RAI AND OTHERS v. CHANDER RAI AND OTHERS.**

[X-235]

SAKINA BIBI AND OTHERS v. SWARATH RAI.

[XIII-11]

(15). —————.] The plaintiffs sued in the Munsif's Court for a declaration that certain land was their *sir* denying that any relation of landlord and tenant subsisted as between themselves and the defendants:—*Held* that such a suit was within the cognizance of a Civil Court. **MAHESH RAI v. CHANDAR RAI (J. L. R., 13 All., 17 S. C., W. N. 1890. p. 235)** distinguished. **MOTI SINGH AND OTHERS v. RAM KISHN SINGH AND OTHERS.**

[XII-46]

(16). —————.] A *zamindar* claimed a declaration that certain land was his *sir*, and that the defendants were in possession thereof as his lessees. The defendants resisted the claim on the ground that they were tenants of the land at fixed rates, and not lessees of it as the plaintiff's *sir*. *Held* that the suit raised the question whether the land was *sir*, in respect of which no occupancy rights could be created except by contract, and whether the defendants were the plaintiff's lessees, and that this was a question purely of contract, and on which was cognizable in the Civil Courts. **KAULESHAR PANDAY v. GIRDHARI SINGH AND ANOTHER.**

[V-31]

(17). —————.] *That plaintiff and not defendant is tenant in chief.* Some land was leased to the plaintiff by the *zamindar* and the plaintiffs put in the defendants as their *shikmis*. Subsequently plaintiff sought to eject the defendant in the Revenue Courts, but his suit was dismissed on the finding that the defendants were the tenants of the *zamindars*, i. e., tenants in chief. The plaintiff has now sued to have it declared that he is tenant in chief. Two main points are urged on behalf of the defence, (i) that the decision of the Revenue Courts being final on the point it is *res judicata*, (ii) a suit for the ejectment of a tenant does not lie in the Civil Court. *Held* that neither contention had any force. The question before the Revenue Court was not as to the class of tenant but whether they were tenants at all, which being a question of title was not within the jurisdiction of the Revenue Court. Secondly the defendant has by his own act,

ACT XII OF 1881, s. 95 (a).—(continued.) made himself a trespasser and can no longer be regarded as a tenant. The Civil Courts are therefore competent to eject him. **ARGAN v. RATTAN.**

[VI-122]

See also

BIRBUL AND ANOTHER v. TIKA RAM.

[I-103]

(18). —————.] *That plaintiff and not defendant is tenant at fixed rate.* The plaintiffs sued in a Civil Court alleging that they were tenants at fixed rates of a cultivatory holding and that at the settlement the Settlement Officer had entered the defendants in the village papers as the tenants at fixed rates and the plaintiffs merely as mortgagees, and they asked for a decree for maintenance of possession "invalidating the proceedings of filing of the columns at the recent settlement." *Held* by the Full Bench (Banerji, J. *dubitante*) that the suit so framed was not within the cognizance of a Civil Court. **AJUDHIA RAI AND ANOTHER v. PARMESHWAR RAI AND OTHERS.**

[XVI-95]

(19). —————.] *Of right to possession as tenant at fixed rate.* A plaintiff brought his suit in a Civil Court asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates, or in the alternative for possession, alleging that the lands were the property of a joint Hindu family, of which he was a member, that the family still remained joint, and that he was entitled as a member of such joint Hindu family to a one-third undivided share in this ancestral property. *Held* that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third undivided share. **BRIJ BHUKHAN v. DURGA DAT AND OTHERS.**

[XVIII-41]

(20). —————.] *Suit for possession on expiration of lease.* This was a suit brought by A in the Civil Court for possession of certain land. He had brought a similar suit therefor which was dismissed on the ground that the defendant held the land under an unexpired lease. He applied in the Revenue Court for ejectment of the defendant. The Revenue Court dismissed the application holding that the defendant was an occupancy tenant. The term of the lease having expired plaintiff brought the present suit. *Held* that the suit was not cognizable by the Civil Courts. **WAZIR ALI v. DAUSHAH.**

[III-121]

ACT XII OF 1881, s. 95 (a).—(continued.)

(21).—[*Suit to avoid revenue proceedings and for an injunction.*] A and B co-sharers in a certain *mahal* jointly owned a certain field situated therein which was held by a tenant C. The purchaser of the rights and interest of A and B in the field applied without their consent, under s. 36 of the Rent Act, for the tenant's ejectment. A and B thereupon brought this suit in the Civil Court (a) for a declaration that they were joint proprietors of the field (b) for the issue of an injunction to C not to proceed to eject the tenant (c) to have the revenue proceedings declared ineffectual. After the suit was instituted the tenant was ejected by the Revenue Court. *Held* that the suit was maintainable in the Civil Courts. That reliefs (a) and (c) should be decreed, as to relief (b) as the plaintiffs had not amended their plaint so as to meet the altered circumstances it could not be decreed. KODAI RAI AND ANOTHER v. SHEO BART RAI.

[III-110]

(22). 95 (c).—[*Jurisdiction—Suit for assessment of rent by Government.*] Certain ground situate within the limits of a cantonment was granted for building purposes by the military authorities to the appellant in 1802. In June, 1873, such cantonment was abandoned and the ground comprised therein was made over to the Collector of the district in which it was situate. The Government subsequently sued the appellant claiming among other reliefs that the appellant should be directed to pay rent for such ground and the alluvial accretions to such ground and that if she refused to pay the rents fixed she might be ejected and the Government put in possession. *Held* that the Civil Courts had no jurisdiction in the matter of assessing rent on such alluvial accretions which were outside the original grant. PATERSON v. THE SECRETARY OF STATE FOR INDIA.

[I-45]

(23).—[*Resumption of rent-free grants.*] A suit was brought for the ejectment of the defendant from certain land, on the allegation that it was rent-paying land which had been granted to the defendant's vendor by the plaintiff's father free from payment of any rent, on condition that he should perform certain services as a mimic, and that these services were discontinued by the defendant's vendor. The plaintiff endeavoured to resume the land in the Revenue Court as a rent free grant under s. 30 of the N.-W. P. Rent Act (XII of 1881) but the application was rejected. In answer to the suit the defendant pleaded that it was not cognizable by the Civil Court. *Held* by Oldfield, J., (Mahmood, J., dissenting) that the suit could not be held to be one to resume a rent-free grant inasmuch as there was no rent-free grant at all in the sense of s. 30 of the Rent Act, and that the Civil Court therefore had jurisdiction to entertain the suit.

ACT XII OF 1881, s. 95 (c).—(continued.)

Held by Mahmood, J., that the land constituted a rent-free grant, that the claim was one for the resumption of such grant or subjecting it to assessment to rent, and that under these circumstances the suit was not cognizable by the Civil Court. *Puran Mal v. Padama* (I. L. R., 2 All., 732), *Tika Ram v. Khudayar Khan* (I. L. R., 7 All., 120) and *Forbes v. Mir Muhammad Taki* (13 Moo. I. A., 438) referred to. WARIS ALI v. MUHAMMAD ISMAIL AND OTHERS.

[VI-221]

(24).—[*Resumption of rent-free grants.*] A *zemindar* brought a suit to recover possession of certain land in the village, which was held by the defendants rent-free, in consideration of rendering services as *kherapaties*, on the ground that he was entitled as *zemindar* to dispense with their services, and that therefore they no longer possessed any right to hold the land. The claim was resisted by the *kherapaties* on the ground that for many years they had been in possession of the land as *muafi*-holders. *Held* that the dispute so raised was a matter which could form the subject of an application to resume a rent-free grant within the meaning of s. 30 of the N.-W. P. Rent Act (XII of 1881), and that the cognizance of the suit by the Civil Court was therefore barred by clause (c) of s. 95 of that Act, and that, for similar reasons, the Civil Court, under clause (b) of s. 241 of the N. W.-P. Land Revenue Act (XIX of 1873) could not exercise jurisdiction over the matter of the suit. TIKARAM AND OTHERS v. KHUDAYAR KHAN.

[IV-331]

(25).—[*Resumption of rent-free grants.*] A *zemindar* applied to the Revenue Court under section 30 of the North-Western Provinces Rent Act, and obtained an order for the resumption of certain plots of land, on the finding that they were resumable rent-free grants. The occupiers of the land were ejected, and the *zemindar* obtained possession. Subsequently the occupiers brought a suit in the Civil Court to obtain a declaration that they held the plots in question, under a licence from the *zemindar's* predecessor in title as orchard land, without payment of any rent or other allowance to the landlord and that they were entitled to retain the land on this footing, so long as it should, continue to be occupied with trees. They sought to recover possession of the soil and timber, asking also for "a determination of the nature of their tenure" therein. *Held* that the cognizance of the suit by the Civil Court was not barred by the provisions of section 13 of the Code of Civil Procedure inasmuch as the jurisdiction of the Civil Court to entertain it was not ousted by section 95 of the Rent Act, since the "matter" presented by the plaintiffs was not one "on which an application of the nature mentioned in that section" could by them have been made to a Court of Revenue clauses: (a) (c) and (n) of the section not being

ACT XII OF 1881, s. 95 (c).—(continued.)
applicable to the case. AJUDHIA PRASAD v.
SHEODIN AND ANOTHER.

[IV-75]

(26.)—Resume—Actual dispossession.]

See s. 30, No. (1.)

(27.)—Burden of proof.]

See s. 30 No. (3.)

(28.) s. 95 (d).—Jurisdiction.—Suit to eject person declared by Revenue Court not to be tenant.] The appellants, claiming to be the proprietors of certain land and treating the respondents as tenants of the land, applied to the Revenue Court for their ejectment. The respondents contended that they were not the appellant's tenants. This contention was allowed, and the application was dismissed. Thereupon the appellants brought the present suit in the Civil Court to eject the respondents as trespassers. The Court (Stuart, C. J. and Oldfield, J.) observed that the suit was clearly cognizable in the Civil Courts. MUHAMMAD ZAKI AND OTHERS v. HASRAT KHAN AND OTHERS.

[II-61]

(29.)—Suit to eject duly ejected tenant.] A tenant of land to which Act No. XII of 1881 applied was duly ejected by process under that Act. As there were crops growing on the land at the time of the tenant's ejectment and the zamindars had not purchased such crops, the tenant re-entered for the purpose of tending and cutting the crops. When the crops were cut the tenant refused to vacate the land. Held that a suit for his ejectment as a trespasser was under the circumstances properly brought in a Civil Court. MUHAMMAD IBRAHIM AND OTHERS v. DEWAN AND ANOTHER.

[XVI-156]

(30.)—Suit to eject person served with notice under s. 36.] The service of a notice of ejectment under section 36 of Act No. XII of 1881 is, as between the person who causes such notice to be served and the person on whom it is served, a conclusive admission by the former of the existence between them of the relationship of landlord and tenant and the landlord cannot afterwards sue in the Civil Court to eject the same tenant from the same land on the ground that he is not a tenant but a mere trespasser. BALDEO SINGH AND ANOTHER v. IMDAD ALI AND ANOTHER.

[XIII-93]

DEONARAIN RAI AND ANOTHER v. SHEO CHARAN RAI AND ANOTHER.

[XIII-166]

(31.)—Suit to eject transferee of tenant.] S P and others,

ACT XII OF 1881, s. 95 (d).—(continued.)
zamindar sued M K and others as trespassers to eject them from certain land alleged to form part of the plaintiff's zamindari. The defendants pleaded that they were mortgagees holding under a mortgage with possession given by one S G said to be a tenant at fixed rates of the land in suit. It was found that S G had been an occupancy tenant not at fixed rates, and that he had died without heirs prior to the institution of the suit. Held that the suit brought under the above circumstances was cognizable by a Civil Court. MAHABIR KANDU AND ANOTHER v. SHEO PRASAD RAI AND OTHERS.

[XIV-98]

(32.)—Suit to eject under the terms of a lease.] K, the occupancy tenant of certain land, to whom the land-holder had granted a lease thereof for a certain term, gave the latter a *kabuliyat* containing the following clause:—"On the expiration of the term the land-holder shall have the power to keep the said land under my cultivation at the former rent, or at an enhanced rent, as may be agreed upon between the parties, or he may make over the land to some other cultivator at an enhanced rent fixed by himself." K died before the expiration of the lease and was succeeded by his son. On the expiration of the lease the land-holder sued K's sons in the Civil Court for possession of the land, claiming under the *kabuliyat*. Per MAHMOOD J. That inasmuch as the plaintiff did not seek the determination of the class of the defendant's tenure, and the suit could not be regarded as one for ejectment of a tenant in the manner provided by the Rent Act, but was one for specific performance of a contract based on the *kabuliyat* according to the terms of which, the plaintiff was entitled, it was alleged to oust the defendant, the suit was cognizable in the Civil Court. LALJI AND ANOTHER v. UMRAN.

[II-196]

See also.

KUARI THAKURAI v. GANGA NARAIN LAL AND OTHERS.

[VIII-239]

(33.)—Suit to eject tenant holding upon service tenure.] The plaintiff, a zamindar, sued in the Court of a Munsif to eject as a trespasser a tenant on the allegation that such tenant held upon a service tenure and had ceased to perform the services due from him to the plaintiff. The plaintiff had previously brought the same suit in a Court of Revenue, but had been defeated in more than one Court. Held that the suit was not cognizable by a Civil Court, and that the plaintiff ought not under the circumstances to be heard to deny the jurisdiction of the Court of Revenue. A tenant holding on a service tenure cannot be ejected as a trespasser merely because he ceases to perform the

ACT XII OF 1881, s. 95 (d).—(continued.)
services due from him to his landlord. CHAJJU
v. NANNU.

[XIII-224]

(34). s. 95 (e).—*Jurisdiction—Suit for perpetual injunction to prevent ejectment of plaintiff.* A tenant, on whom a notice of ejectment had been served under the N.-W. P. Rent Act, 1881, and whose suit to contest his liability to ejectment, brought under that Act, had failed, sued in the Civil Court for a perpetual injunction to prevent his ejectment, basing his suit on an agreement that he should not be ejected so long as he paid a certain rent. *Held* that the suit was not maintainable, the jurisdiction of the Civil Court being excluded by s. 95 of the Rent Act. MAHIP SINGH AND ANOTHER v. CHOTU.

[III-67]

(35). s. 95 (1).—*Determination of rent—Rent for prior period.* An order fixing the rent of an ex-proprietary tenant provided also that the rent fixed should come into force from a certain specified date. That order was not appealed against and became final. *Held* that such restriction became operative as part of the order fixing the rent and that rent could not be recovered by virtue of such order for a period anterior to the time so fixed. Mahadeo Prasad v. Mathura (I. L. R., 8 All., 189) referred to. BRIJ RAJ KUAR AND ANOTHER v. GOPAL PRASAD.

[XVII-13]

(36). s. 95 (m).—*Suit for damages by lessee illegally dispossessed—Measure of.* A had granted a lease to B which under the terms of the lease was to terminate in 1289 Fasli. Without serving a notice under s. 36, Rent Act, on B, A granted another lease to C and put him in possession. B applied to the Revenue Courts and was again put in possession as he had not been lawfully ejected. B then sued for mesne profits for the period he had been unlawfully dispossessed. *Held* that his suit must be decreed, as C must be regarded under the circumstances as a mere trespasser and the damages must be calculated as against a trespasser. SHETAL DEI AND OTHERS v. AJUDHIA PRASAD AND OTHERS.

[VII-269]

(37). s. 95 (n).—*Jurisdiction—Suit for possession of occupancy holding—Denial of tenancy.* *Held* that a suit for possession of land as a tenant, where the defendant denies the tenancy will lie in the Civil Courts. MAHABAL SINGH v. NANDAN SINGH AND ANOTHER.

[V-49]

(38).—*By vendee—Denial of title.* A mortgaged a certain share with sir land to B. The mortgage was one by conditional sale. Subsequently B, the mortgagee, got a decree under

ACT XII OF 1881, s. 95 (n).—(continued.)
a *sulehnama* declaring the conditional sale to have become absolute and giving him possession of the "share in suit." This was a suit by the assignee of the mortgagee for possession of the sir lands and for mesne profits on the allegation that he had been wrongfully dispossessed by A from the sir lands. *Held* that the suit was cognizable by the Civil Courts since plaintiff denied the tenancy and regarded A as a trespasser. SHEO BARUT RAI AND ANOTHER v. RAM RAI AND ANOTHER.

[IV-273]

(39).—*Property leased.* The plaintiff sues as perpetual lessee of some of the defendants alleging that in breach of their contract with him they have given possession as mortgagees to the other defendants over a part of the land leased to him. *Held* that the suit was cognizable by the Civil Courts. HARI DAS v. GOPI RAI.

[VI-137]

(40).—*Act XVIII of 1873.* *Held* that a suit to establish a lease granted by the defendant and to obtain possession of the village comprised in the lease was cognizable in the Civil Court. CHAIL RAM v. HIRA.

[I-54]

(41).—*Against occupancy tenant lessor.* S. 95 (n) of the N.-W. P. Rent Act (XII of 1881) is applicable to a suit by the lessee of an occupancy tenant to recover possession of the land under the lease, from which the lessor has ejected him; and such a suit is exclusively cognizable by the Revenue Courts. Muhammad Zaki v. Hasrat Khan (W. N. 1882, p. 61) and Ribbon v. Pariah Singh (I. L. R., 6 All., 81) distinguished. CHHIDDU v. NARPAT AND OTHERS.

[V-332]

ASGHAR ALI AND ANOTHER v. SHEOPAL SINGH AND ANOTHER.

[IX-24]

(42).—*By one lessee against another.* In this case the Court of Wards gave a lease of some land to the plaintiffs. Before the expiration of this lease the heirs of the Ward gave a lease of the land to the defendants who thereupon took certain proceedings in the Revenue Court and obtained an order for possession of the land. The plaintiffs have brought this suit to set aside the *patta* granted to the defendants and to recover possession of the land. *Held* that as the plaintiffs treated the defendants not as tenants but as trespassers holding the land under an illegal *patta* the suit lies in the Civil Court and should be decreed. LILA DHAR AND OTHERS v. BHAIJU KHAN AND ANOTHER.

[V-332]

ACT XII OF 1881, s. 95 (n).—(continued.)

(43).—*By sub-lessee.*] *S* and others, owners of a *zamindari* share, leased one-third of it to *N* and *S*. *N* and *S* in turn sub-leased their rights to *J R*. In his agreement with *N* and *S*, *J R* covenanted to pay part of his rent to the original lessor of whom *N* and *S* held. Subsequently *J R*, alleging that he had been ejected from the premises sub-leased to him by two persons *M* and *J*, sued *M* and *J* for recovery of possession. *Held* that this was not a suit to which s 95, cls. (m) and (n) of Act No. XII of 1881 were applicable. *MAN RAI AND ANOTHER v. JAI RAM RAI.*

[XV-77]

(44).—] This was a suit by the usufructuary mortgagee of an under-tenant cultivating *sir* land, for possession of the land and compensation for his wrongful ejectment against the land-holders. The plaintiff obtained and enjoyed peaceably possession of such holding and was wrongfully ejected by the *zamindars* after three years. *Held* that though no right of occupancy accrued to the plaintiff under the illegal transfer the suit against the wrong-doer was maintainable. *CHAKURI KHAN AND ANOTHER v. PIRTHI SINGH.*

[II-63]

(45).—*Suit for maintenance of possession by tenant against sub-tenant.*] *Held* that a suit, by an occupancy tenant for maintenance of possession over the occupancy holding and against a sub-tenant, who, after the determination of his tenancy, had endeavoured to retain a wrongful hold on the land, was cognizable by the Civil Court. *GUR DIAL AND ANOTHER v. GOPAL.*

[II-63]

(46).—*Suit for possession of occupancy holding against sub-tenant and zemindar.*] *Held* that a suit, by an occupancy tenant to establish her title to certain land and for possession thereof against a sub-tenant, who set up an adverse title to such land and the *zemindar* who in collusion with the sub-tenant, denied the plaintiff's right, was cognizable by the Civil Court. *LALU AND ANOTHER v. SADIYA.*

[II-62]

RIBBAN AND ANOTHER v. PARTAB SINGH.

[III-222]

(47).—*Against zemindar and person deriving title from him.*] Clause (n) of s. 95 of Act XII of 1881 must be taken to apply to cases in which a tenant of agricultural land has been wrongfully dispossessed by the landlord, or, at the instance of the landlord, by some one claiming title through the landholder. *MAULA AND ANOTHER v. BAHALA AND OTHERS.*

[XVI-169]

ACT XII OF 1881, s. 95 (n).—(continued.)

TARAPAT OJHA AND OTHERS v. RAM RATAN KUAR AND OTHERS.

[XIII-164]

AMIR KHAN AND OTHERS v. JADU NATH DAS.

[II-57]

GANGA RAM v. BENI RAM AND OTHERS.

[IV-312]

SHAKUR KHAN AND ANOTHER v. GUMANI LAL.

[X-177]

(48).—] A plaintiff brought his suit in a Civil Court alleging that he was entitled to the possession of certain land as a tenant at fixed rates, and that in consequence of the order of a Settlement Officer he had been dispossessed by certain persons, alleged by him to be trespassers without title, whom he made defendants, together with the *zemindar* of the land in dispute. *Held* that, inasmuch as the plaintiff could, under the circumstances indicated in his plaint, have obtained no relief from a Court of Revenue, the Civil Court was competent to entertain the suit and to give the plaintiff a decree for possession as against the defendants other than the *zemindar* who were found to be trespassers notwithstanding that the Civil Court could not declare what was the nature of the plaintiff's tenancy. *Tarapat Ojha v. Ram Ratan* (I. L. R., 15 All., 387) and *Ajudhia Rai v. Parmeshar Rai* (I. L. R., 18 All., 340) distinguished. *DUKHNA KUNWAR AND OTHERS v. UNKAR PANDE*

[XVII-105]

(49).—*By heir of tenant.*] When a *zemindar* on the death of an occupancy tenant refused to admit his heir to possession of the occupancy holding and took possession of it. *Held* that the proper remedy of the heir was by application under section 95 of Act XII of 1881 and not by a suit in a Civil Court. *BANI BAI v. PARBATI.*

[XIII-196]

(50).—*Dispossession by process of law.*] The expressions "wrongful dispossession" in clause (m) and "wrongfully dispossessed" in clause (n) of s. 95 of Act No. XII of 1881, do not include a dispossession by order of Court, though such order may be subsequently reversed on appeal. Where therefore a tenant who is evicted under s. 36 and the following sections of the Rent Act, but afterwards reinstated by order of a superior Court of Revenue, sues the evicting *zemindar* for damages, such a suit may be brought in a Civil Court. *Sawai Ram v. Gir Prasad Singh* (I. L. R., 2 All., 707) and *Dhundu Bhagat v. Lalji Pande* (1 Legal Remembrancer, R. and R., p. 183) referred to. *THAKUR DIN v. MANNU LAL.*

XVII-101

ACT XII OF 1881, s. 95.—(continued.)

(51).—s. 95. (p.) *Jurisdiction—Suit for declaration that rent was payable in kind.*] This was suit for a declaration that the rent payable by the plaintiff's (tenants) to the zamindars was by the custom of the village payable only in kind by appraisement. *Held* that the matter could have been dealt under cl. (p.), s. 95, read with s. 24 of Act XII of 1881. The Civil Courts therefore had no jurisdiction. **JAGAN NATH AND OTHERS v. BHAGWAT DAS.**

[VII-266]

(52).—Application for lease by person not tenant.] *Held* that s. 95 (p) of Act XII of 1881 does not apply where the person claiming the lease is not a tenant in possession. **RAI SINGH v. VANSITTART.**

[IX-3]

(1.) s. 96 (b).—Decision of Revenue Court—On application under s. 39—*Resjudicata.*

See s. 95, Nos. (5), (17), (20) and (21.)

(2).—(Act XVIII of 1873).] *Held* that s. 13 of Act X of 1877 applies to suits, and not to applications such as those under s. 39 of the Rent Act. The Revenue Courts have no jurisdiction to determine otherwise than incidentally, for the purpose of deciding the suits which they are competent to decide, questions of proprietary right. **PARNU SINGH v. RUKKO.**

[I-16]

(3).—(Act XVIII of 1873).] The defendants, claiming to be occupancy tenants of certain land and alleging that the plaintiff was their sub-tenant, caused a notice of ejectment to be served on the plaintiff under ss. 36-38 of Act XVIII of 1873. The plaintiff thereupon, under the provisions of s. 39 of that Act, preferred an application contesting his liability to be ejected, alleging that he had a right of occupancy in such land jointly with defendants, and was not their sub-tenant. The Assistant Collector trying the case finally decided that the plaintiff was the sub-tenant of the defendants, and the plaintiff was ejected. The plaintiff then sued the defendants in the Civil Court for a declaration of his right as an occupancy tenant to such land and possession of the same. *Held* that the decision of the Assistant Collector as to the respective rights of the parties could only be regarded as incidental and ancillary to the main point to be determined by him, *viz.*, whether, assuming the relation of landlord and tenant to exist between the parties, the plaintiff was liable to be ejected, and such decision was not a bar to a fresh determination of such rights in the Civil Court. **BIRBUL AND ANOTHER v. TIKA RAM.**

[I-16
63]**ACT XII OF 1881, s. 96 (b)—(continued.)**

(4).—[continued.] One *D P*, the proprietor of a share of a village, mortgaged such share, it was alleged, to *R S* on the 2nd March, 1875. The instrument of mortgage contained a condition against alienation until the mortgage was redeemed. *R S* obtained a decree enforcing this mortgage on the 28th April, 1876, in the execution of which such share was brought to sale on the 11th September, 1877, and was purchased by him. It appeared that, in the meantime, during the pendency of the suit in which that decree was passed, a dispute had arisen between *D P* and one *R P* regarding the nature of the latter's tenure as tenant of certain land appertaining to such share. In March, 1876, this dispute was compromised, *D P* recognizing *R P* to be an occupancy tenant of such land, and granting him a lease thereof for thirty years at favourable rates. Subsequently to his purchase of the share in question, *R S* caused a notice of ejectment to be served on *R P*, under s. 36 of Act XVIII of 1873, alleging that he was a tenant for a limited period whose tenancy had determined. *R P* under s. 39 of that Act, contested his liability to be ejected claiming a title as an occupancy tenant. The Revenue Courts decided this matter in his favour. Thereupon *R S* brought the present suit against him in the Civil Court for possession of such land. He alleged that the compromise and lease abovementioned were collusive and fraudulent transactions intended to defeat his right as mortgagee of the share in question and in breach of the condition against alienation of the share. The Court of first instance dismissed the suit, holding that with reference to the decision of the Revenue Court the question whether the defendant had a title to the land as an occupancy tenant was *res-judicata*; and further that s. 95 (a) of Act XVIII of 1873 debarred the Civil Courts from taking cognizance of the suit. The lower appellate Court held that the decision of the Revenue Court, on questions of title raised in applications under that Act, was not final, and did not bar a suit in the Civil Courts; and remanded the suit for re-trial. In second appeal it was contended on behalf of the defendant that the result of the proceedings in the Revenue Court was conclusive on the question of his right to occupy and hold the land in dispute and such question could not be again raised. The Court observed that it had no hesitation in applying the rule of law as laid down in *Sukhdaik Misr v. Karim Chaudhri* (I. L. R. 3 All, 521), *Muhammad Abu Jafar v. Wali Muhammad* (ib. 81) *Kanahia v. Ram Kishen* (I. L. R. 2 All, 429) and *Parnu Singh v. Rukko* (W. N. 1881, p. 21), as also in the judgments of two (Spankie and Oldfield JJ.) of the four Judges comprising the Court by which the case of *Shimbhu Narain Singh v. Bachcha* (I. L. R., 2 All, 200) was heard. In conformity with and approval of these rulings, the decision of the lower Court must be affirmed. **RAM PRABAD v. RAM SHANKAR.**

[II-58]

ACT XII OF 1881, s. 96 (b)—(continued.)

(5) ————— A decision of a Revenue Court disallowing an application to eject a tenant because he has built on his land, does not under section 13 of the Code of Civil Procedure bar a suit in the Civil Court to have the buildings demolished. *AMRIT LAL AND ANOTHER v. BALBIR AND ANOTHER.*

[III-212]

(6) ————— The defendants served a notice of ejectment under sec. 36, Act No. XII of 1881, on the plaintiffs, alleging the plaintiffs to be their sub-tenants and themselves to be tenants with a right of occupancy. The plaintiffs objected that they and not the defendants were the tenants in chief of the land in question. This objection was decided, under s. 39 of the said Act, by a Court of Revenue adversely to the plaintiffs. The plaintiffs thereupon sued in a Civil Court for a declaration that they were tenants with a right of occupancy and for maintenance of possession. *Held* that, inasmuch as s. 96 (b) of Act No. XII of 1881 gave to a decision of a Court of Revenue under s. 39, the effect of a judgment of a Civil Court, the hearing of the plaintiff's present suit in a Civil Court was barred. The principle of the decision in *Tarapat Ojha v. Ram Raolan Kuar* (I. L. R., 15 All., 387) affirmed. The jurisdiction of Civil Courts and Courts of Revenue in the N.-W. P. considered. *SHEO NARAIN RAI AND OTHERS v. PARMESHA RAI AND OTHERS.*

[XVI-59]

(7) ————— *In suit for rent—Res-judicata.* The appellants sued the respondents in the Revenue Court for a share of the value of the produce of certain trees in a certain grove claiming the same by way of rent for the grove. This grove was part of land which the respondents had held rent-free. This land, with the exception of the grove, had been assessed with rent. The respondents set up as a defence to this suit that they held the grove rent-free and that it belonged to them. The Revenue Court held that the respondents were the proprietors of the trees and had never paid rent for the grove and dismissed the suit. In consequence of this decision, the appellants brought the present suit in the Civil Court for the possession of the grove by establishment of their proprietary right to the same. *Held* that the decision of the Revenue Court which had decided the question of title only incidentally was no bar to the present suit. *LALA MAL AND OTHERS v. SALAR BAKSHI AND ANOTHER.*

[I-82]

(1) s. 96 A.—Arbitration.]

Sec. Act XIX of 1873, cases under ss. 221 and 222,

(2) ————— *Applicability of the provisions of C. P. C.* The provisions of the Code of Civil Procedure relating to awards are not

ACT XII OF 1881, s. 96 (a)—(continued.)

applicable to suits under the N.-W. P. Rent Act, 1881, the matter in dispute in which have been referred to arbitration, as section 96 (a) of that Act specifically imports into it the procedure of the N.-W. P. Land Revenue Act with regard to arbitration. Where the Court trying a suit under the Rent Act, the matters in dispute in which have been referred to arbitration, has refused an application to set aside the award, and has decided the case in accordance with the award of the majority of the arbitrators, no appeal lies from its decision. *FAHIMUN-NISSA AND ANOTHER v. AJODHA PRASAD.*

[IV-15]

(3) ————— *Award by three of five arbitrators.* In this suit for profits under section 93 (b), Rent Act, the parties submitted to an arbitration of four persons and an umpire. But of the two issues submitted for their decision by the Court they decided only one by a majority. The award was consequently remitted for the decision of the second issue. At this stage the arbitrators who had differed refused to act and the second issue was therefore decided by three only of the 5 arbitrators. *Held* that it was not a valid award and the case must be remanded for decision on the merits. *GAYA DIN v. HANUMAM DIN.*

[IV-50]

s. 104.—*Jurisdiction—Land partly in Oudh and partly in N. W.-P.* Where a landlord had leased a quantity of land situated partly in Oudh and partly in the North-West Provinces at one lump amount of rent for the whole, *held* that he was entitled to sue the tenant in the appropriate Court of the North-West Provinces, within the jurisdiction of which part of such property was situated, for the rent due on the whole of such property and he was not obliged to make any deduction from his claim on account of that portion of the property which was situated in Oudh. *Held* also that the fact of his having made such a deduction from his original claim did not disentitle him from suing for the balance. *PARMESHA DAT v. SRI NEWAS.*

[XI-47]

(1) s. 106.—*Undivided property—Suit by one co-sharer for ejectment of trespasser.* *Held* that any one or more of several joint co-sharers is entitled to sue to eject a trespasser upon the land held in common. *JAI GOPAL SINGH AND OTHERS v. KAULESHA RAI AND OTHERS.*

[II-132]

(2) ————— *Suit by some co-sharer for their portion of rent.* *Held* that a suit by some of the co-sharers in a joint and undivided *mahal* for a declaration of their title to receive a proportionate share of the rent payable by the tenants and for the recovery of a proportionate share of the rent is barred

ACT XII OF 1881, s. 106—(continued.)

by s. 106 of Act XII of 1881. MAHADEO SINGH AND OTHERS *v.* BACHU SINGH AND OTHERS.

[IX-87]

(3) ————— *Suit by lambardar for rent.* In a suit by the *lambardar* of a joint undivided *mahal* for rent, the defence was that the tenant had paid the rent to a co-sharer. It appeared that the intention of the *wajib-ul-ara* was that rents should be collected by the *lambardar*. *Held* that this being so, and the intention of the Legislature in passing the N. W. P. Rent Act (XII of 1881) being that in a *mahal* of this kind the *lambardar* and not the co-sharer was the person to whom the rent should be paid, the payment relied on did not relieve the tenant from his liability to the *lambardar*. GANGA SAHAI *v.* GANGA BUKHSH AND ANOTHER.

[X-3]

(4) ————— *Suit by one lessee for his share of rent.* One of several joint lessors of certain land sued the lessee for his share of the rent payable under the lease to all the lessors, making the other lessors defendants. *Held* that the suit was not maintainable, and the making of the other lessors defendants did not cure the defect in the suit. MANOHAR DAS *v.* MANZUR ALI.

[II-143]

(5) ————— *M and S were joint lessors of certain land by a kabuliyaat which did not contain any specification of the shares of the lessors. M, stating that the share of rent due to S had already been paid, sued the lessee for the recovery of his own share. The amount claimed was all that remained due on the lease. Held that the plaintiff was entitled, as one of the joint lessors, to sue for the balance of rent, and that his suit was therefore not barred by the terms of section 106 of the N.-W. P. Rent Act (XII of 1881). Manohar Das v. Manzur Ali (I. L. R. 5 All., 40) referred to. Quære:—Whether the kabuliyaat whereon the suit was based might not be called "a special contract" within the meaning of section 106 of the Rent Act, so as to render that section inapplicable. MURLIDHAR v. ISHRI PRASAD.*

[IV-181]

(6) ————— *Suit by one co-lessee against sub-lessor (Act XVIII of 1873.)* The appellant, to whom and one *N S* jointly a lease of a certain *mauza* had been given, sued one *M L* to whom *N S* had let certain land, for arrears of rent. The lower Court held, with reference to s. 106 of Act XVIII of 1873, that the appellant could not sue alone. *Held* that s. 106 of Act XVIII of 1873 did not apply to bar the suit on the part of the appellant, one of two co-lessees. JIWA RAM *v.* MAKHAN LAL AND ANOTHER.

[I-25]

ACT XII OF 1881, —(continued)

s. 125.—*Held* that the dismissal of a suit under s. 125 of Act XII of 1881 where one of the defendants was present was illegal. PRAG DAS *v.* INDARJIT AND OTHERS.

[VIII-234]

(1).—s. 128 (a).—*Dismissal for default—Appeal.* In this suit for profits under s. 93 (a), Rent Act, after the parties had appeared and issues were framed the 3rd of July was fixed for the final hearing, but on that date the Assistant Collector adjourned it to the 20th. Plaintiff did not appear on the last mentioned date and the Assistant Collector disposed of the case under s. 140, Rent Act, and dismissed the suit. In appeal the District Judge held that no appeal would lie under s. 128 of the same Act. *Held* that the dismissal of a suit under s. 140 does not operate as judgment by default within the meaning of s. 128 (a), and therefore an appeal lay to the district Judge. ABDUL RAHMAN *v.* QUTB UDDIN AND OTHERS.

[IV-158]

(2). ————— In this case the plaintiff's agent being unacquainted with the facts of the case the Court ordered him to produce some person qualified to represent the plaintiff. A *karinda* of the plaintiff was accordingly brought to Court but he also proved to be unacquainted. The Court then ordered the agent to produce the plaintiff on the 1st May. On that date the plaintiff pleaded illness as an excuse for non-attendance and the case was adjourned for the 12th May, the plaintiff did not appear and the case was again adjourned for the 13th. On the 13th the plaintiff failing to appear the Court dismissed the suit against the defendant who did not admit the plaintiff's claim. The District Judge in appeal held that the order of the Court was one under s. 125 of Act XVIII of 1873 read with s. 143 and the remedy against such order was not by way of appeal, s. 128. *Held* that if the suit was dismissed, as suggested by the pleader for the appellant, under s. 136, the provisions of s. 128 would be applicable and there was no appeal to the District Judge. JANKI PRASAD *v.* MANGLI.

[I-92]

(3).—s. 128 (b).—*Re-institution.* *Held* that the Court's neglect to order notice to be served on the defendants and a consequent failure on behalf of the defendants to appear on the date fixed for hearing, was no reason for dismissing the plaintiff's application for a re-institution of the suit. PRAG DAS *v.* INDARJIT AND OTHERS.

[VIII-234]

s. 137.—*Framing issues—Applicability of the provisions of C. P. C.* This was a suit by a *lambardar* against a co-sharer for arrears of revenue, in which appeal lay to the District Judge. An objection taken in appeal, *viz.* that the Assistant Collector had framed no issue was overruled by the District Judge on the

ACT XII OF 1881, s. 137—(continued.)

ground that it was not necessary under ss. 135 and 137, Rent Act, to frame issues. *Held* that the Judge was wrong. S. 137 of the Act directs the Courts to frame issues. *Held* further that even supposing that there was no provision in the Rent Act for framing of issues the Judge should have been guided by the Code of Civil Procedure. **BALDEO V. NAND KISHORE AND OTHERS.**

[IV-35]

(1) s. 139.—*Applicability of ss. 43 and 373. C. P. C., to revenue proceedings.* *Held* by the Full Bench (Stuart, C.J., dissenting,) that the Courts of Revenue in the N.-W. Provinces, in those matters of procedure upon which the Rent Act of those provinces (Act XII of 1881) is silent, are governed by the provisions of the C. P. C. The principal decision in *Nilmoni Singh Deo v. Taranath Mukerjee (I.L.R., 9 Calc., 295)* followed. *Held* therefore that the procedure provided by ss. 43 and 373 of the C. P. C. is applicable to suits tried under the N.-W. P. Rent Act, 1881. **MADHO PRAKASH SINGH AND ANOTHER V. BHONDI AND ANOTHER, HIRA SINGH V. MUKUND SINGH.**

[III-92]

(2). —————. *Held* that a recorded co-sharer of a *mahal* sued the *lambardar* for his share of the profits of the *mahal* for the year 1286 *Fasli*. At the time of the institution of the suit, the profits for 1287 and 1288 *Fasli* also were due, but no claim was then made in respect of them. The suit was struck off on account of non-appearance of the parties, under s. 140 of Act XII of 1881, (N.-W.-P. Rent Act), with leave to the plaintiff to bring a fresh suit. Subsequently the plaintiff brought a suit against the same defendant for his share of the profits of the *mahal* for 1287 and 1288 *Fasli*. *Held* that the suit was not barred by the provisions of s. 43 of the Civil Procedure Code. *Held* also that the Courts below had properly refused to deduct from the plaintiff's claim as "village expenses" within the meaning of s. 93 (k) of the Rent Act, certain charges on account of the expenses of cultivation of *sir* land held in partnership by the plaintiff and defendant. **MUZ CHAND V. BHIKARI DAS.**

[V-129]

s. 140.—*Dismissal for default.*

See s. 128 (a) No. (1).

s. 143.—*Authorized agent.*

See s. 128, No. (2).

(1). s. 148.—*Suit for rent paid to lambardar.* In a suit by a co-sharer in a *zemindari* for arrears of rent, the defendants proved that they had paid a certain amount to a third person who had succeeded the plaintiff as *lambardar*. It was found that the payment had not been made to the *lambardar* in his capacity as such. *Held* that the suit must fail, inasmuch as the rent had been paid to the General Manager or Agent for the plaintiff, and also because, on the

ACT XII OF 1881, s. 148—(continued.)

principle of s. 50 of Act IV of 1882, the payment extinguished the plaintiff's claim, and the plaintiff's remedy was either to sue the *lambardar*, or else to have the amount in question taken into account at the yearly *bujharat* of the *zemindari*. **CHATRI AND OTHERS V. BAHADUR SINGH.**

[VIII-45]

(2). ————*Paid in good faith.* *Held* that s. 148 of the Rent Act only applies to cases when the third party has actually and in good faith received and engaged such rent before and up to the time the right to sue accrued. That in the case of a tenant who has paid rent to the third person after the rights of the contending parties have been decided by a decree, does not pay in good faith, within the meaning of the section. **SHAMSHER KHAN V. ZAHUR HUSAIN.**

[VII-94]

(3). ————*Suit for a declaration under s. 148 of Act XII of 1881.* One *BD* sued certain cultivators of *muafi* holding and one *SA*, praying for a declaration of her right to recover from the said cultivators her proportion of rent and for setting aside an order of the Revenue Court, alleging that the *muafi* land belonged to *SA*; that in consequence of some dispute the said *muafi* was detached by the Settlement Officer and given to the plaintiff's husband who sold it to her; that she remained in possession without interference; that she sued the said cultivators for arrears of rent; that *SA* intervened under s. 148 of Act XII of 1881; and that the Revenue Court decided adversely to the plaintiff. *Held* by the Full Bench that upon the facts alleged there was a cause of action and that the plaintiff had a right to sue under the proviso to s. 148 of the Rent Act. **SABT ALI AND OTHERS V. BASHIR DAULAT.**

[V-194]

(4). ————*Intervenor—Decree against.* *Held* that the Court can not pass a decree against an intervenor who has been made a party to the suit under s. 148, Rent Act. If it is proved that he has recovered the rent the suit against the tenant should be dismissed. **GOBIND RAM V. NARAIN DAS.**

[VII-79]

MADHO PRASAD V. AMBAR.

[III-103]

(5). ————*Intervenor—Appeal.* *M* sued *I* and another for rent in the Court of the Collector. The defendants pleaded payment to *V* who was accordingly brought on to the record as a co-defendant under s. 148 of the North-Western Provinces Rent Act (XII of 1881). The Collector decided in favour of *V*. The plaintiff appealed to the District Judge making all three persons respondents. The District Judge reversed the decision of the Collector and ordered the whole

ACT XII OF 1881, s. 148.—(continued.)

costs to be paid by *V* who thereupon appealed to the High Court. *Held* that the District Judge had no jurisdiction to entertain the appeal so far as the party brought in under s. 148 was concerned, and, that being so, had no power to award costs against him. *MIRZA ANAND RAM v. MAUSUMA BEGUM*.

[XI-107]

(6) ———— [*Act XVIII of 1873.*] *K* sued *B* for arrears of rent, such arrears not exceeding Rs. 100. His right to receive rent was disputed by *H*, a third person, who was made a defendant under the provisions of s. 148 of Act XVIII of 1873. The suit was tried by an Assistant Collector of the second class, who decided that *K* was entitled to the rent. *H* and *B* appealed to the Collector, who decided that *H* was entitled to the rent. *K* thereupon appealed to the District Judge, who affirmed the decision of the Collector. *K* then appealed to the High Court. *Held* that the Collector was not competent to entertain an appeal by *H*; that, as between *K* and *B*, all that the Collector could decide was whether or not *K* was entitled to the amount of rent claimed; that the District Judge had no jurisdiction to entertain *K*'s appeal; and that *K*'s appeal to the High Court was not entertainable, the District Judge not having decided any question of proprietary right that would justify such an appeal. *KISHNA RAM v. HINGU LAL AND OTHERS*.

[II-30]

(7). s. 148 proviso.—*Suit for establishment of right to land—Limitation.* *Held* that a suit against an intervenor under s. 148 of the Rent Act, for the establishment of right to and possession of the land, was not governed by the period of limitation provided in that section. That section applied to suits to recover rent which the tenant had pleaded to have paid over to the intervenor. *MUHAMMAD SALIM AND OTHERS. v. ABDUL RAHIM AND OTHERS*.

[V-261]

GANGA PRASAD AND ANOTHER v. BALDEO RAM AND OTHERS.

[VIII-62]

(8) ————]. The effect and intention of the proviso to s. 148 of Act XII of 1881 is to preserve the jurisdiction of the Civil Courts under s. 42 of Act I of 1877, which prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided *mahal* for a declaration of their title to receive a proportionate share of the rent payable by the tenants. *MAHADEO SINGH AND OTHERS v. BACHU SINGH AND OTHERS*.

[IX-87]

ACT XII OF 1881, s. 148 (Prov.)—(continued.)

s. 149.—*Illegal transfer—Discretion of Court.* *Held* that even, if a usufructuary mortgage by an occupancy tenant of his holding, was an act detrimental to the land or inconsistent with the purpose for which it was let the Court had a discretion under s. 149 either to eject him or not. *SHEOBARAN RAI AND OTHERS v. RAM DIN RAI AND OTHERS*.

[VI-145]

MADHO LAL AND ANOTHER v. SHEO PRASAD MISHR AND OTHERS.

[X-162]

DEBI PRASAD v. HARDAYAL.

[V-205]

Chap. VII.—Execution of decree—Tenant ejected under s. 35.]

See s. 35, No. (1).

s. 170.—*Limitation.* *A* assigned certain trees to *B* for good consideration. A few days prior to the assignment an order for attachment of the trees had been obtained in a suit to which *B* was not a party. No actual seizure in attachment took place, and it did not appear that *B* knew anything about the order. The trees having been sold, and a certificate of sale having been given, *B*, more than a year after the confirmation of the sale, brought a suit for possession of the trees. His claim was dismissed in the Court of first instance, but decreed in appeal. The defendant then appealed to the High Court. *Held*, that the suit was not a suit to set aside a sale, but a suit by a stranger to claim property of his own which had been wrongfully sold as that of another; and consequently was not barred by limitation either under s. 170 of the Rent Act (XII of 1881), or under art. 12, schedule ii, of Limitation Act (XV of 1877). *NISAR ALI AND OTHERS v. MADHO DAS AND OTHERS*.

[X-224]

s. 171.—*Execution against immoveable property.* *Held*, with reference to s. 171 of the Rent Act, that before execution against immoveable property can be had, the decree-holder must either take out execution against both person and moveable property of the judgment-debtor or prove to the satisfaction of the Court that it would be useless to do so. *SURAJNARAIN SINGH v. SHEOBARAN PANDE AND OTHERS*.

[XIII-15]

s. 172.—*Sale when complete—Sale certificate—(Act XVIII of 1873.)* Property sold in execution of a decree of a Revenue Court vests in the purchaser on the completion of the sale and payment of the full price. In order to perfect his title it is not necessary that he should obtain a sale-certificate or should be put into possession by the Collector. *Held*, therefore,

ACT XII OF 1881, s. 177—(continued.)

of the Court of Revenue decree, and for a declaration that the said lien "which is on account of Government," be declared preferential to the mortgages of 1873, the decrees thereon of 1884, and the sales under those decrees of 1887. He claimed this lien not only in respect of the arrears of Government revenue paid, but also in respect of future interest. *Held* by the Full Bench (Mahmood, J., dissenting):—

[III-41]

(i). That the Legislature had not given or recognized in the N.-W. Provinces any such right of charges or lien in favor of a person paying Government revenue as was claimed here, or provided any means by which such a charge could be enforced, and that any such charge would be at variance with the policy and intention of the Government as disclosed in its legislative enactments. (ii) That no Civil Court had jurisdiction to entertain the suit, and no Court of Revenue had jurisdiction to make a decree for sale of the immoveable property or a decree in execution of which the immoveable property could be sold to the prejudice of incumbrances to which it was subject. (iii) That it was not the intention of the Legislature that a Civil Court should have jurisdiction to invest by declaration or otherwise a decree of a Court of Revenue with the attributes of a decree for sale such as could be passed by a Civil Court in a suit for sale under the Transfer of Property Act, 1882. (iv) That there is no general principle of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate obtains a charge on the estate and therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate, does not, by reason of such payment, acquire a charge on the share of his defaulting co-sharer. *Kinn Ram Das v. Mozaffer Hosain Shaha* (J. L. R., 14 Calc., 809) approved. (v) That the principle of maritime civil salvage had no application to the case, and that no analogy could exist between the case of a salvor in maritime civil salvage and the case of a co-sharer in a *mahal* to whom s. 146 or s. 148 of the N.-W. P. Land Revenue Act (XIX of 1873) applied. *Leslie v. French* (L. R., 23 Ch. D. 552), and *Falcke v. Scottish Imperial Insurance Company* (L. R., 34 Ch. D. 234) referred to. SETH CHITOR MAL v. SHIB LAL.

[IV-176]

[XII-117]

(3).—[In execution of a decree obtained by a *lambardar* under s. 93 (g) of the N.-W.P. Rent Act, the decree-holder caused to be attached a certain share upon which the arrears of Government revenue which he had satisfied had accrued. In defence to a suit brought by certain purchasers of the same property from the judgment-debtors to have it declared that the property was not liable to sale under the decree, and to remove the attachment, the decree-holder pleaded that by the fact of paying the arrears of revenue due on the estate of the plaintiffs' vendors, he had

ACT XII OF 1881, s. 177.—(continued.)

obtained a charge on it, and could bring it to sale to satisfy the decree. *Held* that a charge of this nature could not be enforced in execution of a decree which was merely a personal one for arrears of Government revenue against persons against whom it was passed by a Revenue Court not competent to establish or enforce a charge on property, or to do more than pass a personal decree, and whose powers in execution were confined to realization from personal and immoveable property of the judgment-debtors. *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee*, (11 Moo. I. A. 258) referred to. *LACHMAN SINGH AND OTHERS v. SALIG RAM AND OTHERS*.

[VI-134]

(1). **s. 181 (b)—Limitation—Objection disallowed for want of prosecution.** The limitation provided by s. 181, cl. (b) of Act XII of 1881, is none the less operative because the order under s. 179 of the Act, in consequence of which a suit has been brought in a Civil Court, may be an order made not on the merits but in default of prosecution of his objection by the objector. *Sardhari Lal v. Ambika Pershad* (L. R. 15 I. A., 123); *Khub Lal v. Ram Lochun Koer* (I. L. R. 17 Calc., 260); *Kaminee Debia v. Issur Chunder Roy Chowdhry*, (22 W. R. 39.) and *Sadut Ali v. Ram Dhone Misser* (12 C. L. R. 43) referred to. *Kallu Mal v. Brown* (I. L. R. 3 All., 504) discussed. *LACHMI NARAIN v. H. H. C. MARTENDAL*.

[XVII-60]

(2). **s. 181 (c)—Compensation—(Act XVIII of 1873).** *Held* that a suit, by a third party to establish his right to and for possession of a house sold in execution of a decree under Act XVIII of 1873, was not maintainable. The only remedy, provided by s. 181 clause (c) of Act XVIII of 1873, was by compensation. *DWARKA PRASAD v. MIANDAD KHAN*.

[I-169]

s. 188.—Applicability of s. 623, C. P. C. to rent suit. S. 623 and the following sections of the Code of Civil Procedure which deal with reviews of judgments have no application to suits and proceedings under the N.-W. P. Rent Act, 1881. Where section 188 of Act No. XII of 1881 applies, it is only in cases where there is no right of appeal that a review can be granted and that only on the special ground provided for in the Act itself. *WAZIR SINGH v. THAKUR KISHORI RAWANJI MAHARAJ, THROUGH SHIB GOPAL AND ANOTHER*.

[XVII-139]

ss. 188 and 189.—Final—Rehearing—Appeal (Act XVIII of 1873). A suit for Rs. 108-12-4, arrears of rent was brought in the Court of the Assistant Collector of the first class and was decided by him. After such decision one of the parties applied for the rehearing of the suit upon the ground that they had discovered new evidence. The Assistant Collector granted the

ACT XII OF 1881, ss. 188 and 189.—(continued.)

application and made a new decree which was affirmed on appeal to the District Judge. *Held* in second appeal, that as the suit was one in which the judgment of the Assistant Collector was not final, the Assistant Collector was not competent, under s. 188 of Act No. XVIII of 1873, to rehear the suit. His second decree and the decree of the District Judge affirming it were invalid and must be set aside. *MANIK RAI AND ANOTHER v. HARI DAS AND ANOTHER*.

[I-141]

(1) **s. 189.—Claimant under s. 148 Appeal.** *See* s. 148 Nos. (5) and (6).

(2) **Value of subject matter—Appeal.** Where a plaintiff in a suit under s. 93 of the N.-W. P. Rent Act valued his suit at Rs. 46-3, which valuation was not objected to either by the defendant or the Court, and subsequently being defeated in his suit preferred an appeal which he valued at a very much greater amount. *Held* that he must be bound by the valuation put upon his suit and could not by alleging a greatly enhanced value obtain an appeal which would not have lain on the valuation stated in the plaint. *RADHA PRASAD SINGH v. PATTAN OJAH AND ANOTHER*.

[XIII-148]

(3) **Suits below Rs. 100—Appeal.** *Held* that this being a suit for recovery of arrears of rent below Rs. 100 and involving no question of proprietary title to land between parties making conflicting claims, no appeal lay to the Judge of the district from the decision of the Assistant Collector. *SUNDER PANDEY AND OTHERS v. BUDHU CHAUBEY*.

[I-36]

(4) **Value of subject matter—(Act XVIII of 1873).** *Held* that the subject matter of the suit being below Rs. 50, and no question of proprietary title in the law, which was the subject of the claim, having been raised or determined by the Assistant Collector, the District Judge had no jurisdiction entertain the appeal. *LACHMAN DAS v. DAULAT SINGH*.

[I-35]

(5) **Suit above Rs. 100—Second appeal District Judge.** This was a suit for arrears of rent, Rs. 105-8-0, instituted in the Court of an Assistant Collector of the 2nd class, who dismissed the suit, and in appeal the same decision was up held by the Collector. Then the plaintiff preferred an appeal to the District Judge. *Held*, on reference by the District Judge, that a second appeal did lie to the district Judge. *RAJA SINGH v. SULKAR*.

[IV-137]

(6) **"Rent payable"—Rate of rent—Appeal.** The words "rent payable by the tenant" in s. 189 of the North Western Provinces

ACT XII OF 1881, s. 189.—(continued.)

Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his land-lord as rent. Where a *zemin-dar* sued a tenant for rent of certain alluvial land the amount claimed not being above Rs. 100 and the tenant objected that there was a custom in the village by which rent was paid in case of alluvial land only on the culturable portion, and that during some of the years in suit a less portion of the land than that for which rent was claimed had been culturable:—*Held* that in such a suit the rate of rent was in dispute and an appeal would therefore lie. *Radha Prasad Singh v. Pergash Rai* (I. L. R., 13 All. 193,) followed: *Payagsaku v. Mata Din* (W. N. 1890, p. 229) overruled. *RADHA PRASAD SINGH v. MATHURA CHAUBE.*

[XI-219]

(7)———[The criterion to be used in deciding whether an appeal lies under section 189 of Act No. XII of 1881 is whether the decision would merely affect a particular year, or whether it would supply a plea of *res judicata*, if not appealed against for all succeeding years in which the landlord and tenant stood in the same relation as when the suit was brought. *MOHIB ALI KHAN v. E. S. MARTIN AND ANOTHER.*

[XIII-204]

(8)———“*Has been determined.*” Under s. 189 of Act XII of 1881 an appeal lies in a suit under s. 93 of the Act where the rent payable by the tenant has been a matter in issue and has been determined. It is not necessary that the rent payable by the tenant should be a matter in issue in the appeal. *SARJU PRASAD v. HAIDAR KHAN.*

[XVI-148]

(9).———*Rent—Revenue.* The term “rent” as used in s. 189 of Act No. XII of 1881 can not be extended so as to include revenue. Hence where a plaintiff sued to recover arrears of revenue alleged to be payable to the plaintiff by the defendants, under an agreement the defendants being admitted to be inferior proprietors of the land in respect of which the revenue claimed was payable, it was *held* that no appeal lay to the District Judge under s. 189 of Act No. XII of 1891. *TILAKDHARI RAI AND ANOTHER v. SOGRA BIBI.*

[XVI-71]

(10).———*Determination of proprietary title.* *Held* that a decree dismissing a suit under s. 93 (b) of the N.-W. P. Rent Act on the grounds that the plaintiffs were not co-sharers of the defendant and that the defendant was not a co-sharer but an occupancy tenant, had determined the proprietary title to land within the meaning of s. 189, and that an

ACT XII OF 1881, s. 189.—(continued.)

appeal consequently lay to the District Judge. *KULSUM BIBI AND OTHERS v. BANDI BIBI.*

[VIII-65]

(11).———[This was a suit by the plaintiff, a co-sharer, against the defendant another co-sharer, for profits under s. 93 (b), Rent Act, that latter having collected rents during the years in dispute the Court of first instance decreed the claim. In appeal to the District Judge it was contended on behalf of the respondent that no appeal lay as the value of the subject matter did not exceed Rs. 100 nor did the suit involve any dispute as “to the proprietary right to land.” The District Judge overruled the objection observing that the defendants claim for themselves the exclusive rights to collections which is denied by the plaintiff; that constitutes a “claim to proprietary right in law” within the meaning of s. 189, Rent Act. *Held* that the lower Court was wrong and no appeal lay. *BHAIRON SINGH v. KALAB ABID ALI AND ANOTHER.*

[IV-45]

s. 190.—*Applicability of ss. 562 and 588, C. P. C. to rent suits.* S. 190 of Act No. XII of 1881 makes s. 562 of Act No. XIV of 1882 applicable to appeals from a Court of Revenue to a District Judge, and where in such a case a District Judge has made an order of remand under s. 562, C. P. C., an appeal will lie from such order to the High Court under s. 588, cl. (28), of Act No. XIV of 1882. *PARTAP SINGH v. NARAIN DAS.*

[XIV-120]

s. 191.—*Third appeal to High Court.* An appeal lies to the High Court from a decree of a District Judge passed in appeal from an appellate decree of a Collector. *JAIRAM RAI v. DULARI CHAND AND ANOTHER.*

[III-47]

s. 205.—*Reference—Doubt.* *Held* that a reference under s. 205 of the Rent Act by the District Judge to the High Court can only be made when the Judge entertains a doubt as to his jurisdiction and not because plaintiff applies for a reference, though the Judge himself has no doubt upon the point. *RAO RANI v. CHANDERBHAN.*

[III-136]

(1). ss. 206-208.—*Want of jurisdiction—Cure by appeal.* In a suit instituted in the Court of an Assistant Collector, an objection was taken that the suit was not maintainable in the Revenue Court. The objection was allowed, and the suit dismissed. On appeal by the plaintiff, the Assistant Collector's decision was affirmed. The appellate Court had not before it the materials necessary for the determination of the suit. *Held*, reading together ss. 207 and 208 of Act XII of 1881 (N.-W. P. Rent Act), that though the objection to the jurisdic-

ACT XII OF 1881, ss. 206-208.—(continued.)

tion was taken in the first Court and repeated before the appellate Court, the latter should only have *pro tanto* entertained it for the purpose of determining to what Court it should direct its order of remand, and should not have passed an order the effect of which was to maintain the dismissal of the suit. *DEBI SARAN LAL v. DEBI SARAN UPADHIA.*

[IV-122]

(2). ————.]. A suit was instituted in a Court of Revenue which was partly cognizable in the Civil Courts. *Held* on the question raised on appeal whether the Revenue Court had jurisdiction to entertain the suit, that the provision of ss. 207 and 208 of the Rent Act rendered the plea in respect of jurisdiction ineffectual. *BADRI NATH AND OTHERS v. BHAJAN LAL.*

[II-216]

LACHMI NARAIN v. BHAWANI DIN AND ANOTHER.

[II-87]

(3). ————.]. In a suit instituted in the Court of an Assistant Collector under clause (h), s. 93 of the N.-W.P. Rent Act, an objection was taken that, the plaintiffs not being recorded share-holders, the suit was not maintainable in the Revenue Court. The objection was allowed, but the Court, at the same time, disposed of the case on the merits, and dismissed the suit. On appeal, the lower appellate Court affirmed the decree, on the ground that the Revenue Court had no jurisdiction in the matter. *Held* that, as there were materials on the record for the determination of the suit, the Judge should, with reference to s. 207 of the Rent Act, have disposed of the appeal on the merits. *Debi Saran Lal v. Debi Saran Upadhia (I. L. R., 6 All. p. 378)* referred to. *SHEO PRASAD AND OTHERS v. ANRUDH SINGH.*

[IV-154]

(4). ————.]. An occupancy-tenant made a lease for twenty years of her occupancy holding and put the lessees in possession. The *zemindar* thereupon sued in the Munsif's Court to have the lease cancelled and both the lessor, and lessees ousted the occupancy holding. On appeal it was held by the District Judge that the suit was not properly speaking a civil suit at all; and, this being so, the Judge dealt with the appeal under s. 207 of Act XII of 1881. *Held* that whether the suit was or was not of a civil nature, the Judge was right in applying s. 207 of Act XII of 1881. *JANKI v. BALDEO SINGH.*

[XI-191]

(5). ————.]. An Assistant Collector dismissed a suit without considering the merits, on the ground that it was not cognizable by a Revenue Court. On appeal,

ACT XII OF 1881, ss. 206-208.—(continued.)

the District Judge held that it was unnecessary to determine the question of jurisdiction as he had power in any event under s. 208 of the N.-W. P. Rent Act, to remand the suit to the Assistant Collector, and he remanded it accordingly. *Held* that the Judge had rightly construed s. 208 of the Rent Act, and that the remand was proper. *Ahamad-ud-din Khan v. Majlis Rai (I. L. R., 5 All., 438)* distinguished. *GIRWAR SINGH AND ANOTHER v. SITA RAM.*

[VIII-282]

(6). ————.]. A suit by one recorded co-sharer against another for his recorded share of the profits of a *mahal* was decreed by the Deputy Collector acting under s. 93 (h) of the N.-W. P. Rent Act. On appeal, the District Judge dismissed the suit on the ground that a suit under s. 93 (h) of the Act would lie against the *lambardar* only. *Held* that whether or not this view were correct, still the plaintiff could unquestionably sue the defendant for money payable by him to the plaintiff for money received by the defendant for the plaintiff's use, and if such a suit were wrongly brought in a Revenue Court, the error could be cured in appeal under ss. 207 and 208; and the District Judge's order was a nullity and must be set aside. *BANSHIDHAR AND OTHERS v. BEHARI LAL.*

[VIII-74]

(7). ————.]. *Held* that though it was true that until the rent is ascertained either by judicial action or by contract, a suit for rent is not maintainable in a Rent Court, but the holder of the land might be made to pay compensation to the owner of the land by way of damages for the wrongful use of the land by the tenant. Such a suit no doubt is not cognizable in a Revenue Court, but the District Judge combining in him the two jurisdictions is competent to decree such a claim. *BRIJBAWAN SINGH AND OTHERS v. MEHDI ALI AND OTHERS.*

[VII-140]

RANJIT SINGH v. DIWAN SINGH.

[IX-175]

(8). ————. *Nature of suit changed.*] The appellants, co-sharers in a certain *patti*, sued the respondent in the Revenue Court for their share of the profits, on the allegation that the respondent was the *lambardar* of the *patti*. It was found that the respondent was not the *lambardar* of the *patti*. *Held* that the suit as brought must fail, and that ss. 206 and 207 of the Rent Act did not empower the lower appellate Court or the High Court to deal with the suit, as the character of the suit and status of the plaintiff to sue had been entirely changed. *RAI KISHEN v. HARSAREP.*

[III-20]

ACT XII OF 1881, ss. 206-208—(continued.)

(9). —————.] *T*, who had acquired the proprietary rights of *D* in a certain *mahal*, sued *D* in a Civil Court for damages for the use occupation of sir land of which *D*, on losing such rights, had become by law the exproprietary tenant. *Held* that, *T* being *D*'s landlord, such suit was not maintainable in the Civil Courts, *Ram Prasad v. Dina Kuar*, (I. L. R., 4 All., 515), (S. A. No. 768 of 1881 not reported) and (S. A. No. 914 of 1879 not reported) followed. *Held* also that the provisions of s. 206 of the N.-W. P. Rent Act were not applicable, it not being possible to treat the suit as being in any respect the claim that alone *T* was entitled to make on *D*, which was a claim for rent assessed or ascertained in the mode provided in that Act. *DHYAN RAI v. THAKUR RAI*.

[II-138]

(10). —————.] *Transfer of appeal to Subordinate Judge*.] The defendant in a suit instituted in a Civil Court set up as a defence that it was cognizable in the Revenue Court. The Court of first instance (Munsif) disallowed this defence, and gave the plaintiff a decree. The defendant appealed to the District Judge, again contending that the suit was cognizable in the Revenue Court. The appeal was transferred by the District Judge to the Court of the Subordinate Judge. The Subordinate Judge dismissed the suit on the ground that it was not cognizable in the Civil Courts, but in the Revenue. *Held* that, looking to the terms of ss. 189, 206, 207 and 208 of the N.-W. P. Rent Act, the District Judge had no power to transfer the appeal to the Subordinate Judge, who had not the powers vested in the appellate Court by s. 208. *RAM PRASAD AND OTHERS v. RAI KISHEN*.

[III-185]

DEBI DIN AND OTHERS v. BENI PRASAD AND OTHERS.

[IV-39]

(11). —————.] Clause (3) of s. 22 of Act No. XII of 1887 makes ss. 206, 207 and 208 of Act No. XII of 1881 applicable to appeals in suits within s. 93 of Act No. XII of 1881 when such appeals have been transferred under s. 22 of Act No. XII of 1887 by a District Judge and are being heard by such Subordinate Judge. *BABU NANDAN PRASAD v. CHANGUR*.

[XIV-113]

(12). —————.] *Matters falling under s. 95*.] *Held* that ss. 206-208 had no application to matters which might be made the subject of any of the applications mentioned in s. 95 of Act XII of 1881, being limited to cases which might be made the subject matter of suits under s. 93 of Act XII of 1881. *DEBI DAS v. RAM RATAN*.

[II-213]

ACT XII OF 1881, ss. 206-208—(continued.)

RAM PARTAB v. DHARAM SINGH AND OTHERS.

[V-28]

ASGHAR ALI AND ANOTHER v. SHEOPAL SINGH

[IX-24]

AHMAD-UD-DIN KHAN AND ANOTHER v. KHAWANI AND ANOTHER.

[IX-193]

(1). s. 209—"Gross negligence"—*Onus*.] *Held* that where a co-sharer claims a dividend on the full rental and the *lambardar* pleads that the actual collections fell short of that rental, the burden of proving negligence under s. 209 of the Rent Act lies on the co-sharer. *DHANAK SINGH v. CHAIN SUKH*.

[VI-1]

MUHAMMAD INAYAT HUSAIN v. MUHAMMAD KARAMAT-UL-LAH.

[X-131]

(2). —————.] One *D* a co-sharer, brought this suit against *U*, the *lambardar* and *B*, *U*'s brother, who had made the collections. The plaintiff's case was that *U*, through his brother *B*, had made collections in excess of the *jamabandi*, to which the plaintiff was also entitled in proportion to his share. *Held* that *D* was not bound to prove gross negligence against *U* under s. 209. *Held* further that the suit against *B* must be dismissed as under s. 93 (*h*), *B* was not liable. *DURGIA AND ANOTHER v. UDAI RAM AND ANOTHER*.

[VII-297]

(3). —————.] Plaintiffs (co-sharers) sued for their share of the profits of the *mahal* for 1287-1289 *Fasli*. During 1287 and 1288 *Fasli* the *lambardar* was one *Pancham* and in 1289 his son, the defendant in this suit. *Held* that the defendant was only liable upon the actual sums collected and not on the gross rental, for he could not be made liable in a suit for their share of the profits for the misconduct of his predecessor, there being no evidence of his own misconduct. Liability in damages was personal to the deceased *lambardar*. *GULAB v. FATEH CHAND*.

[VI-32]

ACT XXVI OF 1881.—(Negotiable Instruments.)

(1). s. 1.—*Hundi—Local usage—Presentment*.] *Held* that when a local mercantile custom to the effect that the last endorser of a *hundi* remained liable to his endorsee should the *hundi* remain unpaid irrespective of the question whether it had been presented to the acceptor for payment or not, was clearly proved it must be given effect to. *HAR LAL AND ANOTHER v. TULSHI DASS*.

[II-35]

ACT XXVI OF 1881, s. 1.—(continued.)

(2). ————— *Notice of dishonour—Reasonable time.*] In the absence of any local usage to the contrary it is just and equitable that the doctrine of notice of dishonour propounded in the Negotiable Instrument Act (XXVI of 1881) should be applied to a *hundi* in the vernacular, the "reasonable time" within which such notice is to be given being determined according to the circumstances of the case. *Held*, therefore, that where the holder of such a *hundi*, which had been dishonoured, sued the prior endorsors on it, without having given them such notice, and did not prove that they could not suffer damage for want of such notice, the suit must fail. MOTI LAL AND ANOTHER *v.* MOTI LAL.

[III-216]

(3). ————— *Rights and liabilities of drawer, drawee and holder in due course.*] *P* drew a *hundi* on *S*, (which *S* accepted for *P*'s accommodation), which he transferred for value to *B*, who transferred it for value to *C*, who transferred it for value to *R. N.*, at *R*'s request, and on his behalf, presented the *hundi* to *S* for payment, and *S* paid it. *Held* that *S* was entitled to recover the amount of the *hundi* from *P*, but not from *N. Reynolds v. Doyle*, (1 *M* and *G*; 2 *Scott. N. R.* 45) referred to. RAM PRASAD *v.* SITTA PRASAD, NAND RAM AND ANOTHER *v.* SITTA PRASAD.

[III-62]

(4). ————— *Insolvency—Maturity.*] *Held* that the declared insolvency of the drawer and drawee of a *hundi* justified the holder in suing before the *hundi* matured; and that an agreement by the creditors of an insolvent to take eight annas in the rupee, which was not signed by the insolvents, was not binding as between the insolvent and a creditor. ASA RAM *v.* DEBI PRASAD AND OTHERS.

[I-21]

(5). ————— *Forged—Estoppel.*] The *bona-fide* holder for value of a forged *hundi*, to whom, after it had been dishonoured, it had been transferred by endorsement, by the payees, who at the time of endorsement knew that the *hundi* was forged, sued the payees on the *hundi* to recover the amount he had paid them for it. *Held* that the payees were estopped from setting up the forgery of the *hundi* as a bar to the suit. BISHEN CHAND *v.* RAJENDRA KISHOR SINGH AND OTHERS.

[III-50]

(6). ————— *Surrender of.*] The appellants sued the respondents for the money due on two *hundis*. The *hundis* though drawn by the respondents and transferred by him to the appellants, the appellants had surrendered them to the respondent and charged their amount as the opening debt in a new account in their own books. *Held* that under

ACT XXVI OF 1881, s. 1.—(continued.)

the circumstances the appellants could not be permitted to sue on the *hundis*. BIRJ LAL AND OTHERS *v.* ARJAN DAS.

[III-135]

(7). ————— *Payable to a respectable person.*] A number of *hundis* drawn up by Raja Hari Hardatt on himself were accepted by him in the following terms. "*Hundi* accepted by Raja Hari Hardatt in favor of Ram Shanker Shukul." They were all made payable to "a respectable person." Shanker Shukul transferred the *hundis* by endorsement to *B*, who has brought this suit against the Raja. *Held* that the phrase "a respectable person" meant the same thing as the phrase "the bearer" and that they were perfectly good and negotiable instruments. The plaintiff's suit must therefore be decreed. BALMUKAND LAL *v.* THE COLLECTOR OF JAUNPUR AS MANAGER ON BEHALF OF THE COURT OF WARDS AND HARI HARDATT.

[IV-3]

s. 4.—*Promissory Notes.*] The question in this case was whether an instrument in the following terms was a promissory note or not "*I, J. M. C. do hereby promise to pay at Allahabad to the manager of the Agra Savings Bank, Limited, the sum of Rs. 10 on or before the 15th day of October, 1876, and a similar sum monthly every succeeding month, for full value and consideration received: dated the 9th September, 1876.*" *Held* that the instrument was not a promissory note. CARTER *v.* THE AGRA SAVINGS BANK.

[III-148]

s. 5.—*Hundi payable—"A certain person" or "bearer."*

See s. (1), No. (7.)

s. 26.—*Endorsement—Minor.*] A cheque was endorsed in blank by a European British subject who, at the time, was under twenty years of age and was temporarily residing, and not domiciled, in British India. It was subsequently dishonoured and a suit was then brought by the bank which had cashed the cheque to recover the amount from the endorser and the drawer. The former alleged that the drawer had requested him to sign his name to the cheque, saying that it was a mere matter of form, and he would not be liable for the amount, and that the bank would only cash the cheque when endorsed by him, and in consequence he consented to endorse it, but that he did so without any intention of incurring liability as endorser, that he received no considerations, and that his endorsement was in blank, and not in favor of the bank, and was converted into a special endorsement without his knowledge and consent. The Court held that, at the time of endorsement, the endorser was a minor under English law, and dismissed the suit on the ground of minority. *Held* that, assuming the endorser to have been *sui-juris*

ACT XXVI OF 1831, s. 23.—(continued.)

the endorsement taken in conjunction with the facts proved, established a contract by which the endorser was bound to pay the cheque. *ROHIL-KHAND AND KUMAUN BANK LIMITED v. Row.*

[V-101]

s. 36.—Promissory note—Rights and liabilities of—Maker—Payee—Holder in due course.] Held that a holder in due course of a promissory note is entitled to recover his money from the maker and the payee whatever may be the rights and liabilities of the maker and payee between themselves. *PITAM MAL v. RAM CHANDER.*

[VI-34]

(1) s. 64.—Presentment—Hundi—Local custom.]

See s. 1 No. (1).

(2) s. 64.—Bill of exchange—Presentment.] One *B H* drew a Bill of exchange on the Agra Savings Bank payable at ninety one days. The Bill was accepted by one *F A*. There was no special condition that the Bill was to be presented at any particular place or at any particular time. The Bill was never presented for payment, but after maturity a suit was brought on the Bill against the acceptor. Held that the suit was sufficient demand and no presentment was necessary. *FARZAND ALI v. THE AGRA SAVINGS BANK.*

[XVI-201]

s. 93.—Notice of dishonor—Reasonable time—Hundi—Local usage.]

See s. 1, No. (2).

s. 122.—Forged hundi—Estoppel.]

See s. 1, No. (5).

ACT II OF 1882 (Trust).

s. 23 (a).—Trustee—Liability to pay interest.] One *C*, the grandfather of the plaintiff *A*, left a sum of Rs. 1,875 in the hands of *B* his son to be paid by him to the plaintiff without interest by a will, dated the 28th February, 1871. *B* (defendant) traded with the money and made certain profits. This suit was brought by *A* to recover the sum mentioned above with compound interest, but the suit was not based on the will of 1871. Nor any trust was alleged. The defendant resisted the claim for interest on the ground that no interest was payable under the will of 1871. Held that plaintiff was entitled to recover interest under the circumstances. *GOBIND DEO AND ANOTHER v. HAR NARAIN.*

[II-169]

(1) s. 64.—Transferee for consideration—Auction purchaser.] The plaintiffs came into Court on the allegation that one *BP* had, in 1842, executed a will by which he made an en-

ACT II OF 1882, s. 64.—(continued.)

dowment of certain property for the maintenance of an alms-house, that *BT*, who became trustee of the property, mortgaged the same to *BD* (defendant No. 1), who brought a suit thereupon, obtained a decree, caused some of the trust property to be sold without the plaintiffs' knowledge, and was trying to get some other of the property to be sold; that the plaintiffs objected in the execution department but their objection was disallowed. On these allegations, the plaintiffs claiming to be the managers of the trust property, brought the present suit to have their right to protect the property declared, to invalidate the mortgage and the decree obtained thereupon, to have the property released from liability under them, and to get back the property sold. The material part of the defence of *BD* was that the plaintiffs had no right of action; that the will had been revoked and torn up by *BP* himself; that on a proper construction of the will it does not show that any trust was created; that the suit was barred by time and that the defendant was a *bonâ fide* dealer with a person who was competent to deal with the properties. The suit was dismissed by the District Judge; the plaintiffs have thereupon preferred this first appeal. The main points for decision are :—

(1). Whether the will had been revoked or not?

(2). Whether a trust such as the plaintiffs allege was created by the will?

(3). Whether the mortgage and the subsequent sale and attachment of the trust property is invalid?

(4). Whether the plaintiffs have any right of suit?

It appears that in a suit brought in 1846 by certain annuitants under the will against the executor and the heirs of *BP* for the recovery of a certain sum of money under the will, it was held proved by the Court that the will had been revoked and destroyed. Then in 1850 *BT* and certain others, styling themselves as the heirs of *BP* and his brother *DP*, executed a deed of agreement by which they recognized and confirmed the dispositions of the will. This agreement was twice considered by the Court and it was held that the agreement was made to give effect to the will. This was in the years 1876 and 1877.

Held (by Oldfield, J.) that the agreement of 1850 clearly showed that the parties to it converted themselves into trustees of the property and as a fact the charities and endowments have been kept up in accordance with the wishes of the testator. That being so however *bonâ fide* the conduct of *BD* may have been and although the trust may have been concealed from him it cannot be defeated. He, as purchaser in execution of his own decree of trust property, is not a transferee, who can be protected and as one who holds a simple mortgage of trust property, he has no better position. Held

ACT II OF 1882, s. 64.—(continued.)

further that the plaintiffs could maintain the suit. The appeal should therefore be decreed.

Held (per Stuart, J.) that the evidence clearly proved that the will had been revoked by being torn and destroyed by the testator. That the decree of 1847 was binding on the Court and must be given effect to. The appeal must therefore be dismissed. **GANGA NAND AND ANOTHER v. BALGOBIND DAS AND ANOTHER.**

[IV-61]

(2). ————— *Resulting trust.* *B*, having been sentenced to transportation for life, presented a petition in the Revenue Court in which, stating that he owned a certain *zemindari* estate, that he had been so sentenced, and that it was necessary to make arrangements for the payment of the Government revenue and the management of the estate, he prayed that his name might be removed from the Revenue Registers and that of *P* be recorded in its stead, *P* sold the property, for consideration, his vendee purchasing without notice of any trust, and it was subsequently put up for sale in execution of a decree against *P*'s vendee and was purchased without notice of any trust. *Held* that the transfer of the property by *B* to *P* was in the nature of a trust. *Held* also that the property could not be followed into the hands of the purchaser at the execution sale. **Durga Prasad v. Asa Ram, (I.L.R. 2 All. 361) observation.** **HAIT RAM AND OTHERS v. DURGA PRASAD AND OTHERS.**

[III-161]

s. 81.—*Resulting trust—Transferee for value.*

See s. 64, No. (2).

ACT IV OF 1882 (Transfer of property.)

s. 2.—*Usufructuary mortgage—Redemption—Part of mortgaged property.—(Regulation XXXIV of 1803).* A deed of usufructuary mortgage executed in 1846, under which the mortgagee had obtained possession contained the following conditions :—"Until the mortgage money is paid, the mortgagee shall remain in possession of the mortgaged land, and what profits may remain after paying the Government revenue are allowed to the mortgagee and shall not be deducted at the time of redemption. At the end of any year, the mortgagors, may pay the mortgage money and redeem the property. Until they pay the mortgage money, neither they nor their heirs shall have any right in the property." In 1884, a representative in title of one of the original mortgagors sued to redeem his share of the mortgaged property upon the allegation that the principal amount and interest due upon the mortgage had been satisfied from the profits, and that he was entitled to a balance of Rs. 45. It was found that from the profits, after deducting Government revenue, the principal money with interest at the rate of 12 per cent. per annum

ACT IV OF 1882, s. 2.—(continued.)

had been realized, and that the surplus claimed by the plaintiff was due to him. The lower appellate Court dismissed the suit, on the ground that under s. 62 (b) of Act IV of 1882 and with reference to the terms of the deed of mortgage, the plaintiff was not entitled to recover the property until he paid the mortgage money. *Held* that, although the word "interest" was not specifically used, the natural and reasonable construction of the deed was that it was arranged that the mortgagee should have possession of the property and enjoy the profits thereof, until the principal sum was paid, in lieu of interest, but that the provisions of ss. 9 and 10 of Regulation XXXIV of 1803, which was in force when the deed of mortgage was executed, were not affected or abrogated by Act XXVIII of 1855 or Act XIV of 1870 or Act IV of 1882; that these provisions were incidents attached to the mortgagor's rights of which he was entitled to have the benefit; and that the contract of mortgage being subject to these provisions, the charge would have been redeemed as soon as the principal mortgage money with 12 per cent interest had been realized by the mortgagee from the profits of the property. **SAMAR ALI v. KARIM-ULLAH.**

[VI-139]

(2). ————— *Bai-bil-wafa mortgage.* *Held* that s. 2 of the Transfer of Property Act did not save from its operation *Bai-bil-wafa* mortgage or any other kind of mortgages executed before that act came into force. **GOLABI v. RAGHONATH DAS.**

[IV-269]

(3). ————— *Application of s. 99 to suits instituted before Act IV of 1882.* *A* brought a suit for the recovery of money by sale of the mortgaged property before Act IV of 1882, came into force, but the decree for sale was given after the Act had come into force. In execution of the decree the judgment-debtor objected to the sale of the property on the ground that the suit not having been instituted under s. 67 of Act IV of 1882, s. 99 of the Act prevented its being sold in execution of the decree. *Held* that s. 99 did not apply to suits instituted and decrees made under the procedure in force, before Act IV of 1882 came into operation. **MAKUND RAM AND ANOTHER v. RAM SARUP AND ANOTHER.**

[IV-274]

(4). ————— *Conditional sale—Foreclosure—(Regulation XVII of 1806).* A mortgagee by conditional sale, under an instrument executed while Regulation XVII of 1806 was in force, and before the Transfer of Property Act, 1882, which repealed that regulation, came into force, sued, after the repeal of that Regulation, for foreclosure of the mortgage, not having proceeded in accordance with the provisions of s. 8 of that Regulation. *Held* (Stuart C. J., dissenting), that

ACT IV OF 1882, s. 2.—(continued.)

the procedure of that section was not saved by clause (c) of s. 2 of the Transfer of Property Act, but the provisions of that Act were applicable to the suit. *GANGA SAHAI v. KISHEN SAHAI*.

[IV-79.]

(5.)—*Foreclosure—Notice—(Regulation XVII of 1806).* Held that where notice of foreclosure of a mortgage by conditional sale had been duly issued in accordance with the provisions of Regulation No. XVII of 1806, the coming into force of Act No. IV of 1882 during the time limited by the abovementioned notice would not prevent such notice taking the legal effect provided for by the Regulation. *BAIJ NATH RAY AND OTHERS v. SHEOBARAN RAY*.

[XIV-2]

(6.)—*Retrospective effect—(Regulation XVII of 1806).* Held that the Transfer of Property Act of 1882 did not affect retrospectively proceedings commenced under the Regulation XVII of 1806, nor could it affect a right obtained under the regulation before the act came into force. *GOKUL SINGH AND OTHERS v. BIRJ LAL*.

[V-130]

(1.) s. 3.—*Notice—Registered deed.* Held that the purchaser of a share in a village must be deemed, for the purposes of s. 81 of Act IV of 1882, to have had notice of a prior mortgage of the same property under a registered mortgage-deed. *BENI BAHADUR SINGH v. RAMBARAN SINGH*.

[VII-183]

(2.)—*_____.* For the purposes of s. 85 of Act IV of 1882 a mortgagee will be deemed to have notice of a subsequent registered incumbrance affecting the property mortgaged to him. *JANKI PRASAD v. KISHEN DAT*.

[XIV-151]

MUHAMMAD SAMI-UD DIN v. MAN SINGH.

[VI-318]

(3.)—*Notice—Auction-sale.* For the purposes of s. 85 of Act IV of 1882 a mortgagee will be deemed to have notice of a sale by public auction of the property mortgaged to him. *BHUP SINGH AND ANOTHER v. GULAB RAI*.

[VI-269]

(1.) s. 10.—*Sale of right to occupy house.* This was a suit by the owners of the land of a *sarai* against *R*, the occupier of a house in the *sarai*, and his vendee, for possession of the house by establishment of their proprietary right and by cancelment of the sale-deed. It appears that the rights of the parties were settled by a compromise between the plaintiffs and *R*, under which *R* had a full right to remain in occupation of the house on payment of a certain rent. Held that the right given by the com-

ACT IV OF 1882, s. 10.—(continued.)

promise to *R* is a right which may be transferred and is not in any way personal or dependent on the state of the house. There being nothing to show that *R* had discontinued his occupancy or that there was any intention on his part not to resume it, supposing that he did desert the dilapidated house temporarily, the suit must fail, but the existence of the sale-deed cannot affect the plaintiff's title to the site. *RAMZANI AND ANOTHER v. WAZIR MUHAMMAD AND OTHERS*.

[VII-60]

(2.)—*Sale of—Right to sue for wrongful attachment.* The mere right to sue for compensation for the wrongful attachment of moveable property in execution of a decree is not transferable by sale. *PRAGI LAL v. FATEH CHAND*.

[II-219]

ss. 10 & 11.—*Restriction repugnant to interest created.* *M*, a co-sharer in a village, transferred to *A*, another co-sharer, a two *anna* share by deed of sale. Upon the same date, *A* executed an *ikrarnamah* in which he agreed that he would not collect the rents of the two *annas* transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of committing any breach of covenant the sale should be avoided, and the proprietary rights in the two *annas* share should re-vest in *M*. A suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrarnamah*, *A* had collected the rents of the share, that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipts given by *A*, on the basis of which the suits were dismissed; and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages from *A*, the amount of these costs and expenses, and also to recover certain sums of money realized by *A* as rent from the tenants, and further, by reason of the *ikrarnamah*, to avoid the sale-deed which preceded it. Held that the deed of sale and the *ikrarnamah* must be regarded as recording one single transaction, *i. e.*, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two *annas* share to the other by the former; and that, in this view, it was clear from the *ikrarnamah* that the proprietary title created by the sale-deed was cut down to *null*, and limitations placed upon it which rendered it useless as a proprietary right. *Sital Purshad v. Luchmi Parshad* (I. L. R., 10 Calc., 30) referred to. Held that provisions of this kind which absolutely

ACT IV OF 1882, ss. 10 & 11.—(continued.)

debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of ss. 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail. *Holman v. Johnson* (1 Cowper, 543), *Anantha Tirth Chariar v. Nagamuthu Ambala Garen* (1 L. R., 4 Mad. 200); *Bradley v. Peixoto*, (*Tudor's Leading cases on Real Property*, 968) and *Husain Khan Bahadur v. Naleri Srinivasa Charlu* (6 Mad. H. C. Rep., 356) referred to. *Balaji J. Rahalkar v. Narayan Bhal* (6 Bom. H. C. Rep. A. C., 63) distinguished.

Held by Mahmood, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a *lambardar* in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the *lambardar*, and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place. *Held* by Mahmood, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal with the question of costs, and dealt with it, and the costs could not be made the subject matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulva Raya Mudali v. Jhangakhi Ammal* (6 Mad., H. C. Rep., 192); *Jalam Punja v. Khoda Javra* (8 Bom., H. C. Rep. A. C., 29); *Kabir v. Mahadu* (1 L. R., 2 Bom., 360) and *Pranshankar Shivshankar v. Govindh Lal Parbhu Das* (1 L. R., 1 Bom., 467) referred to. **MAHRAM DAS v. AJUDHIA.**

[VI-189]

(1). ss. 10 and 12—*Condition making interest determinable on alienation.*] A Hindu by his will devised a certain village to the devisee and his heirs for ever, but with a condition attached that if the devisee or his heirs alienated the village it should revert to the heirs of the testator. *Held* that the condition was beyond the power of the testator and was inoperative and that the devisee took an absolute estate. *Anantha Tirtha Chariar v. Nagamuthu Ambalagaren* (1 L. R., 4 Mad., 200) and *Ashutosh Dutt v. Daorga Churn Chatterjee* (1 L. R., 5 Calc., 438) referred to. **BAGESHRI KUNWAR AND ANOTHER v. SATNARAIN SINGH AND ANOTHER.**

[XVII-104]

(2). —————.] In a suit for possession of certain shares in certain

ACT IV OF 1882, ss. 10 & 12.—(continued.)

villages, a compromise was effected between the plaintiffs and B, the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows:—“The said B will hold possession as a proprietor, generation by generation, without the power of transferring in any shape.....The following shares recorded in B's name shall not be transferred or sold in auction in payment of any debt payable by the said B, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiff's will then be entitled to set aside that transfer, and to obtain possession.” B obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of B attached the shares referred to in the deed in execution of a decree obtained against the heirs of B for money lent to B on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment. *Held* by Oldfield, J., that the deed of compromise passed an absolute estate to B and his heirs to which the law annexed a power of transfer, and that, in reference to s. 10 of the Transfer of Property Act, the stipulation against alienation on B's part, or against sale by auction in execution of decrees against him, was void.

Per Mahmood, J.—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by s. 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu Law, the rights of B in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu law being silent on this subject, the principles of justice, equity and good conscience must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restrictions imposed by the deed of compromise upon B's powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that B must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts. *The Tagore case*, (9 B. L. R., 377) referred to. **BHAIROW MISER AND OTHERS v. PERMESHRİ DAYAL AND OTHERS.**

[V-136]

(3). ————*Transfer by act of parties.*] A covenant in a lease to a company provided that the lessees should not “assign, underlet, or part with the possession of any part of the said premises unless with the express consent in writing of the said lessors or their assigns.” The company having gone into liquidation and the Official Liquidator having applied under s.

ACT IV OF 1882, ss. 10 & 12.—(continued.)

144 cl. (c) of the Indian Companies Act for sanction to sell the companies' property, it objected on behalf of the lessor's assigns that the proposed sale would be in contravention of the covenant. *Held* that the covenant did not apply to assignments by operation of law or assignments authorized by statute. Ss. 10 and 12 of the Transfer of Property Act (IV of 1882) relate only to transfers by act of parties. IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.

[X-71]

s. 38.—*Transfer—Bonâ fide purchaser.* In this case the members of a family executed an agreement by which they bound themselves not to alienate any of their immoveable property until certain debts due by them should have been liquidated. *Held* that the agreement was not binding on a *bonâ fide* purchaser for consideration who had no notice of the agreement. RAM DIN v. MAHESHA DIAL AND OTHERS.

[IV-254]

(1). s. 41.—*Ostensible owner—Benami purchaser—Transfer for value.* Where the real purchasers of immoveable property had permitted the *benami* purchaser to hold himself out as the real owner and a third person had purchased from such *benami* purchaser for value. *Held* that the former could not recover, unless he could prove that the last mentioned purchaser had direct or constructive notice of the real title or that there existed circumstances which ought to have put him on an enquiry which if prosecuted would have led to a discovery of the real title, JORHU AND ANOTHER v. MEHDI HUSAIN.

[I-67]

(2). ———— *Widow in possession of daughter's share—Transfer.* Upon the death of G, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son A, one upon each of his five daughters, and one upon his widow B. The name of B only was recorded in the revenue registers in respect of the *zeminâri* property left by G. In 1876, A and B gave to X a deed of simple mortgage of $2\frac{1}{2}$ *biswas* out of a 5 *biswas* share of a village included in the said property. In 1878, A and B gave to S a deed of simple mortgage of the 5 *biswas*, which were described in the deed as the widow's "own" property. In 1882, X obtained a decree upon his mortgage for the sale of the mortgaged property, and it was put up for sale and purchased by X himself in January 1884. In February and November 1884, the daughters of G obtained *ex-parte* decrees against A and B in suits brought by them to recover their shares by inheritance in the five *biswas*. In 1885, S brought a suit upon his mortgage of 1878, claiming the amount due thereon and the sale of the whole 5 *biswas*. *Held* (by Mahmood, J.) that the shares of the daughters, even if they were minors at the time

ACT IV OF 1882, s. 41.—(continued.)

of the plaintiff's mortgage, could only be affected if circumstances existed which would furnish grounds for applying against them the doctrine of equity as promulgated in s. 41 of Act IV of 1882, but here no such circumstances existed. SITA RAM v. WILAYATI BEGAM AND OTHERS.

[VI-101]

ss. 41 & 48.—*Transfer—Consent.* In 1869, A and J, two co-sharers of a moiety of a ten *biswas* share in a village (F and W being also co-sharers in the same moiety), joined with H, the holder of the other moiety, in giving to K a usufructuary mortgage of 87 *bighas* of land, being the whole of the *sir* land appertaining to the ten *biswas* share. The deed of mortgage authorized the mortgagee to retain possession of the land until payment of the mortgage-money, and to receive profits in lieu of interest; and he obtained possession accordingly. In 1872, F, W and A, gave to other persons a usufructuary mortgage of their five *biswas* share, together with a moiety of the 87 *bighas* of *sir* land; and it was stated in the deed that half the mortgage-money due to K on the mortgage of 1869 was due by the executants, and that they accordingly left the same with the mortgagees in order that the latter might redeem. In November 1876, H's five *biswas* share, together with its *sir* land, was sold in execution of a decree. Subsequently, K, alleging that the mortgagees under the deed of 1872, and the purchasers under the execution sale of 1876 had dispossessed him, and that his mortgage-debt had not been paid, sued to recover possession of the 87 *bighas* of *sir* land, by virtue of his mortgage-deed of 1869. The Court of first instance held that the plaintiff was not entitled to enforce his mortgage in respect of F's and W's share in the 87 *bighas*, because they were not parties to the deed of 1869. That decision was upheld by the lower appellate Court. *Held* that inasmuch as it was clear that at the time when the mortgage-deed of 1869 was executed, F and W were aware of the transaction which made K, the mortgagee, under the deed, of the whole property, and that, knowing this, they allowed the possession of A, J and H to appear as if covering the entire *zeminâri* rights in the ten *biswas* share of the *sir* land, and inasmuch as the statements contained in the mortgage-deed of 1872 were an admission on the part of F and W that the mortgage of 1869 was executed with their consent, the equitable doctrine contained in s. 41 of Act IV of 1882 applied to the case, and F and W had no defence, either in law or in equity, to the plaintiff's suit, with reference to their shares, and for the purpose of obviating the lien of 1869. *Ramcoomar Koondoo v. Mcqueen* (11 B. L. R. 46) referred to. *Held* further that by virtue of the rule enunciated in s. 48, the rights of the mortgages under the deed of 1872 must give way to the incidents of the prior deed of 1869. *Tulshi v. Radha Kishan* (W. N., 1886, p. 74) referred to. KARAMAT KHAN v. SAMI-UD-DIN AND OTHERS.

[VI-83]

ACT IV OF 1882.—(continued.)

s. 50.—In a suit by a co-sharer in a *zamin-dari* for arrears of rent, the defendants proved that they had paid a certain amount to a third person who had succeeded the plaintiff as *lambardar*. It was found that the payment had not been made to the *lambardar* in his capacity as such. Held that the suit must fail, inasmuch as on the principle of s. 50 of Act IV of 1882, the payment extinguished the plaintiff's claim. CHATRI AND OTHERS v. BAHADUR SINGH.

[VIII-45]

(1.) s. 52.—*Lis pendens*—Award—Party.] This was a suit for the foreclosure of a nine pies share in a certain village on a *bai-bil-wafa* mortgage executed by *J N* and *M P* in favor of the plaintiff, in the year 1873. Among the other defendants were the co-sharers of the mortgagors and their connection with the suit appears to have been due to the circumstance, that during the proceedings taken by the Settlement Officer to prepare the *khewat* of the various shares belonging to the co-sharers in the village, some sort of agreement to refer the matter to arbitration had been executed by *J N* and *M P*, along with the other co-sharers. In pursuance of that agreement reference having been made to arbitration, an award was given on the 22nd September, 1873, wherein it was declared that the share to which the aforesaid mortgagors *J N* and *M P* were entitled was only two pies. These proceedings took place before the Settlement Officer in connection with the preparation of the *khewat*. It was contended on these facts, on behalf of the defendants that because at the time when the mortgage was executed there was a quarrel pending before the Settlement Officer, which was referred to arbitration and which arbitration on the very date of the mortgage declared the rights of the mortgagors by limiting it to only a two pies share, therefore the mortgage was subject to the rule of equity as to *lis pendens*, which rule would involve that a transfer under such circumstance would be subject to the result of the *lis* already pending. Held, in the first place, that as the reference to arbitration and the award were antecedent to Act XIX of 1873 coming into force, that Act was of no value to the defendants appellants. And so far as the general principles are concerned it is admitted that the present plaintiff was no party to the dispute which was going on in the Settlement Court and which ended in the arbitration award. JAGLAL RAI AND OTHERS v. MAKHNA KUAR.

[VIII-246]

(2). ———— Obligation to make transferee party.] Pending a suit for enforcement of three registered hypothecation bonds, the defendant mortgagor executed a registered deed of usufructuary mortgage in favour of a third person. The mortgagee under this deed was not made a party to the suit. Shortly after its execution, the plaintiffs obtained a decree, and ultimately the hypothecated property was sold in execution of the decree, and was

ACT IV OF 1882, s. 52.—(continued.)

purchased by the decree-holders. Meanwhile the usufructuary mortgagee obtained possession, and the decree-holders brought a suit against him for ejectment. Held that the doctrine of *lis pendens* was applicable to the case, that the fact that the plaintiffs, while their former suit was pending, knew of the defendant's mortgage cast no obligation upon them to make him a party to the litigation, and that they were entitled to an unconditional decree for possession of the property. *Bellamy v. Sabine* (1. De. G. and J., 565) referred to. *Muhammad Sami-uddin v. Man Singh* (1. L. R., 9 All., 125) and *Gajadhar v. Mul Chand* (1. L. R., 10 All., 520) distinguished. DAMMAR SINGH AND OTHERS v. NAZIR-UD-DIN.

[IX-91]

(3). ———— Suit for dower.] Where a suit for the dower debt due to a Muhammadan widow was pending on behalf of her heirs. The heirs of her deceased husband mortgaged certain property which had been of the deceased in his life-time. The heirs of the widow obtained a decree which could only be executed against the assets of the deceased husband. Held that this decree took priority over the mortgagee's decree and a sale held in execution thereof. *Bazayet Hossein v. Dooli Chund* (1. L. R., 4 Calc., 402) followed. YASIN KHAN AND OTHERS v. MUHAMMAD YAR KHAN.

[XVII-135]

(4). ———— Registered and unregistered deed—Priority.] B held a decree for the sale of property which had been mortgaged to him by an instrument which was not compulsorily registrable and was not registered. A purchased the same property *pendente lite*, by a registered deed of sale. Held, that there was here no competition between a registered and an unregistered instrument to which s. 50 of Registration Act could apply; and that A's purchase was, by s. 52 of the Transfer of Property Act, subject to the decree passed in B's favor. BHAGWAN DAS v. NATHU SINGH AND OTHERS.

[IV-158]

(1.) s. 53.—Registered and unregistered deeds—Priority—Notice of fraud.] Apart from any question of equitable estoppel, such as described by Lord Cairns in the *Agra Bank v. Barry*. (L. R. 7 H. L. 135) where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle of s. 53 of the Transfer of Property Act (IV of 1882) is applicable to such a transaction. In such a condition of circumstances, *quoad* the prior title, though created by an unregistered instrument, the *status* of the second mortgagee under his registered document is affected by his own *maia fides*; and as, on the one hand, the first

ACT IV OF 1882, s. 52.—(continued.)

mortgagee might avoid it on the ground that it was executed in fraud of him, so, on the other, the second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law to give preference to an instrument which records a transaction that, in its inception, being fraudulent was a *nudum pactum*. *RAM AUTAR v. DHANAURI AND OTHERS*.

[VI-174]

(2). ————*Award—Decree—Fraud.*] The defendant in executing a decree against immoveable property of the plaintiff's husband, was met by the plaintiff with an objection that, subsequent to the decree, the property had been transferred to her under an arbitration award, which was made a decree of Court, in discharge of her dower-debt; and, the objection having been overruled, she brought a suit to establish her title. It was found that the transaction put forward by the plaintiff was fraudulently and collusively entered into in order to defeat her husband's creditors. *Held* that the award being the result of fraudulent and collusive arrangements to defeat the creditors, the mere fact that the parties in perfecting the fraud obtained a decree, would not afford an answer to the creditor's claim; and that as the arbitration award and the decree thereon were fictitious proceedings not taken for the purpose of paying the true dower-debt, but to make it appear that the property was the wife's, when in fact it was the husband's, the rule laid down in *Suba Bibi v. Balgobind Das* (I. L. R., 8 All., 178) and *Narain Singh v. Mata Prasad Singh* (Weekly Notes 1887, p. 52) was not applicable. *MAKSUDUN-NISSA v. KARAMAT ULLAH AND ANOTHER*.

[X-15]

(3). ————*Presumption of fraud from indebtedness.*] Although under certain circumstances it is possible that an alienation made before the alienor is actually indebted may be voidable as being made with the intention of defrauding future creditors. The mere fact that the alienor has subsequently to the alienation become indebted will not of itself be sufficient to establish a presumption that the alienation was made to defraud creditors, the alienor being at the time indebted only to a very inconsiderable extent. *AZIZUN-NISA v. LAL MOHAN LAL*.

[XVI-123]

(1.) s. 54.—*Sale—Completion of—Payment of purchase money.*] Non-payment of the purchase money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the case may require. *Mokun Singh v. Shih Koonwer* (N.-W. P. H. C. Rep., 1866, p. 65), *Goor Pershad v. Nunda Singh* (N.-W.

ACT IV OF 1882, s. 54.—(continued.)

P. H. C. Rep., 1866, p. 160), *Heera Singh v. Raghnath Sahay* (N.-W. P. H. C. Rep., 1865, p. 39) and *Umedmal Motiram v. Dava* (I. L. R., 2 Bom. 547) referred to. The difference between an executed contract of sale and an executory contract to sell observed on. *Ikkal Begam v. Gobind Prasad* (I. L. R., 3 All., 77) dissented from. A deed of sale of immoveable property having been duly executed, and registered, and delivered, and the purchaser having paid a portion of the purchase money to the vendor's creditors. *Held*, with reference to s. 54 of the Transfer of Property Act (IV of 1882), that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase money to the vendor or to a mortgagee of the property, as stipulated in the deed. *SHIB LAL v. BHAGWAN DAS*.

[IX-96]

(2). ————*Sale of house below Rs. 100—Registration—Possession.*] This was a suit to recover possession of a certain house, which the plaintiff alleged, had been conveyed to him under an unregistered sale-deed by the owner and of which he had been dispossessed by the defendants. The registration of the sale-deed was optional under the Registration Law. The defence was that the sale-deed was fictitious. The lower appellate Court decreed the claim on the finding that the sale-deed was genuine and that the vendor made over possession of the house to the plaintiff. In second appeal it was contended by the defendant appellant that because such sale and delivery of possession was accompanied by the execution of a sale-deed which was not registered such sale was invalid under s. 54 of Act IV of 1882. *Held* that the contention was unsound and there was nothing in s. 54 which would render a sale effected in the second alternative method void by reason of the execution of a non-registered deed of sale. *Narain Chunder Chuckerbutty v. Dataram Roy* (I. L. R., 8 Calc., 597) distinguished. *IMAM-UDDIN AND OTHERS v. RAMZAN CHAUDHRI*.

[V-201]

(3). ————*Sale in contravention of section—Pre-emption.*] The *wajib-ul-urz* of a village gave the co-sharers a right of pre-emption in cases where any of them should wish to "transfer his share wholly or partly by sale or mortgage." One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs. 300, and had mutation of names effected in the Revenue Department, but, in order to avoid the right of pre-emption, the parties omitted to execute or register a deed of sale in respect of the transfer. *Held* by the Full Bench (Mahmood, J., dissenting) that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-urz*.

ACT IV OF 1882, s. 54.—(continued.)

Per PETHERAM, C. J., that the terms of the *wajib-ul-arz* meant that if any co-sharer transferred his right wholly or partly, the right of pre-emption should arise; that, although the legal interest in the share was never transferred, the effect of the transaction in question was to transfer absolutely the whole right of possession from the vendor to the vendee, and that it was therefore such a transfer as let in the right of pre-emption.

Per STRAIGHT, J., that inasmuch as the defendants deliberately omitted to observe the necessary legal formality of a registered instrument with the object of defeating the pre-emptive right, it was very doubtful whether a Court of equity would be justified in allowing them to set up, and in giving effect to, a defence based upon their own intentional evasion of the law.

Per OLDFIELD AND BRODHURST, JJ., that failure of the parties to the transfer to comply with requirements of s. 54 of the Transfer of Property Act (IV of 1882), as to the manner in which the transfer should be made, did not alter the nature of the transaction or affect the fact that a sale had been made, and could not affect a pre-emptor's right in respect of it.

Per MAHMOOD, J., that a valid and perfected sale was a condition precedent to the exercise of the pre-emptive right; that, in the present case, nothing had happened which could properly be termed a "sale" within the meaning of the *wajib-ul-arz*; that the application for mutation of names not having been registered, the provisions of s. 54 of the Transfer of Property Act prevented it from taking effect as a sale, or passing the ownership from the vendor to the vendee, and that therefore, under the *wajib-ul-arz*, the right of pre-emption could not arise. JANKI MISIR *v.* GIRJADAT MISR AND ANOTHER.

[V-97]

(4) —————] Where a *Sunni* Mahomedan transferred certain immoveable property exceeding in value Rs. 100 under such circumstances that the price was paid and possession of the property delivered to the transferee, but no sale-deed was executed; on a suit for pre-emption based upon such transfer being brought, it was *held* by the Full Bench (Banerji, J. dissenting) that the Muhammadan law was to be applied in considering whether or not a right of pre-emption arose and that, inasmuch as the transaction in question was a complete sale under that law, a right of pre-emption did arise.

Per BANERJI, J., *Contra*—"In the absence of fraud no claim for pre-emption under the Muhammadan law applicable to persons of the *Hanafi* sect can arise in respect of the sale of immoveable property of the value of one hundred rupees and upwards unless such sale has been effected according to the provisions of s. 54 of Act No. IV of 1882." BEGAM AND OTHERS *v.* MUHAMMAD YAKUB AND ANOTHER.

[XIV-101]

ACT IV OF 1882, —(continued.)

s. 55—*Covenant for quiet enjoyment—Breach—Liability of heirs.*] *B* mortgaged certain *zemindari* share to *X* and subsequently sold the same to *A*, concealing the fact of the prior mortgage. *X* brought a suit to enforce his lien on the property against *B* and *A* and obtained a decree. Thereupon to avoid the attachment and sale of the property *A* paid off the mortgage money and brought the present suit for the same against the heirs of *B*. The suit was contested on the ground that it was in the nature of a tort and was claimable from *B* personally and not from his heirs. *Held* that the suit was one for damages for breach of a covenant for quiet enjoyment and that the heirs were responsible for it to the amount of the assets in their hands. CHATTURI AND ANOTHER *v.* SURAJ NARAIN.

[I-50]

(1.) s. 58. *Mortgage money—Post diem interest assessed as damages.*] Interest *post diem* on a mortgage bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract. Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages no distinction is to be drawn between simple bonds and mortgage bonds. *Mansab Ali v. Gulab Chand* (I. L. R., 10 All., 85) and *Bhagwant Singh v. Daryao Singh* (I. L. R., 11 All., 416) followed. *Cook v. Fowler* (L. R. 7 H. L., 27); *Bishen Dayal v. Udit Narain* (I. L. R., 8 All. 486) and *Rajpati Singh v. Kesh Narain Singh* (W. N. 1890. p. 149) referred to. SRI NIWAS RAM PANDEY *v.* UDIT NARAIN MISR AND ANOTHER.

[XI-66]

(2) ————— *Hypothecation—Specific property—Future indigo produce.*] *Held*, upon principles of equity, that a hypothecation of certain future indigo produce was a valid contract to assign such produce when it should come into existence; and that the hypothecation became complete when the crop was grown and the produce realized; and was enforceable against a transferee of such produce with notice of the obligee's equitable interest. *Held*, also that such an interest would not avail against a transferee without notice. BANSIDHAR *v.* SANT LAL AND ANOTHER.

[VIII-35]

(3) ————— "Our *zemindari* property." A deed of simple mortgage described the mortgaged property as "our *zemindari* property" (*zemindari apni*), and gave no further specification or description. It was proved that at the date of the mortgage the mort-

ACT IV OF 1882, s. 58—(continued)

gagors had a definite and ascertained fractional share into *zemindaris*. Held that the words "our *zemindari* property" were sufficiently certain, or at any rate were capable of being made certain by the proof of the mortgagors being, at the date of the mortgage-deed, the owners of a specific *zemindari* interest; and that the mortgage was therefore not void for uncertainty. *Kanhia Lal v. Muhammad Husain Khan* (I. L. R., 5 All., 11), *Bishen Dayal v. Udit Narain* (I. L. R., 8 All., 486); *Ramsidh Fande v. Balgobind* (I. L. R., 9 All., 158); *Raz Manick Chand v. Beharee Lal* (N. W. P. H. C. Rep., 1870, p. 263); *Deojit v. Pitambar* (I. L. R., 1 All., 275); *Talbey v. The Official Receiver* (L. R., 13 App. Cas. 323) and *Tadman v. D. Epineuil* (L. R. 20 Ch. D. p. 758) referred to. SHADI LAL v. THAKUR DAS AND OTHERS.

[X-60

(4). —————.] A bond specified certain property as belonging to the obligors and contained the following provision:—"Our right and property in the aforesaid *taluka* Rajapur shall remain pledged and hypothecated for this debt." Held that the terms of the bond were sufficiently clear and explicit to constitute a legal hypothecation of the shares and interest of which it recited in the opening that the obligors were owners. BISHEN DAYAL AND OTHERS v. UDIT NARAIN.

[VI-216

(5). —————. *Arh—Mustaghraq—Power of sale.*] Defendants having borrowed money from plaintiffs executed in their favor a bond, the material portion of which was as follows:—"We have pledged and hypothecated (*arh aur mustaghraq*) our share of the *zemindari* (rights and interests) in the village Papli Khas, *pargana* Meerut, to secure the creditors. Until payment of the aforesaid moneys we shall not transfer the aforesaid property to any one by mortgage, sale, gift or otherwise; if we should do so, our act would be invalid. We have therefore executed these presents in the shape of a bond." Held that these words were equivalent to a simple mortgage as defined in s. 58 of the Transfer of Property Act, 1882, and carried with them power to sell through the intervention of the Court the property named in the bond, if the debt were not repaid according to the terms of the bond. TOBAR AND ANOTHER v. AYUB KHAN AND OTHERS.

[XIV-57

(6). —————.] The question in this case was whether or not a certain bond amounted to a simple mortgage bond; and if so, whether the mortgagee was to be preferred to a subsequent *bond fide* purchaser for value without notice. The bond itself contained no express provision for the sale of the property mentioned therein, and the word "*rihan*" was not used; but it did contain a covenant against alienation of the said property; and

ACT IV OF 1882, s. 53—(continued)

the transaction was described in the document by the words "*arh*" and "*Mustaghraq*." Held that the words "*arh*" and "*Mustaghraq*" used in the bond implied a power of sale and that the transaction in question, though entered into before the passing of the Transfer of Property Act (IV of 1882) must be taken as amounting substantially to a "simple mortgage" such as is defined in s. 58, cl. (b) of that Act, and could not be understood as merely creating "a charge" as defined in s. 100 of the same enactment; and that, this being so, the rights of the mortgagee must prevail over those of a subsequent *bond fide* purchaser for value without notice. *Aliba v. Nanu* (I. L. R., 9 Mad. 218); *Rangasami v. Muttu Kumar Appa* (I. L. R., 10 Mad., 509); *Khemji Bhagvan Das Gujar v. Rama* (I. L. R., 10 Bom., 519); *Martin v. Puras Ram* (N. W. P. H. C. Rep., 1867, p. 121); *Raj Coomarram Gopal Narain Singh v. Ram Dutt Choudhry* (13 W. R., 82 Full Bench); *Moti Ram v. Vitai* (I. L. R., 13 Bom., 50); *Sheoratan Kuer v. Mahpal Kuar* (I. L. R., 7 All., 258); *Gopal Pandey v. Parsotam Das* (I. L. R., 5 All., 121); *Shib Lal v. Ganga Prasad* (I. L. R., 6 All., 551); *Girdhar Ranchoddas v. Hubam Chand Kevachand* (8 Bom. H. C. Rep., 75, A.C.); *Sobhagchand Gulab Chand v. Bhaichand* (I. L. R., 6 Bom., 193); *Unnapoorna Dassee v. Nafur Poddar* (21 W. R. 148); *Rajah Enayet Hossein v. Giridhari Lal* (2 B. L. R., 75 P. C.) and *Durga Prasad v. Shambhu Nath* (I. L. R., 8 All. p. 86); *Naran Purshotam v. Dolat Ram Virchande* (I. L. R., 6 Bom., 538) referred to. KISHUN LAL v. GANGA RAM AND ANOTHER.

[X-216

(7). —————. *Condition against alienation—Power of sale.*] The obligors of a bond for the payment of money covenanted as follows:—"To secure this money, we have mortgaged a five *gandas* share out of a ten *ganda's* share in each of the villages, &c., so long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one." Held (Petheram, C. J., dissenting) that the bond created a simple mortgage.

Per Petheram C. J.—That the bond gave the obligee a charge only, on the property. SHEORATAN KUER AND OTHERS v. MAHPAL KUER.

[V-8

(8). —————. *Conditional sale—Construction.*] Held that the question whether a certain transaction is a simple mortgage or a mortgage of conditional sale is to be determined from the whole instrument; and the mere mention of the remedy by *foreclosure* does not necessarily make it a mortgage of conditional sale. SHEOAMBAR PANDEY v. FAKHARUD-DIN AHMAD.

[VI-11

(9). —————. *Conditional sale—Mere right of re-entry—Construction.*] Held that an agreement by the purchaser of certain immoveable property that it should, on payment by the

ACT IV OF 1882, s. 58.—(continued.)

vendor of a certain sum within a specified time, be restored to the vendor, and that on failure of such payment it should become the absolute property of the purchaser, did not create the relation of mortgagor and mortgagee between the parties, and that upon the vendor's failure to comply with the terms of the agreement, the property vested in the purchaser. **BHUP KUAR AND OTHERS v. MUHAMDI BEGAM.**

[III-211]

(10.) —————.] A land-holder sued an occupancy tenant, in the Revenue Court, for arrears of rent and ejectment. The suit was compromised and a decree for the arrears of rent as admitted to be due was given and a decretal order was added that the parties should govern themselves in respect of the decree by the terms of the compromise. These terms were that the land-holder should wait five years for the sum decreed to him, holding meanwhile the tenant's occupancy tenure in his hands for him, the tenant reserving the right of re-entry by the payment of the decree debt at any time within the term of five years. On failure of such payment by the tenant his property in the tenure would lapse absolutely and be relinquished to the land-holder. The decree debt was not paid within the term of five years. After the term the tenant sued the land-lord for redemption of the land. *Held* that the circumstance that the terms of the arrangement were incorporated and found in the decree must be regarded as precluding the contention that any thing was contemplated or intended other than the grant of an extended period of grace to the tenant for the liquidation of his debt, the *zemindar* retaining his holding for him meanwhile and thus saving his occupancy rights for him. The defendant's contention that the transaction was a mortgage had no force. **RAMCHARAN v. BAKAR ALI.**

[I-111]

(11.) ————— *Interest—Liability of purchaser.*] A deed of mortgage by conditional sale, executed in 1872, giving the mortgagee possession contained a stipulation that the principal money should be paid within ten years from the date of execution of the deed, and that, in default of such payment, the conditional sale should become absolute. It contained the following condition as to interest:—"As to interest, it has been agreed that the mortgagee has no claim to interest, and the mortgagor has none to profits." The mortgagee, however, did not obtain possession. In 1878, the mortgaged property was purchased by the appellant at a sale in execution of decree. In 1884, the mortgagee brought a suit for foreclosure against the purchaser and the heirs of the mortgagor, claiming the principal money with interest at 8 annas per cent. per mensem. The defendants pleaded that the plaintiff was not entitled to claim interest. *Held* that whatever claim the mortgagee might have against his mortgagors for compensation or

ACT IV OF 1882, s. 58.—(continued.)

damages by way of interest in consequence of the failure to get possession under the contract, he had none enforceable in this respect against the land, which had passed free from charge for interest to the purchaser. **Rameshar Singh v. Kanahia Sahu (I. L. R., 3 All., 653)** referred to. **ALLAH BAKSH AND OTHERS v. SADASUKH AND OTHERS.**

[VI-47]

(12.) ————— *Bai-bil-wafa.*] *Held* that the transaction known to Mahomedan law as *bai-bil-wafa* is a mortgage within the meaning of s. 58, Act IV of 1882 and not a sale. **ALI AHMAD v. RAAMAT-UL-LAH.**

[XII-42]

(13.) ————— *Hypothecation—Usufructuary mortgage—Interest.*] This was a suit brought upon a deed of mortgage the material portions of which were as follows:—"I (so and so)... have mortgaged for Rs. 450 a *pacca* shop in ... to Sita...; that the said mortgagee has been put in possession of the shop in lieu of interest...; that at the time of the redemption of the mortgage the mortgagee shall not claim interest from me nor I shall claim rent from him.....; that if the mortgagee relinquishes or vacates the mortgaged shop of his own accord he shall, from the date of his doing so, be entitled to receive from me interest at *Re. 1 per cent. per mensem*..."—Plaintiff, the representative of the mortgagee, having given up possession of the shop in 1882, sued to recover Rs. 450 principal and Rs. 162 interest by enforcement of lien against the mortgaged property. The purchaser of the equity of redemption of the mortgaged property, who was also in possession of the property, resisted the suit on the ground that the mortgaged property was not liable, as the mortgage was a usufructuary one; that the interest payable under the deed was not a charge on the property but was a personal liability which did not extend to him as purchaser of the equity of redemption. *Held* that the principal mortgage money was secured on the mortgaged property and so was the interest. The suit must therefore be decreed. **Jugal Kishore v. Ram Sahai, (W. N., 1886, p. 212)** followed. **Mahesh Singh v. Chauhan Singh, (I. L. R., 4 All., 245)** and **Sheo Narain v. Jai Gobind (I. L. R., 4 All., 281)** referred to. **CHANDAR KUAR v. SUBHKARANDAS.**

[VII-119]

(14.) —————.] One *W A* gave a usufructuary mortgage of the land in suit to *A* for a sum of Rs. 200 for a period of five years. The mortgagor, under the terms of the mortgage, was left in possession of the mortgaged property on payment of certain rent to the mortgagee. The rent not having been duly paid *A* obtained a simple money decree for the same, caused the property to be sold in execution of the decree and it was purchased by

ACT IV OF 1882, s. 58.—(continued.)

U B, defendant. The sale was admittedly made subject to the mortgage lien. *A* subsequently sold her mortgagee's right to *V* who brought the present suit for the mortgage money by enforcement of lien. It was contended on behalf of the defendant that the mortgage being of a usufructuary character the mortgaged property could not be sold. Held that the terms of a mortgage such as one in suit must be understood to cover both cases of a usufructuary mortgage and those of an hypothecation charge. *Phul Kuar v. Murlidhar*, (I. L. R. 2 All., 527), *Jugal Kishore v. Ramsahai*, (W. N. 1886, p. 212) followed. *UMRAO BEGAM v. VALI-UL-LAH*.

[VIII-171]

(15).—Hypothecation—Lease.] Certain mortgagees, in whose favour a deed of mortgage providing for possession in lieu of interest had been executed, on the day following the execution of the mortgage granted a lease of the mortgaged premises to the mortgagor. The two documents were registered on the same day. The amount of rent reserved by the lease was exactly equivalent to the amount of interest payable under the mortgage, and the mortgage-deed contained a covenant that any arrears due by the lessee should be a charge upon the mortgaged property. In the counterpart of the lease also a similar covenant making the mortgaged property security for the rent payable under the lease was inserted. Held that under the above circumstances the mortgage and the lease formed merely different parts of the same transaction, and that the mortgagees were entitled to seek their remedy for non-payment of the rent reserved in a Civil Court by means of a suit upon the mortgage and were not obliged to have recourse to a suit for rent in a Court of Revenue. *Baghelin v. Mathura Prasad* (I. L. R. 4 All. 430) followed. *ALTAH ALI KHAN AND OTHERS v. LALTA PRASAD AND OTHERS*.

[XVII-128]

(16).—Sub-mortgage—Right of mortgagee.] *R* and others mortgaged certain immovable property to *N K*; *N K* made a sub-mortgage to *C L* purporting to mortgage to him his rights as mortgagee, but without assigning his mortgage to *C L*. Upon this title *C L* sued for sale of the property mortgaged by *R* and others to *N K*. Held that *C L* was not entitled to bring the property mortgaged to *N K* to sale, but at most to obtain a decree for money against *N K*, in execution of which he might possibly have attached, if it had not been paid off, the mortgage held by *N K*. *GANGA PRASAD v. CHUNNI LAL*.

[XVI-3]

s. 59.—“Signed by mortgagor”—Attestation.] Semble that s. 59 of Act No. IV of 1882 does not require that the signature of the mortgagor should be affixed to the mortgage-deed in the actual presence of the attesting witnesses; but it

ACT IV OF 1882 s. 59.—(continued.)

is sufficient that the mortgagor acknowledges his signature on the deed in their presence. *SHEIKH GHAZI AND OTHERS v. BHAWANI PRASAD AND OTHERS*.

[XVI-89]

(2).—Scribe—Attestation.] Held that the scribe of a mortgage-deed who had signed his name on the deed, and who at the same time was in a position to give evidence as to the execution of the deed, might be considered as an attesting witness within the meaning of s. 59 of Act No. IV of 1882, although there were also other witnesses to the same deed who had signed specifically as attesting witnesses. *MUHAMMAD ALI v. JAFAR KHAN*.

[XVII-146]

(3).—Equitable mortgages.] Up to the 1st of July, 1882, being the date of the coming into force of Act No. IV of 1882, there was no difference between the law in the *Mufassal* and that prevalent in the Presidency towns as to the validity of a mortgage created by the deposit of title deeds with a creditor with intent to secure a debt. *Waghela Rajsanji v. Shekh Masludin* (L. R. 14, I. A. 89); *Verden Seth Sam v. Luckpathy Royjee Lallah* (9 Moo., I. A. 307). *THE HIMALAYA BANK, LIMITED, IN LIQUIDATION v. F. W. QUARRY AND ANOTHER*.

[XV-97]

(4).—[] It is not necessary to the validity of an equitable mortgage that the property to which the title deeds deposited relate should be situated within the limits of one of the towns where such mortgages are allowed. *Verden Seth Sam v. Luckpathy Royjee Lallah* (9 Moo., I. A. 307) and *Maneckji Framji v. Rustomji Naserwanji Mistry* (I. L. R., 14 Bom., 269) referred to. *MADHO DAS v. RAM KISHEN AND ANOTHER*.

[XII-97]

(1).—s. 60—Time of redemption.] In a usufructuary mortgage of agricultural land it was stipulated that the mortgage might be redeemed by the payment of a certain sum in the *Jeth* of any year. Held that having regard to the agricultural conditions of the country the time of payment was of the essence of the contract, and that the mortgagor would not be entitled to redeem in any other month. *BANSI AND OTHERS v. GIRDHAR LAL*.

[XIV-143]

(2).—[] No such general rule of law exists in India as would preclude a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made, unless the mortgagee succeeds in showing that by reason of the terms of the mortgage itself, the mortgagor is precluded from paying off the debt due

ACT IV OF 1882, s. 60.—(continued.)

by him to the mortgagee. Where parties agree that possession of any property shall be transferred to a mortgagee by way of security and repayment of the loan for a certain term, it may be inferred that they intended that redemption should be postponed until the end of the term, though the creation of a term is by no means conclusive on the point. The term fixed for payment of a debt should be presumed to be a protection only for the debtor, till a contrary intention is shown. *BHAGWAT DAS v. PARSHAD SINGH*.

VIII-263

(3). — [] A mortgage-deed, dated the 15th March, 1883, stipulated that the mortgagor would "pay the interest every year, and the principal in ten years," that "the principal shall be paid at the promised time, and the interest every year," and that upon failure by the mortgagor to pay the principal and interest "at the stipulated period" the mortgagee should be at liberty to realize the debt from the mortgaged property and from the other property and against the person of the mortgagor. The mortgagor instituted a suit for redemption on the 16th July, 1884. *Held*, upon a construction of the mortgage-deed, that the advance by the mortgagee to the mortgagor was for a period of ten years certain; that the case was essentially one in which, looking to the merits of the matter between the parties, their obligations were mutual and reciprocal, and there was nothing in the terms of the deed to take it out of the ordinary rules applicable to documents of the kind; and that while on the one hand the mortgagee could not enforce his rights during the period of ten years, on the other hand the mortgagor was not entitled, before that period had expired, to redeem the property. *Vadju v. Vadju*, (I. L. R., 5 Bom. 22) referred to. *RAGHUBER DAYAL AND ANOTHER v. BUDHU LAL*.

[VI-13

(4). — *Redemption of portion—mortgage money satisfied from usufruct.* [In a suit by some of several, co-mortgagors to redeem the entire property mortgaged, on the ground, that the mortgage-debt had been satisfied out of the usufruct, *held* that the plaintiffs could only claim their own shares, and the Court of first instance should determine the extent of the shares after making the other co-mortgagors parties. *FAKIR BAKSH v. SADAT ALI AND ANOTHER*.

[V-63

See also

SAMAR ALI v. KARIM ULLAH,

[VI-139

(5). — *Integrity broken by mortgagee.* [*Held* that whilst it is per-

ACT IV OF 1882, s. 60.—(continued.)

fectly true that a mortgagor is not entitled to redeem any portion of the property mortgaged without the whole debt being liquidated the mortgage transaction being one and indivisible, it is equally true that when the mortgagee or mortgagees by their own act break up the indivisibility of the mortgage they can no longer insist upon the integrity of their security and they are liable to be sued by each individual mortgagor for redemption of his own share by payment of the proportionate amount remaining due on the mortgage. *KESHAN LAL AND OTHERS v. CHUNNA LAL AND ANOTHER*.

[VII-250

(6). — [] A mortgagee by allowing his mortgagor to pay a portion of the mortgage debt and releasing a proportionate part of the mortgaged property does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece-meal. *Marana Ammannna v. Pendyala Peribotulu* (I. L. R. 3 Mad., 320) and *Subramanyan v. Mandayan* (I. L. R., 9 Mad., 453) not followed. *LACHMI NARAIN AND OTHERS v. MUHAMMAD YUSUF*.

[XV-6

(7). — [] The fact that one of several mortgagees has acquired the equity of redemption of the share of one of the mortgagors in the mortgaged property does not give another of the mortgagors the right to redeem his share in the mortgaged property. *Sobha Shah v. Indarjit* (I. L. R., 5 All., 149) distinguished, *Kuray Mal v. Purau Mal* (I. L. R. 2 All., 565) and *Nawab Azimut Ali Khan v. Jawahir Singh* (13 Moo., 1. A 404) referred to. *MAHTAB RAI AND OTHERS v. SANT LAL*.

[III-31

(8). — [] The joint owners of three houses granted a usufructuary mortgage thereof to D C and P C and put the mortgagees in possession. Subsequently the mortgagors granted a simple mortgage of the same property to other mortgagees. Part of the mortgage money of the second mortgage was left with the mortgagees for the discharge of the first mortgage. The second mortgagees took part of that money and paid off the interest of one of the mortgagees in the former (usufructuary) mortgage. The second mortgagees then sued for possession by partition of one half of the mortgaged property. *Held* that the suit would not lie. *PURAN CHAND v. RAM RATAN AND ANOTHER*.

[XVI-171

s. 61.—A mortgagee held two mortgages over the same property from the same mortgagor, the one being a usufructuary mortgage in respect of interest only, and the other being a simple mortgage. The mortgagor sued to redeem

ACT IV OF 1882, s. 61.—(continued.)

the usufructuary mortgage. The mortgagee objected that the mortgagor was bound to redeem both mortgages. *Held* that the mortgagor, in the absence of a special contract to redeem both mortgages simultaneously, could not be compelled to do so. *Vithal Mahadev v. Daud balad Muhammad Husen* (6 Bom. H. C. Rep. A. C. 90) dissented from *Shuttleworth v. Laycock* (1 Vernon, 245) and *Jennings v. Jordan* (L. R. 6 App. Cas. 698) referred to. *TAJJO BIBI v. BHAGWAN PRASAD AND OTHERS.*

[XIV-98]

s. 63.—*Conversion of land into grove.* *Held* that a mortgagee in possession of cultivated land who had converted a portion of it into a grove was not entitled to hold the grove after the mortgage had been extinguished. *MADHO RAM v. SHAMSHUDDIN.*

[III-203]

s. 66.—*Waste—Lease.* Where a simple mortgagor, after the passing of a decree for enforcement of the mortgage, made a lease of the mortgaged property for a term of years; *Held*, that the granting of lease was not, in the absence of any covenant against alienation, and act destructive of or permanently injurious to the security within the meaning of section 66 of the Transfer of Property Act (IV of 1882), that section contemplating some substantial waste by the mortgagor. *Chunni v. Thakur Das* (I. L. R., 1 All., 126) distinguished. *Radha Pershad Misser v. Monohur Das*, (I. L. R. 6 Cal., 217) referred to. *RAM LAL v. MUHAMMAD IRSHAD ALI.*

[X-59]

(1) s. 67 (a).—*Usufructuary mortgage. Suit for sale.* *Held* that a usufructuary mortgagee who never got possession under the mortgage and who was entitled under the covenant to sue for the mortgage-money could not get a decree for sale of the mortgaged property. *MADHO PRASAD v. DEBI DIAL.*

[XI-168]

(2) —————. Under s. 67 (a) of Act IV of 1882, a usufructuary mortgagee whose possession has not been disturbed cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chowdhri Umrao Singh v. The Collector of Moradabad* (S. D. A., N.-W. P., 1859, p. 13); *Dulli v. Bahadur* (N.-W. P. H. C., Rep. 1875, p. 55); *Ranee Ganesh Kooer v. Deedar Buksh* (N.-W. P. H. C. Rep., 1873, p. 128); *Venkatasami v. Subramanya* (I. L. R., 11 Mad. 88), and *Jhabbu Ram v. Girdhari Singh* (I. L. R., 6 All., 289) referred to. *UMDA AND OTHERS v. UMRAO BEGAM.*

[IX-140]

(3). —————. A usufructuary mortgagee, so long as his possession is undisturbed, has in the absence of any special covenant, merely a right to remain in

ACT IV OF 1882, s. 67 (a). —(continued.)

possession of the property mortgaged to him until the mortgage-debt is paid. He has no right either of foreclosure or sale. Further the sale of his right of redemption by the mortgagor will not convert a usufructuary mortgage into a simple mortgage so as to enable the mortgagee to bring the property to sale. *Jhabbu Ram v. Girdhari Singh* (I. L. R., 6 All., 288); *Umda v. Umrao Begam* (I. L. R., 11 All., 357); and *Chathu v. Kunjan* (I. L. R., 12 Mad., 109) referred to. *LALAI RAM v. ANANT RAM.*

[XII-66]

(4). —————. *Usufructuary and simple mortgage—Rights of mortgagee.* *Held* that one and the same deed may create a simple and a usufructuary mortgage and confer upon the mortgagee the alternative rights of possession and of bringing the mortgaged property to sale. *JAGAL KISHORE v. RAM SAHAI AND OTHERS.*

[VI-212]

CHANDAR KUAR v. SUBHKARANDAS.

[VII-119]

UMRAO BEGAM v. VALIULLAH.

[VIII-171]

(5) s. 67 (d).—*Suit by person interested in part of mortgage-money.* Upon the death of a sole mortgagee of *zemindari* property, his estate was divided among his heirs, one of whom, a son, was entitled to fourteen out of thirty-two shares. The son executed a sale-deed whereby he conveyed the mortgagee's rights under the mortgage to another person. In a suit for sale brought against the mortgagor by the representative of the purchaser, it was found that the plaintiff acquired, under the deed of sale, only the rights in the mortgage of the son of the mortgagee, though the deed purported to be an assignment of the whole mortgage. *Held* by the Full Bench that the plaintiff was not entitled, in respect of his own share, to maintain the suit for sale against the whole property, the other parties interested not having been joined; that moreover he was not entitled to succeed, even in an amended action, in claiming the sale of a portion of the property in respect of his own share, and that the suit was, therefore, not maintainable. *Bishan Dial v. Manni Ram* (I. L. R., 1 All., 297); *Bhora Ray v. Atilack Roy* (10 W. R., 476); and *Bedar Bakht Muhammad Ali v. Khurram Bakht Yaheya Ali Khan* (10 W. R. 315) referred to. *CHIRANJI v. MULU AND OTHERS.*

[VI-298]

(6). —————. Unless the interests of the mortgagees have been severed with the consent of the mortgagor, one of two joint mortgagees cannot maintain a suit to recover his share only of the mortgage-debt, whether the suit be brought in respect of the whole or of only a proportionate part of the mort-

ACT IV OF 1882, s. 67 (d).—(continued.)

gaged property; nor can such a co-mortgagee cure the defect in his suit by joining the other co-mortgagee as a defendant. His proper course is to sue in respect of the whole property mortgaged and for the whole mortgage-debt, and then if his co-mortgagee refuses to join as a plaintiff to apply to the Court to have him brought on to the record as a defendant. **GO-BIND RAM v. SUNDAR SINGH AND OTHERS.**

[XII-246]

(7). —————.] *Held* that a sale by one of several joint mortgagees of his interest in the mortgage can not entitle the purchaser to maintain a suit for his share only, the case not coming within s. 67, sub-section (d), of the Transfer of Property Act. **LALJU AND ANOTHER v. JANGI LAL.**

[VII-233]

(8). —————.] *B* mortgaged by conditional sale two villages to *Z* for a certain sum. He subsequently sold one village to *Z* and the other to *S*, *Z* having foreclosed the mortgage in respect of the village sold to *S*, for a proportionate amount of the mortgage-money, sued *S* for possession of that village. *Held* that the suit was maintainable. **Chandika Singh v. Pokhar Singh (I. L. R., 2 All., 906)** distinguished. **BISHESHAR SINGH AND ANOTHER v. LAIK SINGH AND OTHERS.**

[III-10]

(9). —————.] One of two joint mortgagees sued for her moiety of the mortgage debt and obtained a decree for sale of the whole mortgaged property. The other mortgagee would not join as plaintiff in that suit and was accordingly made a defendant. Subsequently the other mortgagee sued the mortgagor for recovery of his moiety of the mortgage debt by sale of the whole mortgaged property. *Held* that such a suit would not lie. **KANHAI LAL v. JWALA DEI.**

[XVI-153]

(1). s. 68 (a).—*Right of usufructuary mortgagee to sue for mortgage-money—Covenant to pay.*] The plaintiff executed a simple mortgage in favour of one *T P* on the 26th March, 1881. On the 29th March, 1883, he executed a second mortgage of the same property in favour of one *D D*. This second mortgage purported to be an usufructuary mortgage, but the mortgagee never got possession under it. It contained, amongst others, the following covenant:—"If the mortgagee come to know of any hypothecation he may at that very time recover his money by suing me (the mortgagor) personally, and if I wish to pay off the money in part it shall be impossible." The second mortgagee came to know of the first mortgage before the term of his mortgage had expired and thereupon sued the mortgagor for posses-

ACT IV OF 1882, s. 68 (a).—(continued.)

sion and mesne profits. He obtained a decree in appeal for sale of the mortgaged property and against the mortgagor personally. The mortgagor then appealed to the High Court. *Held* that the decree so far as it was for sale of the mortgaged property was wrong. The only decree which could properly be given under the circumstances was a decree for money. **MADHO PRASAD v. DEBI DIAL.**

[XI-168]

(2). s. 68 (b) and (c).—*Right to sue for mortgage-money—Lease—Lessee holding over.*] *H L* and others, mortgagees under a usufructuary mortgage executed in their favor by one *G* (the usufruct being applicable in satisfaction of the interest of the debt) leased the mortgaged premises to the mortgagor. The lease was for a term certain with a covenant that the mortgagor might renew on compliance with certain conditions. The mortgagor on the expiry of the lease did not fulfil the conditions of the said covenant, but refused to give up possession of the mortgaged property to the mortgagees. *Held* that the mortgagees were entitled either under cl. (b) (as held by Edge, C. J., and Tyrell, J.) or under cl. (c) (as held by Knox, Banerji and Burkitt, JJ.) of s. 68 of Act No. IV of 1882 to a money decree for the amount due under the mortgage. **Shitab Dei v. Ajudhia Prasad (Weekly Notes, 1887, p. 269)** and **Jhabhu Ram v. Girdhari Singh (I. L. R., 6 All., 298)** distinguished. **HIRA LAL AND OTHERS v. GHASITU.**

[XIV-107]

(3) s. 68 (c).—*Right to sue for mortgage-money—Failure of mortgagor to deliver possession of part of the mortgaged property—Acquiescence.*] In 1869, *A* gave *B* a usufructuary mortgage of certain land. The instrument of mortgage provided that if the mortgagor failed to put the mortgagee in possession the latter might recover the mortgage-money and that the mortgagees should be entitled on redemption to be paid any sum which they might have had to pay as enhanced revenue. *B* obtained possession of all the property except a small part as to which they obtained possession afterwards. *B* brought this suit in 1881 against *A* for the mortgage-money, on the ground that he had not been put in possession of all the property mortgaged. *Held* that, as *B* had agreed to accept the contract though they did not get possession of the whole property, they are not entitled to bring this suit. **LACHMAN DAS AND OTHERS v. BAL-DEO SINGH.**

[III-91]

(4). —————.] *Sale—Mortgagee dispossessed by vendee.*] A usufructuary mortgagee, to whom possession of the mortgaged property had been delivered, sued the mortgagor for the mortgage-money on the ground that the mortgagor had sold a part of the mortgaged property, and the purchaser had deprived him of possession of such part. One of the conditions

ACT IV OF 1882, s. 68 (c).—(continued)

serted in the deed of mortgage was that of on the part of the mortgagor, or other persons by kind of dispute or any interference or obstruction took place in obtaining of possession by the mortgagee of the mortgaged property, the mortgagee should be entitled to sue for the mortgage-money. *Held* that such condition contemplated the case of the mortgagor, in the first instance, in breach of the conditions of the mortgage, failing to deliver possession to the mortgagee, or to secure his possession from any obstruction or disturbance by other persons, but not the case of the mortgagee being deprived of possession after it had been once obtained and secured, and therefore the mortgagee was not entitled by virtue of such condition to sue for the mortgage-money. *Held* further, that the mortgagee's case being that he had been deprived of possession of a part of the mortgaged property, he would be entitled to sue for the mortgage-money only if he had been deprived thereof by in consequence of the wrongful act or default of the mortgagor, and not if he had been deprived thereof by or in consequence of the wrongful act or default of other persons; that the sale by the mortgagor was not a wrongful act, there being no condition against alienation, and the sale by a mortgagor of his equity of redemption not being rendered wrongful or unlawful by any rule of law, nor being in itself a wrongful act; that a wrongful act by the purchaser, though committed under colour of the purchase, could not be said to have taken place "in consequence of the wrongful act or default of the mortgagor," and that therefore the mortgagee had no cause of action. **JHABBU RAM AND OTHERS v. GIRHARI SINGH AND ANOTHER.**

[IV-97]

(5).—*"Any other person."* The words "any other person" in the concluding portion of clause (c) of s. 68 of Act IV of 1882 mean "any other person availing a title." The disturbance of the mortgagee's possession by a trespasser will not confer upon the mortgagee a right to sue the mortgagor or the mortgage-money. *Gopalasami v. Arunahella (I. L. R., 15 Mad., 304)* followed. **NAKHEDI RAM v. RAM CHARITAR RAI AND OTHERS.**

XVII-14

(1). s. 72—*Mortgagee in possession—Right to add to mortgage-money cost of repairing well.* Where a mortgagee of agricultural land had with the consent of his mortgagor's spent money in reconstructing a well on the property which had been rendered useless from natural causes, it was *held* that such mortgagee was entitled, in a suit by a subsequent mortgagee against him for redemption, to add the amount so expended to the mortgage debt to be paid by the plaintiff before he could obtain the decree for redemption claimed by him. **DURGA SINGH v. NAURANG SINGH.**

[XV-69]

ACT IV OF 1882, s. 72.—(continued.)

(2).—*Cost of gratuitous building.* *Held* that where a suit is for redemption of immoveable property usufructually mortgaged and for the surplus profits, the mortgagee cannot be allowed to set off costs of a gratuitous building made without the consent of the mortgagor and in no way necessary for the maintenance or preservation of the mortgaged property. **SAMMO AND OTHERS v. ABDUL WAHID.**

[III-208]

(3).—*Cost of preserving property from forfeiture.* S. 72 of the Transfer of Property Act (IV of 1882) does not take away from a mortgagee in possession the right of suit for the recovery of money spent by him in order to preserve the mortgaged property from forfeiture. **PARSOTAM DAS v. JAIJIT SINGH AND ANOTHER.**

[X-90]

(4).—*Arrears of rent and revenue.* On the 27th August, 1883, *M* and *B* jointly executed two usufructuary mortgages for the sums of Rs. 3,000 and 5,000 respectively in favour of the defendants. On the 24th March, 1886, the mortgagors executed another usufructuary mortgage in favour of the plaintiffs for Rs. 15,000, entitling them to possession of the property mortgaged. The second mortgagees instituted a suit to redeem the prior mortgages by depositing in Court the principal sum of Rs. 8,000. The defendants urged that a sum of Rs. 4,000 was due to them besides the principal amount, without payment of which the property in suit could not be redeemed. The Court found that a sum of Rs. 498-15-9 only composed of certain arrears of rent, and an item of arrears of Government revenue paid by the defendants was due to them, and decreed redemption of the property on condition of payment of the aforesaid sum. Both the parties appealed. *Held*, that the items of arrears of rent were recoverable under the covenant contained in that behalf in the mortgage-deed; as to the item for arrears of Government revenue it was clear that unless this revenue was duly paid the whole estate might have been sold to realise it, thereby putting an end to all rights of the mortgagors and mortgagees; and therefore upon the general principles of law upon which the doctrine of salvage and subrogation proceeds, persons in the position of mortgagees in possession are entitled to claim that sum before the property which they saved from sale for arrears of revenue could be redeemed. *Held* further, that s. 72 of the Transfer of Property Act only reproduces the rules of land which Courts of justice in India have uniformly adopted. **GIRDHAR LAL AND OTHERS v. BHOLA NATH AND OTHERS.**

[VIII-288]

(5).—*Arrear of revenue.* The plaintiffs were mortgagees in

ACT IV OF 1882, s. 72—(continued.)

possession under a simple mortgage of certain shares in a village. The mortgagees, to save the property, paid up certain arrears of Government revenue. Subsequently, the mortgagors, under s. 83 of the Transfer of Property Act, paid the original sum due under the mortgage into Court. That money was withdrawn by the mortgagees and the mortgage-deed was deposited. The mortgagees then, after relinquishing possession of the mortgaged property, sued to recover the money which they had paid as Government revenue by sale of the mortgaged property. *Held* that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit which was for realization of the Government revenue, paid by them by sale of the mortgaged property, must fail. *Kinnu Ram Das v. Mozafer Husain Shaha* (I. L. R., 14 Cal., 809); *Lachman Singh v. Salig Ram* (I. L. R., All., 8 384); *Achut Ram Chandra Pai v. Hari Kamti* (I. L. R., 11 Bom., 313); *Girdhar Lal v. Bhola Nath* (I. L. R. 10 All., 611); *Parsootam Das v. Jaijit Singh* (W. N., 1890, p. 99); *Nikka Mal v. Sulaiman Sheikh Gardner* (I. L. R. 2 All., 193); *Kristo Mohinee Dossee v. Kaliprosona Ghose* (I. L. R., 8 Cal., 402); and *Nugender Chunder Ghose v. Sree Mutty Kaminee Dassee* (11 Moo. I. A. 254) referred to. *ANANDI RAM AND OTHERS v. DUR NAJAF BEGAM*.

[X-223]

(1) s. 74.—*Redemption—Time of.* *Held* that where there exists a prior usufructuary mortgage a subsequent mortgagee of the same property can not bring the mortgaged property to sale in virtue of his incumbrance until such time as the usufructuary mortgage becomes capable of redemption. *Mata Din Kasodhan v. Kazim Husain* (I. L. R., 13 All 432) explained and followed. *AKHARA PANCHAITI THROUGH HIRA GIR AND OTHERS v. SUBA LAL AND OTHERS*.

[XV-230]

(2)———*Subsequent mortgagee paying off prior mortgagee.* Where in a suit to bring certain immoveable property to sale under a mortgage it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immoveable property in order to save a portion thereof from sale under two prior mortgages: *held* that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant

ACT IV OF 1882, s. 74—(continued.)

of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged. *TULSA v. KHUB CHAND*.

[XI-193]

(3)———*Prior and subsequent mortgagee—Amount to be paid.* A subsequent mortgagee is not entitled to redeem the prior mortgage by simply paying the price for which the prior mortgagee may have purchased the mortgaged property at an auction sale held in execution of a decree obtained by him without joining the subsequent mortgagee as a party; but such subsequent mortgagee must, if he wishes to redeem, pay to the prior mortgagee the full amount due on his mortgage. *Ganga Pershad Sahu v. The Land mortgage Bank* (I. L. R. 21, Cal., 366); *Dadoba Arjunji v. Damodar Raghunath* (I. L. R., 16 Bom., 486) referred to. *Baldeo Bharthi v. Hushiar Singh* (W. N., 1895, p. 45) distinguished. *DIP NARAIN SINGH v. HIRA SINGH AND ANOTHER*.

[XVII-147]

(1). s. 76.—*Redemption—Damages.* A mortgaged his house to B giving the mortgagee possession; the latter subsequently leased the house to A; the plaintiff (purchaser of the equity of redemption, brought this suit against B for redemption and damages (for neglecting to keep the house in repair). *Held* that B not having been in possession was not liable for damages claimed. *BAQAR ALI v. NISAR HUSAIN AND OTHERS*.

[V-262]

(2).———*Accounts.* By the terms of a usufructuary mortgage, it was provided that the annual profits of the mortgaged property should be taken to be a certain amount, that out of this amount the revenue should be paid annually by the mortgagee; (that the balance should be taken by the mortgagee) as representing interest on the principal amount of the mortgage-money; and that the mortgage should be redeemed on payment of the principal of the mortgage-money in a lump sum. It was further provided that the mortgagor should not be entitled to claim mesne profits nor the mortgagee to claim interest. J, alleging that he had purchased the equity of redemption of the mortgaged property in 1869; that since the purchase the mortgagee had not paid any revenue and there fore he, J, had been compelled to pay it; and that consequently the mortgage money had been paid out of the profits of the mortgaged property and a surplus was due, sued the original mortgagor and the mortgagee for possession by

ACT IV OF 1882, s. 76.—(continued.)

redemption of the mortgaged property, and for surplus profits, or for possession of the mortgaged property on payment of any sum which might be found due. *Held* that the plaintiff was entitled to take into account the amount of revenue which he had been compelled to pay by reason of the mortgagee's default; that in the accounting the plaintiff was entitled to avail himself of annual rests; and that the mortgagee having had notice of the plaintiff's purchase, any payments which he might have made to the original mortgagor on account of revenue after the purchase were improperly made, and could not be taken into account against the plaintiff. *JAJIT RAI v. GOBIND TIWARI AND ANOTHER.*

[IV-92]

(1). s 81—*Application of section to bond fide auction purchaser.* The equities which apply to a *puisne* incumbrancer in the marshalling of securities apply also to a *bond fide* purchaser for value, without notice, of a portion of property the whole of which was subject to a prior incumbrance. *Tulsi Ram v. Munnoo Lal* (1 W. R. 353); *Norwa Koer v. Abdul Rahim*, (W. R., January to July 1864, p. 374); *Bishonath Mookerjee v. Kisio Mohun Mookerjee* (7 W. R. 483); and *Khetoosee Cherooria v. Banee Madhub Doss* (12 W. R. 114) referred to. The mortgagees of two properties, one of which had, subsequently to the mortgage, been purchased for value *bond fide* by one who had no notice of the incumbrance, brought a suit to enforce their lien against both the properties originally owned by the mortgagor, impleading as defendants both the mortgagor and the purchaser. *Held* that while there was no doubt that, if the purchaser was compelled to pay more than the share of the mortgage debt apportioned on the property purchased by him, he would be entitled to contribution, yet, in a suit so framed, and having regard to the array of parties, such an apportionment could not be made at the stage of second appeal. *RODH MAL v. RAM HARAKH AND ANOTHER.*

[V-198]

(2). ————. [On the 24th September, 1876, G R and L R mortgaged to R B a two pies share, and also 10 *bighas* 13 *biswas* 11 *dhurs* of *sir* land and 14 *bighas* and 16 *dhurs* of other land for a consideration of Rs. 141. On the 10th December, 1884, B B purchased the two pies from the mortgagors. This suit by R B for sale was resisted by B B on the ground that he was a *bond fide* purchaser without notice and that the incumbrance of 1876 had been discharged. The Court below overruled both the objections but limited the effect and operation of the plaintiff's decree by ordering that the two pies share purchased should be exempted from sale unless the other property mortgaged proves insufficient to satisfy the plaintiff's security. *Held* that the mortgage of 1876 being registered B B must be deemed to have had notice. That the equitable

ACT IV OF 1882 s. 81.—(continued.)

doctrine of notice has no application to such cases. *Held* further that the restriction placed by the Court below on its decree was illegal inasmuch as the doctrine of the marshalling of securities formulated in s. 81 of Act IV of 1882, which no doubt in the case of *Rodh Mal v. Ram Harakh*, (I. L. R., 7 All. 711,) has been applied to the case of a *bond fide* purchaser without notice, has no application to the present case in which the defendant is fixed with notice. *Indu Kuri Rama Raju v. Yerramilli Subbarayudu*, (I. L. R., 5 Mad 387,) referred to. *BENI BAHADUR SINGH v. RAMBARAN SINGH.*

[VII-183]

(3). ————. *Application of section to vendee.* The right of a mortgagee to bring any portion of the mortgaged property to sale is not curtailed by the mortgagor subsequently to the mortgage selling a portion of the mortgaged property to a third person. *Lala Dilawar Sahai v. Dewan Bolakiram*, (I. L. R., 11 Calc., 258); *Indu Kuri Rama Raju v. Yerramilli Subbarayudu* (I. L. R., 5 Mad., 387) and *Banwari Das v. Muhammad Mashrat* (I. L. R., 9 All., 690) referred to. *BHIKHARI DAS AND ANOTHER v. DALIP SINGH AND OTHERS.*

[XV-83]

(4). ————. *Held* that a mortgagee who had bought in a moiety of the property mortgaged to him at an auction-sale in execution of a money decree held by a third person, at which auction-sale the incumbrance created by his mortgage was notified, could not subsequently sue for satisfaction of the whole of the mortgage-money due to him by sale of the remaining moiety of the mortgaged property, without taking into account the moiety already purchased by him. *SUMERA KUAR AND OTHERS v. BHAGWANT SINGH.*

[XV-1]

See also

NAND KISHORE v. RAJAH HARI RAJ SINGH AND OTHERS.

[XVII-163]

CHUNNA LAL v. ANAND LAL AND OTHERS.

[XVII-18]

(5). ————. [On the 24th of July, 1874, thirty-eight villages were mortgaged by Kadir Ali and Umrao Begum to Raja Sheuraj Singh, the father of the appellant. On the 28th of February, 1878, the mortgagee obtained a decree for sale on his mortgage. At the date of this mortgage, some of the villages comprised therein were liable under one or both of two decrees obtained on prior mortgages. Subsequently to the decree of the 28th of February, 1878, four of the villages affected by that decree were sold in execution of a simple money decree and were acquired from the purchasers by one Ahmad-ud-

ACT IV OF 1882, s. 81.—(continued.)

din Khan. On the 20th of August, 1879, and the 20th of August, 1882, these same four villages were brought to sale in execution of the decree of the 28th of February, 1878, and were sold for Rs. 44,500. Thereupon the former purchaser, Ahmad-ud-din Khan, brought a suit against the representative of the mortgagee of 1874, and certain other persons for contribution, alleging that the said four villages had been sold for considerably more than the amount for which they were proportionately liable under the mortgage decree; that the defendants were owners of villages which were equally liable with his (the plaintiff's) villages under the decree of the 28th of February, 1878, but which had contributed nothing towards the satisfaction of that decree; that six of those villages and an eighth share in a seventh had been purchased by Raja Sheuraj Singh (the representative of the mortgagee of 1874) in execution of simple money-decrees, and that a share in an eighth village had been similarly purchased by the predecessor of the other defendants in title. Against these villages the plaintiff sought contribution. *Held* that in calculating the amount to which the plaintiff was entitled by way of contribution, the plaintiff was bound to take into account the liabilities which existed on most of the villages in respect of which the suit was brought under the two prior mortgages; that the plaintiff was entitled to obtain contribution from those villages only which had not been sold in execution of the decree of the 28th of February, 1878; that the unrealized balance of that decree must be regarded as the amount which the villages purchased by the decree-holder himself had contributed to the decree, and further that in determining the amount which the plaintiff is entitled to recover regard must be had to the claims for contribution of the owners of such of the other mortgaged villages as had been sold in execution of the decree of the 28th of February, 1878, and had, like the plaintiff's villages, fetched more than their *quota* of liability for the decree. **HARIRAJ SINGH v. AHMAD-UD-DIN KHAN.**

[XVII-168]

(1). s. 82.—*Contribution.*] Where two out of several villages mortgaged are sold under a decree obtained upon the mortgage, the owners of the other villages are liable to contribution and the owner of the property sold is entitled to a charge on those other villages. **IBN HASAN AND ANOTHER v. RAMDAI AND OTHERS.**

[X-31]

(2). ————.] Two properties, *A* and *B*, belonging to different owners were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and having obtained a decree caused property *A* to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage debt. Before such sale, however, *X* had, in execution of his simple money decree, acquired a share in property *A*. *X* accordingly

ACT IV OF 1882, s. 82.—(continued.)

sued for contribution from property *B*, in that, so far as his share in property *A* went, he had satisfied the mortgage debt, and ultimately obtained a decree in his favour; but, during the pendency of that litigation property *B* had been transferred to *Y*. *Held* that *Y* must take the property subject to *X*'s right to contribution from it in respect of the loss of his share in property *A*. **BALDEO SAHAI v. BAIJNATH.**

[XI-133]

(3) ————.] *A* held a decree against *B* enforcing a mortgage on the estates *X* and *Y*; the estate *X* was sold in execution of another decree against *B*, but subject to the mortgage of *A*, and *A* purchased it. He subsequently sought to enforce his decree against the estate *Y*. *Held* that the purchase of the estate *X* by *A*, subject to his mortgage debts, satisfied such mortgage debt. **AHMAD WALI v. BAKAR HUSAIN.**

[III-61]

s. 83.—*Deposit in Court.*] In this case the original mortgagees having died and there being a dispute as to the succession of her estate the mortgagor deposited the money in Court on account of all the persons so claiming. *Held* that he had fulfilled the requirements of s. 83, Transfer of Property Act, and was entitled to sue for the possession of the mortgaged property. **RAM SUMRAN v. SAHIBZADA BIJAI PARTAB NARAIN SINGH.**

[V-328]

(1). s. 85.—*Person interested—Hindu son.*] When a plaintiff mortgagee institutes a suit for sale under s. 88 of Act No. IV of 1882 against his mortgagor, who is the father of sons in an undivided Hindu family governed by the Mitakshara, without joining as parties to the suit the sons of the mortgagor, of whose interests he has notice, and obtains a decree and an order absolute for sale against the father only, the sons can successfully sue for a declaration that the mortgagee decree-holder is not entitled to sell in execution of his decree for sale the interests of the sons in the property comprised in the mortgage given by the father although the sole ground of their suit is that they were parties to the suit by the mortgagee. So *held* by Edge, C. J., Knox, Blair, Burkitt and Aikman, JJ. **Banerji, J., dissenting.**

Held by Banerji, J., that where, under the circumstances above described, a decree has been obtained against the father alone without joining the sons, the sons cannot plead against the operation of the decree on their interests any pleas other than those which they could have urged against the claim of the mortgagee in order to relieve them from liability for their father's debt had they been made parties to the mortgagee's suit. **BHAWANI PRASAD v. KALLU AND OTHERS.**

[XV-212]

ACT IV OF 1882, s. 85.—(continued.)

(2).—*Mortgagee, under a deed executed pendent lite.* Held that a mortgagee suing for the enforcement of hypothecation bonds is not bound to implead a subsequent usufructuary mortgagee under a registered mortgage-deed executed after the institution and during the pendency of the suit. **DAMMAR SINGH AND OTHERS v. NAZIRUDDIN.**

[IX-91]

(3).—*Failure to make party.—Dismissal of suit.* Where a second mortgagee coming into Court and denying or ignoring the title of a prior mortgagee, asks to have the property sold as if there were no prior incumbrance, the suit should be dismissed, and should not be decreed with words of limitation reserving the rights of the prior mortgagee. *Raghunath Prasad v. Furawan Rai* (I. L. R., 8 All. 105) referred to. **SALIG RAM AND ANOTHER v. HARCHARAN LAL AND OTHERS.**

[X-89]

(4).—*Non-joinder.* The non-joinder in a suit to which Chapter IV of Act No. IV of 1882 applies of a person interested in the mortgaged property within the meaning of section 85 of that Act, and of whose interest the plaintiff has notice, is a fatal defect in the suit unless cured by the action of the Court under s. 32 of the Code of Civil Procedure; and where such non-joinder is brought to the notice of the Court, the Court will give effect to the objection and to dismiss the suit, even though such objection be raised for the first time in appeal. *Maia Din Kasodhan v. Kazim Husain* (I. L. R., 13 All., 432), *Janki Prasad v. Kishen Dat* (I. L. R. 16 All., 478) and *Bhawani Prasad v. Kalu* (I. L. R., 17 All., 537) referred to. **GHULAM KADIR KHAN AND OTHERS v. MUSTAKIM KHAN AND OTHERS.**

[XVI-7]

(5).—*Rights of such interested person.* Held that a subsequent mortgagee has a right of redeeming a prior mortgage, and the fact that the prior mortgagee has enforced his mortgage, obtained a decree, caused the property to be sold and bought it himself, does not affect his right if he was no party to the proceedings. **RAGHUBANS KUAR v. RAMSAHAI.**

[III-193]

(6).—*Certain immovable property was mortgaged in 1865 to H, in 1871 to G, and in 1873 again to H. In 1883 the property was purchased by M, the representative of G, in execution of a decree obtained in 1877 by G in a suit for sale brought by him upon the mortgage of 1871. To*

ACT IV OF 1889, s. 85.—(continued.)

deeds of 1865 and 1873 was not a party. In 1885 M sued the representatives of H for redemption of the mortgage of 1865. One of the defendants pleaded that as he was a puisne incumbrancer in the property in suit at the time of the plaintiff's suit against the mortgagors in 1877, he ought to have been made a party to that suit, and thus afforded "an opportunity of protecting his rights by payment of the mortgage-money." He did not in the Court below ask in express terms to be allowed to redeem the plaintiff's mortgage, but he did so in appeal to the High Court. Held, with reference to the terms of s. 88 of the Transfer of Property Act, that inasmuch as the defendant was in possession of the mortgaged property at the time of the suit of 1877, and his mortgage was a registered instrument, it must be presumed that the plaintiff had notice of its existence and should therefore have made him a party; and that under the circumstances, he should be placed in the same position as he would have held if the decree of 1877 had never been passed. Held, also that, although it would have been more regular had the defendant in the Court below asked in express terms to be allowed to redeem the plaintiff's mortgage and brought into Court what he alleged to be due thereunder, or expressed his willingness to pay such amount as might be found to be due on taking accounts, yet, the defendant having pleaded that he ought to have been afforded an opportunity of protecting his rights by payment of the prior mortgage-money, the Court should not be too technical in such a matter where the defendant had the undoubted right now asserted by him and where the result of not recognizing such right would be to extinguish his security. The Court therefore passed an order declaring the defendant entitled to retain possession of the property in suit, if within ninety days he paid into Court the amount of the plaintiff's mortgage-debt, with interest, otherwise the lower Court's decree for redemption on payment of the amount due on the mortgage of 1865 would stand. **MUHAMMAD SAMI-UD-DIN v. MAN SINGH.**

[VI-318]

(7).—*The plaintiffs in this case were the simple mortgagees of certain land under two mortgages dated in 1878. The defendant took a mortgage of a share of the same property in 1881, brought a suit thereupon and obtained a decree in 1883, caused the property to be sold in 1884 and purchased it himself. The plaintiffs also put their mortgage in suit but did not make the defendant a party to the suit, obtained a decree in 1884, caused the whole of the property mortgaged to them to be sold and purchased it themselves. They then brought the present suit against the defendant to recover possession of the property they had caused to be sold and purchased. Held that as the defendant was not made a party to the suit brought by*

ACT IV OF 1882, s. 85.—(continued.)

opportunity to pay off the prior mortgage such an opportunity ought to be allowed to him now and the decree in the plaintiffs' favor should be made to contain that provision. *GANGA RAM v. TIKA RAM AND OTHERS.*

[VIII-184

(8). —————.] On the 21st December, 1871, three of the defendants in this suit mortgaged four groves to *H*. In 1872 the plaintiffs obtained a money decree against one *D*, and in August, 1872, in execution of that decree, sold the said groves and at the sale purchased them and also two mills which were not in dispute in this suit. The decree against *D* has been found to have the same effect as if it were had and obtained against all the mortgagors. Of this sale *H* had notice, in fact he opposed it. Subsequently *H*, the mortgagee, sued the mortgagors on their mortgage, and obtained a decree on it and under the decree brought the said groves to sale in 1877 and purchased them himself. In May, 1880, *H* sold the groves to two of the defendants. The plaintiffs, who were not parties to the suit which resulted in the decree under which the groves were sold in 1877, instituted this suit for possession of the groves. *Held* that notwithstanding the sale of 1872, what was sold under the decree of 1877, was the right, title and interest of the mortgagors, as they existed at the date of the mortgage of 21st December, 1871, with which would go the rights and interests of the mortgagee, and although at a sale under a decree for sale by a mortgagee the right, title and interest of the mortgagor which is sold is his right, title and interest at the date of the mortgage, and any right, title and interest he may have acquired between the date of the mortgage and of the sale, still any puisne incumbrancer or purchaser from the mortgagor prior to the date of the mortgagee's decree and who was not a party to the suit in which the mortgagee obtained his decree would have the right to redeem the property which the mortgagor would have had but for the decree. This view is consistent with the principles of equity and recognized by the Transfer of Property Act. *Muhammad Sumiruddin v. Man Singh* (I.L.R., 9 All., 125) followed. The following cases were referred to and considered in the judgment:—*Abdulla Saiba v. Abdulla* (I.L.R. 5, Bom. 8); *Mohan Manor v. Togu Uka* (I.L.R., 10 Bom., 224); *Khub Chand v. Kalan Das* (I.L.R. 1 All., 240); *Ali Hossan v. Dhirja* (I.L.R., 4 All., 518); *Sita Ram v. Amir Begam* (I.L.R., 8 All., 324); *Bhup Singh v. Gulab Rai* (W. N. 1886, p. 70); *Ram Nath Das v. Boloram Phookun* (I.L.R. 7 Calc., 677); *Naran Purshotam, v. Dolat Ram Verchund* (I.L.R., 6 Bom. 538). *GAJADHAR AND OTHERS v. MUL CHAND AND OTHERS.*

[VIII-210

(9). —————.] If a prior incumbrancer, having notice of a puisne

ACT IV OF 1882, s. 85.—(continued.)

incumbrance, does not, when he puts his mortgage into suit, join the puisne incumbrancer as a party, the puisne incumbrancer's right to redeem will not thereby be affected. *Mohan Manor v. Togu Uka* (I.L.R., 10 Bom., 224); *Muhammad Sami-uddin v. Man Singh* (I.L.R., 9 All., 125) and *Gajadhar v. Mul Chand* (I.L.R., 10 All., 520) referred to. *NAMDAR CHAUDHRI v. KARAM RAJI AND OTHERS.*

[XI-90

(10). —————.] *Held* that a prior simple mortgagee, who does not make the subsequent usufructuary mortgagee a party to the suit against the mortgagor, obtains a decree, puts the property to sale, buys it himself, takes the property subject to the subsequent incumbrance. *MITHU LAL v. RAM CHANDAR.*

[VII-125

(11). —————.] *A* was the holder of two unregistered mortgage bonds of which registration was optional, dated respectively in 1872 and 1873. *B*, on the other hand, was mortgagee of the same property under a subsequent registered bond, but the registration of this bond was compulsory. *B*, brought a suit on his subsequent bond, got a decree, had the properties mortgaged sold and bought it himself. *A* then brought a suit on his bond, got a decree and attached the mortgaged property. *B* objected successfully in the execution department. *A*, thereupon, brought this suit. *Held* that a subsequent registered bond of which registration was compulsory had no priority over an unregistered prior bond of which registration was optional and as *A* was not a party to the suit of *B* the decree cannot affect him and the sale was held subject to the pre-existing lien of *A*. *KANHIYA LAL AND ANOTHER v. BANSIDHAR.*

[IV-136

(12). —————.] *A* the purchaser of the equity of redemption, brought a suit against the mortgagees to have it declared that a decree which they had obtained against the original mortgagors and to which decree he was no party, did not affect him (the suit by the mortgagees was brought after the purchase by *A*.) *Held* that *A* was entitled to the decree claimed. *HAR NAND RAI AND OTHERS v. HAR GOLAL.*

[VII-188

(13). —————.] *A* mortgagor, who had given a simple mortgage over certain land, sold some of the mortgaged property. The mortgagee, after such sale has taken place and without making the vendee parties to his suit, brought a suit for sale on his mortgage, and having caused the mortgaged property to be sold, including that portion which had been sold by the mortgagor, purchased it

ACT IV OF 1882, s. 85.—(continued.)

himself. The mortgagees then sued to eject the vendees of the mortgagor. *Held* that the suit would not lie inasmuch as the plaintiff mortgagee had at its commencement no title to present possession of that particular portion of the mortgaged property as against any one. **HARGU LAL SINGH V. GOBIND RAI AND ANOTHER.**

[XVII-154]

(14.) —————. Two persons each held a mortgage over the same property from the same mortgagor. The mortgagees were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained a decree, in execution of which they had the mortgaged property put up for sale, and each purchased it at the sale under his decree respectively. Neither mortgagee made the other a party to the suit on his mortgage. The representatives of one of the mortgagees decree-holders, Musammam Sangari, got possession of the mortgaged property and held it as against the other mortgagee decree-holder or his representatives. Thereupon the representatives of the other mortgagee brought their suit for possession of merely of the property or in the alternative for redemption of the other mortgage. *Held* that a suit was not barred either by the provisions of s. 43 of the Code of Civil Procedure or by reason of s. 85 of the Transfer of Property Act 1882. **BALMAKUND AND ANOTHER V. MUSAMMAT SANGARI AND ANOTHER.**

[XVII-94]

(15.) —————. There is nothing to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. **SUNDAR SINGH AND OTHERS V. BHOLU AND OTHERS.**

[XVIII-58]

(16.) —————. Certain mortgagees holding a second mortgage obtained a decree against their mortgagor and a subsequent mortgagee, one *H L*, for sale of the mortgaged property. At the time of the suit there was subsisting on the same property a prior mortgage held by one *D P*. *D P* was not made a party to that suit. After the decree in that suit was passed, *D P* brought a suit for sale on his mortgage, but did not make the second mortgagees parties to that suit. In that suit *D P* obtained a decree and having brought some of the mortgaged property to sale some of it was purchased by *H L*. On application by the second mortgagees for an order absolute for sale in execution of their decree it was *held* that the property purchased by *H L* in execution of *D P*'s decree on his prior mortgage could not be brought to sale in execution of the second mortgagee's decree. **Mata Din Kasodhan v. Kazim Husain (I. L. R., 13 All., 432)** referred to. **HIRA LAL V. KISHEN LAL AND ANOTHER.**

[XVII-153]

ACT IV OF 1882, s. 85.—(continued.)

(17.) ————*Omission to mention a prior lien.* One *A S* purchased the equity of redemption of a property subject to two mortgages, and as part of the transaction paid off the prior mortgage. The mortgagees under the second mortgage sued to bring the mortgaged property to sale making the original mortgagor and the purchaser of the equity of redemption defendants, but omitting any mention of the lien acquired by such purchaser. *Held* that such omission was not a valid reason for dismissing the plaintiff's suit altogether. **Salig Ram v. Harcharan Lal (I. L. R., 12 All., 548)** distinguished. **KALI CHARAN AND ANOTHER V. AHMAD SHAH KHAN.**

[XIV-199]

(18.) ————*Notice—Registration.* For the purposes of s. 85 of the Transfer of Property Act a mortgagee will be deemed to have notice of a subsequent registered incumbrance affecting the property mortgaged to him, inasmuch as it is the duty of such prior mortgagee before suing on his mortgage to search the registry for record of any such subsequent encumbrance, and if he has not done so he must be taken either to have wilfully abstained from an inquiry or search which he ought to have made within the meaning of s. 3 of the above mentioned Act or have omitted to do an act which a reasonably prudent mortgagee about to bring a suit on his mortgage under Chapter IV of Act No. IV of 1882 ought to have done and would have done, which act, inquiry or search, would have resulted in the disclosure of the existence of the subsequent encumbrance. **JANKI PRASAD V. KISHEN DAT.**

[XIV-151]

(1.) s. 86.—*Power of Court to extend time fixed.* A Court having framed a decree conditioned on the payment by the plaintiff of a sum certain within a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed. **Raja Har Narain Singh v. Chaudhrai Bhagwant Kuar (I. L. R., 13 All., 300)** referred to. **RAM LAL DUBE AND OTHERS V. HAR NANDAN SINGH AND ANOTHER.**

[XI-150]

(2.) ————. In the case of a decree for redemption or for foreclosure under Act IV of 1882, both of which decrees stand in this respect upon the same footing, no extension of the time limited by the decree for payment of the decretal amount can be made except for good cause shown, whether the order under s. 87, in a suit for foreclosure, or the order under s. 93, in a suit for redemption, has been applied for or not. **Poorash Nath Mojumdar v. Ramjodu Mojumdar (I. L. R., 16 Calc., 246)** dissented from; **Kanara Kurup v. Govinda Kurup (I. L. R., 16 Mad., 214)**

ACT IV OF 1882, s. 86.—(continued.)

distinguished. **RAM LAL AND OTHERS v. TULSA KUAR AND OTHERS.**

[XVII-11]

(3).—Interest—Post decree—Charge.]

Where in a decree for foreclosure interest subsequent to the decree was included in the amount made payable to the plaintiff, it was held that such future interest, supposing it could be properly awarded, concerning which no opinion was expressed, could not be treated as a charge upon the land; but the judgment-debtor was entitled to resist foreclosure on payment within the prescribed period of the mortgage money and interest up to date of decree, the decree-holder being at liberty to recover the future interest only from the judgment-debtor personally. **BHAWANI PRASAD v. BRIJ LAL AND OTHERS.**

[XIV-79]

(4).—After date fixed for payment.]

In a suit upon a mortgage for the sale of the property mortgaged, the Court has no power to allow in the account under s. 86 of Act IV of 1882 or in its declaration under that section interest for a period beyond the date of payment which has to be fixed within six months from the date of the decree, ss. 209 and 222 of Act No. XIV of 1882 do not affect the special provisions as to allowance of interest contained in Act IV of 1882. In construing a decree the terms of which are ambiguous such construction must if possible be adopted as will make the decree a decree in accordance with law and not a decree such as the Court making it had no power to pass. **AMOLAK RAM AND OTHERS v. LACHMI NARAIN AND OTHERS.**

[XVII-9]

See also

TARA CHAND AND OTHERS v. DINA NATH.

[XV-76]

RAJ KUMAR v. BISHESHAR NATH AND OTHERS.

[XIV-80]

NAIN DAT AND OTHERS v. HARIHAR DAT SINGH.

[XVIII-57]

ss. 86 & 87—Costs.] A decree for foreclosure containing a distinct and separate order for costs under s. 220 of the C. P. C. was afterwards confirmed by an order absolute for foreclosure, and the mortgagee under such order obtained possession. Subsequently he applied for execution of the order for costs. Held that the costs awarded could not be considered part of the money due upon the mortgage, and, as such, superseded by the order absolute and the mortgagee's possession thereunder, and the application must therefore be allowed. **DAMDAR DAS AND ANOTHER v. BUDH KUAR AND OTHERS.**

[VIII-68]

s. 87—Payment one day after date fixed.] A obtained a foreclosure decree in terms of s. 86

ACT IV OF 1882, s. 87.—(continued.)

of the Transfer of Property Act, declaring that if the mortgage money was not paid within six months all rights of redemption would be gone. The mortgagor deposited the money one day beyond the time allowed. The original Court ordered that the mortgage should be foreclosed (as the deposit was not within the time allowed). The lower appellate Court held that the payment of money one day after might be treated as an application for extension of time and set aside the Munsif's order. Held that the lower appellate Court (being a Court executing the decree) could not modify the terms of the decree. Appeal decreed. **WALI MUHAMMAD v. HUSAIN BAKHS.**

[IV-178]

(1) s. 88—Interest after due date—Construction of decree.] A decree for sale under s. 88 of the Transfer of Property Act, 1882, provided that the judgment-debtor should pay on or before the 22nd of February, 1892, a certain sum, being principal and interest calculated up to the 22nd of January, 1892, together with future interest at 6 per cent, but the decree did not specify that the interest was to be paid up to the date of realization. Held that the decree framed as above only carried interest up to the 22nd of February, 1892. **TARA CHAND AND ANOTHER v. DINANATH.**

[XV-76]

See also

AMOLAK RAM AND ANOTHER v. LACHMI NARAIN AND OTHERS.

[XVII-9]

RAJ KUMAR v. BISHESHAR NATH AND OTHERS.

[XIV-80]

(2).—Application for execution before time fixed in decree.] An application for execution of a decree for sale of mortgaged property passed under s. 88 of Act IV of 1882, and which directed that if the decree were not satisfied within two months the property should be sold, ought not to be allowed before the expiration of the period therein provided. **HARDAYAL AND OTHERS v. CHADAMI LAL.**

[IV-332]

(3).—Suit for foreclosure—Decree for sale.] The plaintiffs in this case claimed to foreclose a mortgage by way of conditional sale. It was found by the Court below that it was not a mortgage by conditional sale, hence no foreclosure decree could be given. The suit was therefore dismissed. Held that instead of dismissing the suit the relief mentioned in s. 88, para (2), should have been given. **SHEORATAN RAM AND OTHERS v. JAIMANGAL RAI AND ANOTHER.**

[V-329]

(4).—Amount found due—Increased by agreement.] A decree for sale under s. 88 of Act IV of 1882 can only be executed for the amount decreed or found in account to be due,

ACT IV OF 1882, s. 88.—(continued.)

and the order for sale cannot, except with regard to any additional costs which may be provided for by s. 94, extend in any way the liability of the judgment-debtor or his property under the decree. *Sita Ram v. Dasrath Das* (I. L. R., 5 All. 492) distinguished. KASHI PRASAD v. SHEO SAHAI.

[XVII-12

(5).—[*Post diem interest by way of damages—Charge.*] Where in a suit upon a mortgage bond *post diem* interest is decreed as damages, the payment of such damages does not constitute a charge upon the mortgaged property. *Narindra Bahadur Pal v. Khadim Husain* (I. L. R., 17 All., 581) referred to. RIKHI RAM AND ANOTHER v. SHEO PARASHAN RAM AND OTHERS.

[XVI-78

(6).—[*Interest awarded under Act XXXII of 1839—Charge.*] When in a suit for sale under ss. 88 and 89 of Act No. IV of 1882, a Court allows under Act No. XXXII of 1839 interest *post diem*, its decree so far as such *post diem* interest is concerned, is not a decree for sale under s. 88, but is a decree for money which can be executed in the manner provided for the execution of simple money decrees. *Bikramajit Tewari v. Durgadyal Tewari* (I.L.R. 21, Calc. 274) dissented from. NARINDRA BAHADUR PAL v. KHADIM HUSAIN AND OTHERS.

[XV-128

(7).—[*Decree under s. 88—Further remedy against person and other property.*] A deed of mortgage of immoveable property executed in 1875 contained a covenant whereby the mortgagor made himself personally liable for payment of the mortgage debt. The mortgagee having become insolvent, the Official Assignee brought a suit in which he prayed, first, for enforcement of the mortgage by sale of the mortgaged property, and, secondly, in the event of the sale proceeds being insufficient to discharge the debt, for enforcement of the personal covenant. The Court granted the former relief, but refused to grant the latter on the ground of delay in bringing the suit and of hardship to the defendant. *Held* that the plaintiff was entitled to join with his claim for enforcement of the mortgage the further claim to a declaration that, in the event of the sale proceeds being insufficient to discharge the debt, its discharge might be enforced against the person and other property of the defendant; and that the claim to enforce the personal covenant ought to have been decreed. *Hafizuddin Ahmad v. Damodar Das*, (W. N. 1889, p. 149) distinguished. MILLER v. DIGAMBARI DEBYA.

[X-142

(8).—[*Decree under s. 88 of Act IV of 1882, in a suit by a mortgagee for sale, can only direct the sale of the mortgaged property, and should not*

ACT IV OF 1882, s. 88.—(continued.)

go further and give power to the decree-holder to bring to sale any other property of the judgment-debtor, or to execute the decree against his person. But where the net proceeds of the sale are insufficient to pay the amount due for the time being upon the mortgage, the mortgagee may, if the balance is legally recoverable otherwise than out of the property sold obtained from the Court, under s. 90 of the Act, a decree for the balance to be recovered in the ordinary way in which a money decree would be recoverable against the person and other property of the judgment-debtor. Upon an application for such decree, notice would issue to the judgment-debtor, who would have an opportunity of showing cause why such a decree should not be passed. Nothing in the terms of the original decree under s. 88 can make any question arising under s. 90 *res judicata*. *Gopal Das v. Ali Muhammad* (I. L. R. 10 All., 632) referred to. *Pran Kuar v. Durga Prasad* (I. L. R., 10 All., 127) distinguished. HAFIZ-UD-DIN AHMAD v. DAMODAR DAS.

[IX-149

(9).—[*Decree in favor of a mortgagee for sale of the mortgaged property cannot be treated as one for money.*] According to the Transfer of Property Act, ss. 88, 89 and 90, the mortgagee must first sell the mortgaged property, and if the net proceeds of such sale be insufficient to pay the amount due for the time being on the mortgage, and if the balance be legally recoverable from the mortgagor otherwise than out of the property sold, he may ask the Court for a decree for such balance. *GOPAL DAS v. ALI MUHAMMAD AND OTHERS.*

[VIII-254

(10).—[*Decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.*] *RAJ SINGH AND ANOTHER v. PARMANAND.*

[IX-191

(11).—[*Where there is nothing to show a contrary intention of the parties every mortgage carries with it a personal liability to pay the money advanced; but a mortgagee must sue for his remedy against the property first. In so doing it is immaterial whether or not he prays in his plaint for relief over against non-hypothecated property. Unless in exceptional cases he can obtain such relief only under the provisions of s. 90 of the Transfer of property Act, and if such relief is refused the refusal will not bar a subsequent application under s. 90.*] *Hafiz-ud-din Ahmad v. Damodar Das* (W. N. 1889, p. 149), approved. *Batak Nath v. Pitambar Das* (I. L. R., 13 All., 360) distinguished. *Sutton v. Sutton* (22 Ch. D. 515), *Raj Singh v. Parmanand* (I. L.

ACT IV OF 1882, s. 88.—(continued.)

R., 11 *All.*, 486), *Miller v. Digambari Dehya* (*W. N.* 1890, *p.* 142), and *Durga Dai v. Bhagwat Prasad* (*I. L. R.*, 13 *All.*, 356) referred to. Observations on the meaning and application of ss. 88, 89 and 90 of the Transfer of Property Act, Explanation of the term "legally recoverable" in s. 90. *Sonatun Shah v. Ali Newaz Khan* (*I. L. R.*, 16 *Calc.*, 423) distinguished. **MUSA-HUB ZAMAN KHAN AND OTHERS v. INAYAT-UL-LAH.**

[XII-80]

(12).—[] Where a decree on a hypothecation bond, besides decreeing sale of the hypothecated property, purported also to grant relief over against the person and non-hypothecated property of the judgment-debtor, and such decree remaining unchallenged became final in its entirety. *Held* that it was competent to the decree-holder by application for execution of the decree to proceed against the non-hypothecated property of his judgment-debtor, and it was not necessary for him to proceed by way of suit under s. 90 of the Transfer of Property Act. *Musaheb Zaman Khan v. Inayat-ul-lah* (*I. L. R.*, 15 *All.* *p.* 513) distinguished. **LALJI LAL v C. J. BARBER.**

[XIII-121]

(13).—[] In a suit for enforcement of a mortgage security the plaintiff prayed for a decree both as against the mortgaged property, and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment-debtors were to be liable. *Held* that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree-holder to obtain a separate decree under s. 90 of the Transfer of Property Act, (Act IV of 1882). *Miller v. Digambari Dehya* (*W. N.* 1890, *p.* 142) referred to. **BATAK NATH v. PITAMBAR DAS AND OTHERS.**

[XI-127]

(14).—[] The plaintiff obtained a decree on a hypothecation bond on the 26th October, 1887. The decree provided that the money was to be realized by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment-debtor. The hypothecated property was sold and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied on the 23rd September, 1889, for enforcement of that portion of the decree which related to the

ACT IV OF 1882, s. 88.—(continued.)

other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under s. 90 of the Transfer of Property Act (IV of 1882). This objection was allowed and the decree-holder applied for and obtained a decree under the said section on the 11th January, 1890. The judgment-debtor then appealed against that order on the ground, amongst others, that, looking to the terms of the original decree, the application under s. 90 was superfluous. *Held* that the decree contemplated by s. 90 of the Transfer of Property Act is in fact an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. **DURGA DAI v. BHAGWAT PRASAD.**

[XI-104]

RAHIM BAKSH v. THE UNCOVENANTED SERVICE BANK, LIMITED.

[XI-163]

(1) s. 89.—*Interest after date fixed.* A decree for sale under s. 88 of the Transfer of Property Act, 1882, in a suit for sale on a mortgage declared a certain sum, including principal and interest up to date of decree, to be payable to the plaintiff within a stated time, and also provided that the decree should carry future interest. The judgment-debtor did not pay within the specified time, and subsequently the decree-holder applied for an order absolute for sale under s. 89 of the above mentioned Act. *Held* that the amount which could be realized by the decree-holder by sale of the mortgaged property would include future interest from the date of the decree under s. 88 to the date of sale and that it was not necessary that specific mention of future interest should be contained in the order under s. 89 of the Act. **RAJ KUMAR v. BISHESHAR NATH AND OTHERS.**

[XIV-80]

See also

TARA CHAND AND OTHERS v. DINA NATH,

[XV-76]

AMOLAK RAM AND ANOTHER v. LACHMI NARAIN AND OTHERS.

[XVII-9]

NAIN DAT AND OTHERS v. HARIHAR DAT SINGH.

[XVIII-57]

(2).—*Order absolute for sale—Execution without such order.* A conditional decree for the sale of mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882) can-

ACT IV OF 1882, s. 89.—(continued.)

not be executed unless and until it is made absolute by an order passed under s. 89. Where on a previous application being made for execution of such a conditional decree, the judgment-debtor did not appear to oppose the decree-holder's application for attachment and sale; *held* that as the question whether the conditional decree was capable of execution before it was made absolute was never before in issue, and was not judicially treated on the occasion of the former application, there was no *res judicata* on the point. *RAM LAL AND ANOTHER v. NARAIN AND ANOTHER.*

[X-97]

(3.) —————.] Where in the case of a decree, for recovery of money by enforcement of lien against hypothecated property, which did not strictly comply with the requirements of s. 88 of the Transfer of Property Act (IV of 1882) applications for execution had on previous occasions been made and not objected to, but, on a subsequent application being made the objection was taken that no order for absolute sale, as contemplated by s. 89 of the Transfer of property Act, had been obtained by the decree-holder. *Held*, that the decree being clear in its terms and capable of execution, such an objection could not be taken at that stage in the Court executing the decree, but should have been made in the form of an appeal from the decree. *DHANI RAM v. HURDEO DAS.*

[X-223]

(4.) —————.] The holder of a decree under s. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree. *Held* that this was a good application under s. 89 of the Act and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters. *ODDH BEHARI LAL v. NAGESHAR LAL.*

[XI-83]

THE UNCOVENANTED SERVICE BANK, LIMITED
v. NAND KISHORE.

[XI-108]

(5.) —————. *Applicability of ss. 291 and 310 A, C. P. C., to sale held under s. 89.*] Ss. 291 and 310 A of C. P. C. will apply to a sale held in virtue of an order absolute for sale passed under s. 89 of Act IV of 1882 although no power is given under that Act to postpone the operation of an order under s. 89. *RAJA RAM SINGHJI v. CHUNNI LAL.*

[XVII-47]

ACT IV OF 1882.—(continued.)

(1). s. 90.—*Remedy against person and other property—Decree under s. 88.*

See s. 88, Nos. 7, 8, 9, 10, 11, 12, 13, 14.

(2). —————. *Mortgagee purchasing property sold—Proceeds of sale.*] A mortgagee, decree holder, in a suit for sale under s. 88 of the Transfer of Property Act, 1882, brought the mortgaged property to sale and, with the leave of the Court, purchased it himself. The amount realized by the sale being insufficient to satisfy the mortgage debt, the decree-holder applied for execution against other property of the mortgagor. *Held* that the decree-holder was not bound to give credit to the mortgagor to the amount of the market value of the mortgaged property purchased by him, but only to the amount of the actual purchase money. *Mahabir Pershad Singh v. Macnaghten* (I. L. R., 16 Cal., 682), *Sheonath Doss v. Janki Prosad Singh* (I. L. R., 16 Cal., 132) and *Gunga Pershad v. Jawahir Singh* (I. L. R., 19 Cal., 4) referred to. *MUHAMMAD HUSEN ALI KHAN v. THAKUR DHARAM SINGH.*

[XV-144]

(3). —————. *Balance legally recoverable.*] A decree-holder having obtained separate decrees against his judgment-debtor on two unregistered bonds each for a sum of less than Rs. 100 took out execution on one bond and brought to sale the hypothecated property, which was purchased by a third party. The sum for which that property was sold was only sufficient to satisfy one decree, and the decree-holder accordingly, within three years from the date when the unsatisfied bond fell due, applied for a decree under s. 90 of the Transfer of Property Act. *Held* that under the above circumstances there was a balance legally recoverable otherwise than out of the property sold and that the decree-holder was therefore entitled to a decree under s. 90. *Musahib Zaman Khan v. Inayat Ullah* (I. L. R., 14 All., 513) referred to. *BAGESHRI DIAL v. MUHAMMAD NAQI.*

[XIII-120]

(1). s. 91.—*Person entitled to redeem—Subsequent mortgagee of a portion.*] One *M R* was a co-mortgagee under mortgages of the years 1867, 1868 and 1870, of a village called *Ahak* and shares in certain other villages *Surai-pur*, *Raipur*, *Bamole*, and *Khera Buzurg*. *K D* the plaintiff was a subsequent mortgagee of the share in *Khera Buzurg*. *K D* in 1874 brought the share mortgaged to him to sale and purchased it himself. Subsequently, in 1879, *M R* sued for a decree for sale of all property mentioned above, but the decree which he obtained was limited to the village *Ahak* and the share in *Khera Buzurg*. In 1882 one *M M A* purchased the share in *Sheorajpur* which had been subject to the mortgage sued upon by *M R* in 1879. In 1892 *K D* sued for redemption of the whole of the property comprised in the original mortgage. *Held* that, inasmuch as

ACT IV OF 1882, s. 91.—(continued.)

M. R's interest in the mortgaged property had been limited by the decree of 1879 to the village of Ahak and the share in Khera Buzurg, the plaintiff was not entitled to redeem the share purchased by M M A in Surajpur. MUHAMMAD MAHMUD ALI v. KALIYAN DAS.

[XVI-65]

(2) ————— *Purchaser of equity of redemption.—After redemption.* One of the defences to this suit for redemption of a usufructuary mortgage brought by the purchaser of the equity of redemption of the mortgaged property was, that the mortgage had already been redeemed by the original mortgagor. *Held* assuming that such redemption had taken place, that fact could not prejudice the plaintiff's right arising out of the mortgage, whatever the effect of such redemption might be as between the original mortgagors and the mortgagee, and such redemption was therefore not a bar to the suit. *JAJIT RAI v. GOBIND TIWARI AND ANOTHER.*

[IV-92]

(3) ————— *Legitimate son of an illegitimate member of a joint Hindu family.* *Held* that the legitimate son of an illegitimate member of a Hindu family, who, as such illegitimate son, might have had a right to maintenance from the property of his father, had no such interest in the state belonging to the family as would entitle him to redeem a mortgage made by a previous rightful owner of the estate. *BALWANT SINGH v. ROSHAN SINGH*

[XVI-41]

(1). s. 92.—*Power of Court to extend time fixed.*

See s. 86, No. (1), (2).

(2). ————— *Amount due.—Interest not provided in mortgage.* A usufructuary mortgagee obtained a final decree for possession on the 16th January, 1880. The decree-holder did nothing further until the 18th April, 1883, when he obtained possession. In 1887, the mortgagor brought a suit for redemption, and the Court of first instance gave him a decree conditioned on his paying the principal money with interest calculated up to April, 1883. This decree was modified by the lower appellate Court. *Held* that the mortgagee was not entitled to interest for the period between the date of the decree in January, 1880, and the date when the mortgagee obtained possession in April, 1883, the claim to such interest not being based on the terms of the mortgage, and the mortgagee's want of possession being due to his own omission to take it by executing his decree. *BANSIDHAR AND OTHERS v. HADI ALI.*

[IX-177]

(3). ————— *Decree not specifying result of non-payment.—Consequence.* *Held* that a decree for a

ACT IV OF 1882, s. 92.—(continued.)

redemption which did not embody the direction required by s. 92 of the Transfer of Property Act, to the effect that on failure of the decree-holder to deposit in Court the mortgage-money within the prescribed period, could not bar the plaintiff's right of redemption; and the failure to deposit the amount within the time could not affect the right. *KERAMAT ALI v. INAYAT HUSAIN.*

[IV-329]

(4). —————.] Where a decree for redemption of mortgage did not say in terms that if the amount due were not paid within the prescribed period the right to redeem should be barred, and where after the period had expired, the Court of appeal, (which had passed the decree) made an order allowing the amount due to be deposited; *held* that the case was not one in which the High Court should interfere in revision under s. 622 of the C. P. C. the order objected to being merely ministerial, and not prejudicing the right of the mortgagee, if any, by reason of the non-payment within the time prescribed. *BANDHU v. SHAH MOHAMAD TAKI.*

[VIII-119]

(5). —————.] Where a Court gave a plaintiff a decree for redemption of a mortgage conditioned on payment by him of the mortgage money within a specified time from the date of the decree but omitted to state in such decree what would be the consequence of the plaintiff's default in so paying in the mortgage money. *Held* that such omission could not operate to extend the period available to the plaintiff for payment beyond the maximum term provided for by s. 92 of Act No. IV of 1882. *Jai Kishen v. Bhola Nath (I. L. R., 14 All., 529)* referred to. *Bandhu Bhagat v. Muhammad Taqi, (I. L. R., 14 All., 350)* dissented from. *SHEIKH WAZIR v. DHUMAN KHAN.*

[XIII-222]

(6). ————— *Time fixed.—Appeal.—Extension by appellate Court.* When a decree gives a right of redemption within a certain specified period with a certain specified result to follow if redemption is not made within such period, the mere fact of an appeal being preferred against it will not suspend the operation of such decree, and, unless the appellate Court extends the period limited by the original decree, the right of redemption will be barred if not exercised within the period so limited. The principal in *Jaggar Nath Pande v. Fokhu Tewari (I. L. R., 18 All., 223)* applied. *CHIRANJI LAL AND OTHERS v. THAKUR DHARAN SIEGH.*

[XVI-130]

(1) s. 93.—*Second suit for redemption.—Res-judicata.* In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendant, within a time specified, a sum which

ACT IV OF 1882, s. 93.—(continued.)

was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage debt had now been satisfied from the usufruct. *Held*, having regard to s. 93 of Act IV of 1882, in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property. *Sheikh Goham Hossein v. Musammat Alla Rukhee Bibi* (N.-W. P. H. C. Rep., 1871, p. 627) *Chaita v. Purumookh* (N.-W. P. H. C. Rep., 1867, p. 256) and *Aurudh Singh v. Sheo Prasad* (J. L.R., 4 All., 481) referred to. MUHAMMAD SAMI UDDIN KHAN v. MANNU LAL AND OTHERS.

[IX-136]

(2.)—[Calculation of time.] A decree for redemption was made conditional upon the mortgage-money being deposited in Court "within 15 days from the 30th October." The money was deposited on the 15th of November. *Held* that the direction of the decree must be construed as meaning fifteen clear days not including the first mentioned but beginning from mid-night of that day. HINDU SINGH AND OTHERS v. SARDAR SINGH AND OTHERS.

[VIII-80]

(1.) s. 95—[Cases falling under section.] Where one of several co-mortgagors redeems the whole mortgage he thereby puts himself into the position of the mortgagee as regards that portion of the mortgaged property which represents the interests of the other co-mortgagors. ASHFAQ AHMED AND OTHERS v. WAZIR ALI AND OTHERS.

[XI-211]

RAGHUEIR SAHAI AND ANOTHER v. BUNYAD ALI AND ANOTHER.

[VI-152]

NURA BIBI v. JAGAT NARAIN AND OTHERS

[VI-98]

(2.)—[In the case of a usufructuary mortgage by several co-mortgagors, when such mortgage is satisfied out of the usufruct each co-mortgagor is not entitled to recover possession of more than his share of the mortgaged property. Consequently where in such a case one of several co-mortgagors gets possession of the whole of the mortgaged property he does not occupy the position of a mortgagee to his co-mortgagors but his possession is adverse to them. *Fakir Bakhsh*

ACT IV OF 1882, s. 95.—(continued.)

v. Suddi Ali (J. L. R., 7 All., 376) followed. GOSARDHAN AND ANOTHER v. SUJAN.

[XIV-72]

(3.)—[Suit for redemption—Against co-mortgagor.] Where a mortgagor is suing his co-mortgagor for possession upon payment of the proportionate share of redemption money due, of mortgaged property which has been redeemed by the said co-mortgagor, all he has got to prove is that a mortgage was made within sixty years by him and the defendant or those whom they represent, that the defendant or those represented by him, redeemed the mortgage, and that the plaintiff is willing to pay his proportionate share of the redemption money commensurate with his interest and reasonable interest from the date of redemption. RANI v. AMIR BAKHSH.

[XVIII-39]

(1.) s. 93.—[Anomalous mortgage—Simple and usufructuary.] *Held* that one and the same deed may create a simple and a usufructuary mortgage. JOGAL KISHORE v. RAM SAHAI AND OTHERS.

[VI-212]

CHANDAR KUAR v. SUBHKARANDAS.

[VII-119]

UMRAO BEGAN v. VALI-UL-LAH.

[VIII-171]

(2.)—[A deed of mortgage executed in 1879 for a consideration of Rs. 300 provided that the terms of the mortgage should be four years certain, that certain interest should be payable, that the mortgagee should have possession, that the profits should be appropriated first in lieu of yearly interest and any balance appropriated in payment of the principal debt, and that the mortgagor should be entitled to redeem if the principal and interest were paid at the expiration of the four years. The mortgagee never obtained possession; and in 1882 he brought a suit against the mortgagor to recover the unpaid interest then due and obtained a decree, which was satisfied by the sale of property belonging to the judgment-debtor. In 1886 he brought another suit for recovery of the principal together with the residue of interest up to the date of suit. *Held* that inasmuch as there was no stipulation in terms that the mortgagee was to remain in possession until payment of the mortgage money, the instrument did not strictly fall within s. 58 (d) of the Transfer of Property Act (IV of 1882), and that the rights and liabilities of the parties must be determined in accordance with the principles enunciated in s. 98 of that Act. *Held*, upon the construction of the instrument, that it must be regarded as a usufructuary mortgage not only during the four

ACT IV OF 1882, s. 98.—(continued.)

years, but after their expiration. HIKMAT-UL-LAH KHAN AND ANOTHER *v.* IMAN ALI AND OTHERS.

[X-87]

(1). s. 99.—*Application of section to suits instituted before Act IV of 1882.*

See s. 2, No. (3).

(2).—*Sale of mortgaged property otherwise than by instituting suit under s. 67—Decree not complying with ss. 88 and 89.* This was an appeal from an order passed on an application for execution of a decree for the sale of mortgaged property. The decree was made in a suit instituted after Act IV of 1882 came into force. It was contended that under s. 99 of the Act the mortgaged property could not be brought to sale otherwise than by instituting a suit under s. 67 of the Act; but the suit which resulted in the decree sought to be executed, could not be considered a suit under s. 67 as the requirements of ss. 88 and 89 were not satisfied. *Held* that the plea was invalid as the Transfer of Property Act was the only law under which the suit could be instituted and dealt with; it must be assumed that it was instituted under s. 67. Any informality or irregularity may afford ground for appeal but it cannot be said that the suit was not instituted under that Act. BHARAT SINGH AND OTHERS *v.* GORAKH MAL AND ANOTHER.

[IV-183]

(3).—*Suit for mere declaration.* The plaintiff held a mortgage, dated July 20th, 1883, over the property of one A K for Rs. 55,000. On the 12th of July, 1884, the plaintiff and A K entered into an agreement whereby A K was to execute a possessory mortgage of his property in favour of the plaintiff for Rs. 80,000, part of which was to be the amount of principal and interest due upon the mortgage of 1883. The plaintiff sued for specific performance of this agreement, and got a decree for payment by A K within a specified time of Rs. 64,970-4-8 or in default for specific performance of the agreement. The decretal money was paid within the time limited by A K; but the plaintiff appealed, claiming a further sum of Rs. 18,125-8-10, but admitting that his right to specific performance was gone. The plaintiff succeeded in his appeal and obtained a decree, which was a simple money decree, for payment of Rs. 18,125-8-10. The plaintiff then attempted to execute his decree for this last mentioned amount by bringing to sale portions of the property hypothecated under the deed of the 29th of July, 1883, but was met by objections on the part of two persons who held mortgages over the property subsequent in date to 1883. The plaintiff thereupon brought a suit for a declaration that he was entitled, in virtue of his decree in the abovementioned suit, for specific performance, to bring to sale the property in question in priority to the claims of the two subsequent mortgagees. *Held* that the

ACT IV OF 1882, s. 99.—(continued.)

suit brought under the circumstances above described must fail; whether for the reason that it was not a suit under s. 67 of Act IV of 1882; or that it was barred by the proviso to s. 42 of the Specific Relief Act, 1877, inasmuch as if the plaintiff was entitled to the relief sought he was entitled also to bring a suit for sale on his mortgage. LEKHRAJ *v.* ABDUL GHAFUR KHAN.

[XIV-205]

(4).—*Sale in execution of decree for rent.* *Held* that a usufructuary mortgagee who had leased the mortgaged premises to his mortgagor could not in execution of a simple money decree for rent against the mortgagor attach and sell the mortgaged premises, but must bring a suit as provided by s. 67 of Act No. IV of 1882. AZIM-ULLAH *v.* NAJM-UN-NISSA AND ANOTHER.

[XIV-140]

(5).—*Sale in execution of decree for mesne profits.* Certain usufructuary mortgagees not having been put in possession of the mortgaged property by the mortgagor sued and obtained a decree for possession with mesne profits and costs. They then applied for attachment of the mortgaged property in execution of their decree for mesne profits and costs. This application was disallowed. The mortgagees then brought a suit for sale of the equity of redemption of the mortgaged property reserving their rights and interests under the mortgage. *Held* that such a suit would not lie as being opposed to the intention of s. 99 of the Transfer of Property Act 1882. *Azimullah v. Najmunnisa* (I. L. R., 16 All., 415) and *Jaduh Lal Shaw Chowdhry v. Madhub Lal Shaw Chowdhry* (I. L. R., 21 Cal., 34) referred to. MAHABIR SINGH AND ANOTHER *v.* SAIRA BIBI AND OTHERS.

[XV-116]

(6).—*"Notwithstanding s. 43, C. P. C."* One B P brought a suit on a mortgage dated in 1870 and obtained a decree for the sale of the hypothecated property against B S the mortgagor. Subsequently one G S purchased a share of the same property in an auction sale held in execution of a simple money decree against B S. D S thereupon sued to enforce his right of pre-emption in respect of the share and obtained a decree. After this B P caused the same share to be advertised for sale in execution of his decree. In order to save the share from sale, D S paid B P the amount of his decree, then brought a suit against B S for contribution and obtained a simple money decree for Rs. 2658 odd against him. D S attempted to execute this decree against B S's share of the property and in this he was resisted by one J L., who had instituted a suit against B S on a mortgage in which that share was mortgaged to him. Upon this D S brought this suit for the sale of such share of the property in satis-

ACT IV OF 1882, s. 101.—(continued).

In 1873 *A* mortgaged the same property to *D* and in 1874 *A* and *B* mortgaged the same property to *D*. Subsequently *A* and *B* in the same year, *i. e.*, 1874, mortgaged the same property to *C* in consideration of the debt under the bond of 1869 plus something more. Now *D* brought a suit on his two bonds of 1873 and 1874, obtained a decree and put the property to sale. *C* thereupon paid the sum due to *D* and had the property released from sale. *D* then purchased the equity of redemption in the property from *A* and *B*. *C* has now brought the suit to recover from *D* the amount which he was obliged to pay to protect the property from sale. The defence was that in paying these sums *C* acted as a volunteer for his bond of 1874 was only a continuation of the prior bond of 1869, and he was therefore under no legal necessity to pay subsequent incumbrances. The question therefore is whether narrative did or did not result from execution of the bond in 1874. *Held* that the question was to be determined from the intention of the parties as expressed in the document on which can be implied under the particular circumstances of the case. *Held* further that under the present circumstances no such intention could be implied. **AJUDHIA PRASAD AND ANOTHER v. DULARILAL.**

(7) ———. *Sale in contravention of section—
Suit by auction purchaser to set aside.*] A Court of Revenue in execution of a decree for rent sold the mortgagor's interest in a certain house which had been mortgaged together with other property, and the sale was upheld on appeal to the Board of Revenue. Subsequently the auction-purchaser at the sale above referred to sued in a Civil Court for partition of the share purchased by him. *Held* that the co-sharers in the property in question other than the mortgagor could not dispute the title of the auction purchaser, notwithstanding that the decree and the sale in pursuance thereof under which he claimed were in direct violation of s. 99 of Act IV of 1882. **TARA CHAND v. IMDAD HUSAIN AND OTHERS.**

(3) _____.] The plaintiff was mortgagee under a bond, dated the 27th July, 1883, of certain properties, namely, (i) 20 *biswas* of *manza* Jalaluddin-Ganauri, (ii) 20 *biswas* of *manza* Sarawah, and (iii) 19 *biswas* 6 *kach*. 13½ *tan*. of *manza* Khalsia. Of these properties (i) was already mortgaged to the plaintiff under a bond, dated the 21st August, 1878, for Rs. 30,000, (ii) was also mortgaged under the same bond to the plaintiff, (iii) was already hypothecated to one Prabhu Dayal for Rs. 15,000, under a bond, dated the 28th August, 1878. The consideration for the plaintiff's mortgage of the 27th July, 1883, was Rs. 16,500. Out of this sum the plaintiff was found to have made at the instance of the mortgagors the following appropriations or payments, *viz.*—Rs. 3,171 as interest due to himself on his bond of the 21st August, 1878, Rs. 9,080 to Lakhmi Chand Tej Ram, principal and interest on their bond for Rs. 15,000 of 13th August, 1880, and Rs. 817 to Parbhu Dayal as interest on his bond of August, 1878. The defendants held a mortgage for Rs. 15,000, dated the 15th July, 1883, on the three villages Jalaluddin-Ganauri Sarawah and Khalsia, on which they obtained a decree and having brought the villages to sale purchased them themselves. The plaintiff then sued to recover the sum of Rs. 14,283 by sale of the villages mentioned above on the allegation that the property was liable to that extent in consequence of the disposition made by him at the request of the mortgagors of the moneys advanced by him under the mortgage of the 21st August, 1883. Held that as to the sum of Rs. 3,171 credited to the mortgagors as interest on the

(1) s. 100—*Charge—Unspecified property.* The terms of a mortgage bond were as follows: "That if the money could not be recovered from the resumed *muafi* land (the land specifically mortgaged) *the mortgagees might realize it from other property in Nagoria Alampore.* Held that the words italicised were sufficient to create a lien in favour of the mortgagee which will have priority over any subsequent mortgage. BHAGWANO PERSHAD v. NARAIN PRASAD.

(2) ————— *Post diem interest.*
Held that interest post diem assessed as damages on a mortgage bond for a term certain and containing no express provision as to the payment of post diem interest does not form a charge upon the property mortgaged. *SRI NIWAS RAM PANDEY v. UDIT NARAIN MISR* AND ANOTHER.

(1) s. 101.—*Extinguishment of charge.* Held that a subsequent mortgagee who pays off a prior mortgagee can not hold it as a shield against intermediate mortgagees so as to defeat their prior lien. SHANKAR LAL v. NANIK CHAND.

(2) _____.] *A*
and *B* mortgaged certain property to *C* in 1869.

ACT IV OF 1882, s. 101.—(continued.)

mortgage of the 21st August, 1878, and the sum of Rs. 9,080 paid to Lakhmi Chand Tej Ram in complete satisfaction of their bond of the 13th August, 1880, the plaintiff must be considered to have intended to keep those charges alive for his benefit, and this being so, he would be entitled to bring the properties mortgaged to sale for such amount; but in respect of the sum of Rs. 817 paid to Parbhu Dayal as interest on his bond of the 28th August, 1878, that the plaintiff was not entitled to recover the amount from the properties mortgaged. The principal of equity under which the properties mortgaged were made liable to the two preceding payments could not be extended to cover the payment to Parbhu Dayal. To do so would be to create a second charge under the same mortgage. *SANT LAL AND ANOTHER v. KISHUN SAHAI.*

[XI-121]

(4). —————.] The purchasers of the equity of redemption of land which had been mortgaged in 1866 and 1874 to different persons, paid off the prior mortgage. The second mortgagee sued to bring the property to sale in satisfaction of his mortgage. *Held* that the prior mortgage was not extinguished, and that the purchaser of the equity of redemption had, by paying off that mortgage, acquired an equitable right to its benefits, which they could use against the second mortgage. *Gokaldas Gopaldas v. Puranmal Preamsukhdas* (I. L. R., 10 Cal., 1035); (L. R., 11, Ind. App., 126) followed.

Per OLDFIELD, J. (Mahmood J., dissenting), that the prior mortgage afforded a defence against the claim of the second mortgagee seeking to bring the property to sale. *Gokaldas Gopaldas v. Puranmal Preamsukhdas* (I. L. R., 10 Cal., 1035) and (L. R., 11, Ind. App., 126) followed.

Per MAHMOOD, J., that the ruling of the Privy Council in *Gokaldas Gopaldas v. Puranmal Preamsukhdas* (L. R., 11, Ind. App., 126) and (L. R., 10 Cal., 1035) did not go beyond laying down the proposition that when the purchaser of the equity of redemption pays off a prior mortgage, which carries with it the right of possession of the mortgaged property, the mortgage is not extinguished for all purposes, but such purchaser, acquiring the benefits of the usufructuary mortgage, is entitled to remain in possession, and can successfully resist a suit by a subsequent usufructuary mortgagee seeking to disturb such possession. Also *Per* MAHMOOD, J., that although the persons who had paid off the prior mortgage were entitled to claim its benefits, they could not be understood to have acquired rights greater than those which the prior mortgagee himself possessed; that as holders of the equity of redemption they could not resist the suit which aimed at enforcing a valid security and, as persons entitled to the benefits of the prior mortgage, they were at best in the position of assignees of that mortgage;

ACT IV OF 1882, s. 101.—(continued.)

that the union of the two capacities could not confer upon them rights higher than those which the mortgage they had paid off created; that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his security without paying off the prior mortgage, so long as such enforcement does not clash with the rights secured by the prior mortgage; and that therefore the purchaser of the equity of redemption held that right subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the prior mortgage did not place the equity of redemption on a better footing though it entitled them to the benefits of that mortgage secured to them in the same manner as to the original mortgagee whose rights they had acquired by subrogation. *Gaya Prasad v. Sulik Prasad* (I. L. R., 3 All., 62; *Ramu Naikan v. Subaraya Mudali* (7 Mad., H. C. Rep., 229) and *Mulchand Kuber v. Lallu Trikam* (I. L. R., 6 Bom., 404, referred to. *RAGHUNATH PRASAD v. JURAWAN RAI AND ANOTHER.*

[VI-25]

(5). —————.] Where on the sale of the rights of the mortgagor in certain property which was subject to two mortgages a certain portion of the purchase money was left with the purchasers to pay off the prior mortgage, it was *held* on suit for sale by the second mortgagee that the purchasers must be taken to have intended to keep the first mortgage alive for their benefit, and that the second mortgagees were not entitled to sale without redeeming the first mortgage. *Gokal Das Gopal Das v. Puran Mal Preamsukh Das* (I. L. R., 10 Cal., 1035). *KALLU AND ANOTHER v. SANT LAL.*

[XVI-129]

(6). —————.] *B* made two mortgages, dated respectively the 10th October, 1871, and 10th October, 1872, of his *zamindari* property in favor of *P*. On 27th January, 1874, *B* mortgaged 117 *bighas* 7 *biswas* and 10 *dhurs* of *sir* and cultivatory land belonging to his *zamindari* for Rs. 700 to the defendant. On 10th September, 1877, *B* made a conditional sale of his *zamindari* property to the plaintiff for Rs. 4,500 to pay off the two charges created in favour of *P*. On the 10th August, 1878, *B* made another mortgage to the defendant for Rs. 300 of the same 117 *bighas* 7 *biswas* and 10 *dhurs*. On the 9th November, 1881, defendant obtained a decree on his two bonds of the 27th January, 1874, and 10th August, 1878, and on his application for execution of the decree the property mortgaged to him was advertised for sale on the 20th November, 1883. Meanwhile the plaintiff had taken the necessary proceedings to foreclose his conditional sale, and upon the 19th March, 1883, the sale was foreclosed. On the 19th November, 1883, plaintiff instituted this suit with the object of having it declared that defendant was not entitled to bring to sale

ACT IV OF 1882, s. 101.—(continued.)

the property mortgaged to him. *Held* that by the conditional sale, which became absolute upon the 19th March, 1883, the plaintiff acquired all the rights that subsisted under the two mortgages of the 10th October, 1871, and 10th October, 1872, and was entitled to press those securities in his aid as prior incumbrances to that of the defendant, for the purpose of stopping him from bringing the property to sale in execution of his decree before first recouping the plaintiff the amount which the latter found to satisfy and discharge those incumbrances. *Held* further that the only right which the defendant had to bring the property to sale was upon the strength of the decree obtained in the bond of 27th January, 1874, for he had no right under the instrument in his favour of the 10th August, 1878. The defendant should therefore only be permitted to bring the property to sale under his decree in respect of the mortgage of the 27th January, 1874, when he had satisfied and discharged the two mortgage bonds held by the plaintiff of the 10th October, 1871, and 10th October, 1872. *ZALIM GIR v. RAMCHARAN SINGH.*

[VIII-247]

(7). —————.] *A* mortgaged his property to *B* and subsequently to *C*. He afterwards sold the same property to *B*. *Held* that so much of the consideration (for sale) as was due under the prior mortgage of *B* was a charge upon the property and *C* could not bring the property to sale without first discharging it. *Parsi and another v. Girand Singh.*

[V-155]

(8). —————.] The defendants, who held a mortgage of certain property, under a registered deed, dated in 1878, purchased the same by private sale on the 3rd of September, 1881. In the sale deed the defendants covenanted to pay a sum of Rs. 140 due to the plaintiff on a mortgage deed dated in 1880. The plaintiffs put their mortgage of 1880 in suit, obtained a decree against the obligors, caused the property to be sold, purchased it themselves and have brought the present suit to recover the property from defendants. *Held* that, although the defendant's mortgage and purchase were prior to those of the plaintiffs, it is clear from the covenant in the sale-deed that their mortgage merged in the purchase and they bought the property subject to the payment of the plaintiffs mortgage upon it. *NATHU AND OTHERS v. BINDRABAN AND ANOTHER.*

[V-130]

(9). —————.] *A* made a grant from his property of an annuity to his sister and her heirs with a proviso that if he failed to pay the annuity the grantee and her heirs would be entitled to take possession of the property. Subsequently he mortgaged the property to the defendant, declaring that no

ACT IV OF 1882, s. 101.—(continued.)

other person had any interest in it. Sometime after, the sister died leaving him as her heir. *Held* that as the two rights now vested in him, the charge was merged in the other right (of ownership) and extinguished it, and that as he had transferred the property to the defendant as unencumbered he was equitably estopped from asserting to the contrary. *RADHEY LAL AND OTHERS v. MAHESH PERSHAD AND ANOTHER.*

[V-275]

(10). —————.] *A* held two decrees, standing against *B*, enforcing simple mortgage of a house. He brought the house to sale in execution of the decree enforcing the second mortgage and bought it himself. *Held* that having notice of the prior mortgage his purchase operated by the rule of merger to extinguish the prior incumbrance and he could not bring the property again to sale in satisfaction of the second mortgage. *KHWAJA BAKHSH v. IMAMAN.*

[V-210]

(11). —————.] *A* decree-holder, holding two decrees of different Courts on separate bonds, hypothecating the same property, in execution of the first decree purchased the property himself. The surplus of the sale proceeds was distributed by the Court among other persons who held money decrees against the same judgment-debtor. *Held* that the decree-holder could not afterwards execute the second decree against property of the judgment-debtor not included in the hypothecation bond. *Ahmad Wali v. Bakar Husain* (IV. N., 1883, v. 61); *Khwajah Bakhsh v. Imaman*, (IV. N., 1885, p. 210) and *Bapu Ravi v. Ramji Svarupji v.* (I. L. R. 11 Bom : 112) referred to. *BALLAM DAS v. AMAR RAJ AND ANOTHER.*

[X-90]

(12). —————.] *Sale in execution of property subject to mortgage—Purchase by mortgagee—Satisfaction of mortgage—Debt.*

See s. 82, Nos. 3 and 4.

(13). —————.] When a mortgagee holding a mortgage over two distinct properties brings one of them to sale in execution of a decree against the mortgagor not being a decree on his mortgage and purchases such property himself, the whole mortgage is not necessarily thereby extinguished; but if the mortgagee subsequently seeks to bring the mortgaged property to sale in execution of a decree obtained on his mortgagee he will have to bring into account the full value of the portion of the mortgaged property purchased by him under his former decree. *Sumeru Kuar v. Bhagwant Singh*, (IV. N. 1895, p. 1) followed; *Ahmad Wali v. Bakar Husain* (IV. N. 1883, p. 61); *Ballam Das v. Amar Raj* (I. L. R. 12 All. 537) referred to. *CHUNNA LAL v. ANANDI LAL AND OTHERS.*

[XVII-18]

ACT IV OF 1882, s. 101.—(continued.)

(14).—[The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage. *Ahmad Wali v. Bakar Husain* (W. N. 1883, p. 21) overruled. *Nawab Azimut Ali Khan v. Jeevahir Singh* (13 Moo. I. A. 404); *Nila Kant Banerji v. Suresh Chandra Mullick* (I. L. R., 12 Cal. 414); *Mahtab Singh v. Misree Lal* (N.-W. P. H. C. Rep. 1867, p. 88); *Bitthul Nath v. v. Toolsee Ram*, (N.-W. P. H. C. Rep. 1866, p. 125); *Kesree v. Seth Roshun Lal* (2 N.-W. P. H. C. Rep. 4); *Kuray Mal v. Puran Mal* (I. L. R., 2 All. 565); *Mahtab Rai v. Sant Lal* (I. L. R. 5 All., 276); *Sumera Kuar v. Bhagwant Singh* (W. N. 1895, p. 1); *Chunna Lal v. Anandi Lal* (I. L. R. 19 All., 196); *Khwaja Bahsh v. Imaman* (W. N. 1885, p. 210); *Ballam Das v. Amar Raj* (I. L. R., 12 All., 537); and *Bisheshar Singh v. Laik Singh* (I. L. R., 5 All., 257) referred to. *NAND KISHORE v. RAJAH HARI RAJ SINGH AND OTHERS*.

[XVII-163]

(15).—Government revenue—uncharge—Notice.] The heirs of a *lambardar* who have paid the Government revenue on behalf of certain land, cannot, when seeking to recover the same as a charge on the property in the hands of subsequent vendees, succeed without proving as against those vendees notice that the Government revenue had been paid by the *lambardar* as alleged, on behalf of the land purchased by them. *Lachman Singh v. Saligram* (I. L. R., 8 All., 384), referred to. *Ngender Chunder Ghose v. Sreemutty Kaminee Dossee* (11 Moo. I. A. 254) distinguished. *KHUSHHAL CHAND v. NIZAM-UN-NISSA AND OTHERS*.

[XI-9]

(1). s. 106.—Notice—Expiring with the end of a month of the tenancy.] On the 11th December, 1882, A, who had, on the 1st July, 1882, let rooms in a dwelling house to B, sent a letter to the tenant in the following terms:—“If the rooms you occupy in the house No. 5, Thornhill Road, are not vacated within a month from this date, I will file a suit against you for ejectment, as well as for recovery of rent due at the enhanced rate.” On the 1st February, 1883, the lessor instituted a suit against the tenant for ejectment, with reference to the above letter. Held by the Full Bench, (confirming the judgment of Oldfield, J., (W. N. 1885, p. 147) with reference to the terms of s. 106 of the Transfer of Property Act, that the letter was not such notice to quit as the law required, inasmuch as it was not a notice of the lessor's intention

ACT IV OF 1882, s. 106.—(continued.)

to terminate the contract at the end of a month of the tenancy.

Per STRAIGHT, J., *Quære*, whether the letter was a notice to quit at all. Also *per* Straight J.—A notice to quit must be certain, at all events in respect of the date of the determination of the tenancy, in other words there must be a clear and explicit intimation to the tenant as to the date after which he will, if he remains in occupation of the premises, become a trespasser. *Ahearn v. Bellman*, (L. R., 4 Exch. Div. 201) distinguished. The judgment of Mahmood, J., (I. L. R., 7 All., 509) reversed, and that of Oldfield, J., (I. L. R., 7 All., 597) affirmed. *BRADLEY v. ATKINSON*.

[V-288]

(2).—[The plaintiffs as owners of a house served notice of ejectment on the defendants, their tenants. The notice was served on the 2nd of January; it directed the defendants to vacate the house on the 7th of February. Held that this was not a good notice within the meaning of s. 106 of Act No. IV of 1882, not being notice “expiring with the end of a month of the tenancy.” *Bradley v. Atkinson* (I. L. R., 7 All., 899) followed. *SAHTAWAN AND OTHERS v. MOHAN SINGH AND OTHERS*.

[XVI-51]

(3).—Essential to maintain suit for ejectment.] The giving of such notice as is required by s. 106 of the Transfer of Property Act for the termination of a lease of immoveable property is a condition precedent to the maintenance of a suit for ejectment of the lessee. *Bradley v. Atkinson* (I. L. R., 7 All., 899) followed. *HARBANSI v. BHOLAI*.

[X-175]

(4).—Denial of lessor's title.] In a suit by a landlord for ejectment of a tenant no notice of determination of tenancy, under s. 106 of Act No. IV of 1882, is necessary where the defendant has, prior to the suit being brought, denied the plaintiff's title as landlord and that there was any contract of tenancy between them. *Unkamma Davi v. Vaikunta Hegde* (I. L. R., 17 Mad., 218) and *Dodhu v. Madhavarao Narayan Gadre* (I. L. R., 18 Bom., 110) referred to. *HAIDRI BEGAM v. NATHU*.

[XIV-196]

s. 107.—Lease—Registration.] An agreement to lease certain land ran in the following terms:—“Whereas I having taken land from KH, and building a shop thereon at my own cost, I promise and give it in writing that I will pay to KH every month a rent of 3 *annas* a month. In any month in which I shall fail to pay the rent KH will be competent to have the shop vacated by me.” Held that a lease embodied in such terms was not a lease of the description mentioned in s. 107 of Act, No. IV of 1882 and did not

ACT IV OF 1882, s. 107.—(continued.)

require to be either registered or in writing.
KHAIRAT HUSAIN v. MAHESHWRI PRASAD.

[XVII-69]

(1). s. 108.—*Rights and liabilities of lessor and lessee—Written assignment.* An official liquidator sold, with the sanction of the Court, the remainder of a lease for a long term of years held by a bankrupt company. A certain rent was reserved on the lease. No written assignment to the purchasers was ever executed, but the lease was handed over to them and they were put in possession and remained in possession for some years. Held that whether or not the assignment of the lease was invalid by reason of its not being in writing the purchasers of the company's interest were liable to pay rent to the lessors for the period during which they had been in possession. GAYA PRASAD v. BAIJ NATH AND ANOTHER.

[XII-25]

(2). ———— *Lessor acting in derogation of lessee's rights.* Where an occupancy tenant grants a lease of land forming part of his occupancy holding for a term of years he can not during the subsistence of such term relinquish his holding to the zamindar so as to put an end to his lessee's rights under the lease. *Khiali Ram v. Nathu Lal* (I. L. R., 15 All. 219), *Hoolassee Ram v. Pursotum Lal* (N. W. P. H. C. Rep 1871, p. 63), *Hiramonee v. Ganga Narain* (10 W. R. 384), and *Nehaloonnissa v. Dhunoo Lal* (10 W. R. 281) referred to, *Sukru v. Tafazzul Husain Khan* (W. N. 1894, p. 130) distinguished. BADRI PRASAD v. SHEODHIAN AND ANOTHER.

[XVI-109]

(3). ———— *Compensation for additions—Consent.* Where the lessee of a dwelling house being fully aware of his position as such lessee made certain additions to the leased premises without the permission of his lessor, but apparently with his knowledge and without any interference on his part; and, subsequently, when the lessor sued to eject him for non-payment of rent, claimed compensation for such additions: Held that the lessor was entitled to recover possession from the lessee without paying him compensation. NAUNIHAL BHAGAT v. PARMESHWAR BHAGAT AND ANOTHER.

[XIV-99]

(4). ———— *Surrender of leased property.* Held that lessees who take into their cultivation, as such, land surrendered by the cultivators in the *mohal* can not continue in possession of such lands after the expiration of the lease as cultivators, and can be dispossessed by new lessees as trespassers. LACHMAN PRASAD AND ANOTHER v. KALI CHARAN AND OTHERS.

[I-18]

ACT IV OF 1882.—(continued.)

(1). s. 111.—*Forfeiture—Breach caused by plaintiff's conduct.* The plaintiff, a zamindar, leased a certain village to the defendants in 1884. In 1887 the plaintiff brought a suit to eject the defendants in consequence of certain alleged breaches of covenants in their lease. In this suit the plaintiff obtained a decree, and on the 23rd of September, 1887, dispossessed the defendants and regained possession of the village in suit. The plaintiff retained possession treating the property as absolutely his own until the 12th of April, 1888, on which date the defendants having appealed successfully against the decree in the plaintiff's favor got back into possession in execution of the appellate Courts decree, which decree was not appealed against by the plaintiff and became final. Upon the 15th of November, 1888, the plaintiff again sued to eject the defendants alleging on their part fresh breaches of covenants contained in the lease other than those which formed the subject of the former suit. In this second suit the plaintiff claimed forfeiture of the lease and payment by the defendants of a sum amounting to Rs. 800-12-10, alleging the same to be due on account of payments which ought to have been made, but had not been made, by the defendants to or on behalf of the plaintiff. The defendants, amongst other defences, pleaded an offer by them to the plaintiff of a sum of money which to the best of their knowledge represented the payments to which they were liable under the lease taking into account what the plaintiff should have received during his occupation from the 23rd of September, 1887, to the 12th of April, 1888. Held that the plaintiff having by his occupation of the leased land which was subsequently held to be wrongful, materially contributed to disabling the defendants from making payments which should have been made by them was not entitled to the benefit of the covenant for forfeiture upon which he had sued, and also that the defendants were entitled to have the sums which the plaintiff had realised during his occupation of the land in suit between the 23rd of September, 1887, and the 12th of April, 1888, taken into account in estimating what was due by them to the plaintiff. BAKHTO AND OTHERS v. RAJA RAM.

[XII-217]

(2). ———— *Setting up adverse title.* The owners of a house sued to recover rent from a person whom they alleged to be their tenant, and for ejectment for non-payment of rent and denial of the plaintiffs' title. It was found by the lower appellate Court that the plaintiffs had not proved that the defendant had ever taken the house from them on a contract to pay any specified rent: and the Court accordingly dismissed the claim for rent; and also dismissed the claim for ejectment, on the ground that, with reference to s. 111 (g) of the Transfer of Property Act, denial of the lessor's title in a suit for ejectment (there being no previous denial) did not work a forfeiture of the lease. Held that as

ACT IV OF 1882, s. 111.—(continued.)

the contract of tenancy had been negated by the lower appellate Court, and both the lower Courts had negated the defendant's allegation that he was the owner of the house in suit, and no one alleged on his behalf that he was a licensee, he could only have occupied the house as a trespasser, and neither s. 111 (g) of the Transfer of Property Act nor any other provision relating to leases had any application. *Prann Nath Shaha v. Madhu Khulu* (I. L. R., 13 Calc., 96) distinguished. *Gopal Rao Ganesh v. Kishor Kalidas* (I. L. R., 9 Bom., 527) referred to. *ALI HUSAIN v. ALI BAKHS*.

[IX-176]

s. 123.—Gift of moveable property—How effected.] *K*, a servant in the employment of the East Indian Railway Company was recommended by the Traffic Manager a bonus in consideration of long and good services. This recommendation was sanctioned, and the amount of the bonus was received by the District Paymaster. Before payment to *K*, the money was attached in execution of a decree obtained against him by *J*. Held that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July, 1882, and was not evidenced by a registered instrument, it could only be effected by actual delivery; that as there had been no such delivery as completed the transfer (s. 123 of the Transfer of Property Act, and s. 90 of the Contract Act,) the money was not at *K*'s disposal, and he could not have enforced payment, and that the money was therefore not liable to attachment in execution of a decree against him. *JANKI DAS v. THE E. I. RAILWAY COMPANY*.

[IV-210]**s. 130.—Actionable claim.]**

See s. 131, No. (1), and s. 135, Nos. (1.)—(5.)

(1.) s. 131.—Applicability of section to mortgages.] Held that s. 131 of Act IV of 1882, does not apply to a mortgage security. The section makes inoperative any assignment of any interest in moveable property without notice of the assignment to the debtor. *VILAYAT ALI v. GULLO*.

[V-282]

(2.) ————Effect of not giving notice.] One *B* executed a bond in lieu of Rs. 100 in favor of one *C*. And as a collateral security hypothecated his "*khet naishaker*." The deed was registered on the 13th of October, 1885, *C* re-transferred the bond to *A* by an endorsement on the deed but it was neither stamped nor registered. In the meantime *B* cut down the sugarcane crops and sold the same to *F* and *G*. The present suit was brought by *A* against *B* or *F* and *G* for the recovery of the 100 rupees due upon the bond. The suit was met

ACT IV OF 1882, s. 131.—(continued.)

by the plea that *C* having given no notice of the transfer to *A*, the transfer was invalid under s. 131 of Act IV of 1882. Held that failure to give notice does not render a transfer void *ab initio* under s. 131 of Act IV of 1882. It simply affects the liability of the obligor. *KALKA PARSAD v. CHANDAN SINGH AND OTHERS*.

[VII-270]

ss. 131 and 132.—Assignment—Debt—Writing.] In satisfaction of the interest under a bond a *jamog* was come to, by which the obligee with the consent of the obligor agreed to take the rents of certain tenants, to which the tenants also agreed, Held that it was not necessary that a *jamog* like the present should be in writing (s. 131 and 132 of Act IV of 1882.) *AUTU SINGH v. AJUDHIA SAHU*.

[VII-27]

(1) s. 135.—Actionable claim—Sale by reversioner of his right.] Where a Hindu widow in possession of her husband's estate executed (without legal necessity), a deed of sale purporting to convey not merely her life interest but the entire estate, and after her death the reversioners, not being in possession, sold their interest, and their vendee brought a suit for ejectment of the widow's vendee,—held that section 135 of Act (IV of 1882) did not apply to the case. *JAMAL UDDIN KHAN AND ANOTHER v. BAIJNATH*.

[X-24]

(2) ————Transfer of dower debt.] Held that the transfer of a dower debt was a transfer of actionable claim within the meaning of s. 135 of Act IV of 1882, and the transferee could not recover more than he had actually paid for the claim. *JANI BEGAM v. JAHANGIR KHAN*.

[VII-67]

(3) ————Sale by usufructuary mortgagee out of possession of his rights.] The transfer by a usufructuary mortgagee, whose mortgagor has failed to give him possession of the mortgaged property, of his rights as such mortgagee against his mortgagor is a transfer of an actionable claim within the meaning of s. 135 of Act No. IV of 1882. *RANI AND ANOTHER v. AJUDHIA PRASAD*.

[XIV-100]

PHUL CHAND v. CHHOTE LAL AND OTHERS.

[XVIII-54]

(4) ————Simple mortgage.] The term "actionable claim" as used in s. 130 of Act No. IV of 1882, means a claim in respect of which a cause of action has already matured and which, subject to procedure, may be enforced by suit. Held that the assignment for value of a simple mortgage before the due date of the mortgage is not a sale of an actionable claim within meaning of s. 135

ACT IV OF 1882, s. 135.—(continued.)

of Act No. IV of 1882. *Rani v. Ajudhia Prasad* (I. L. R., 16 All., 315) referred to and explained. *SHIB LAL v. AZMATULLAH AND OTHERS.*

[XVI-80]

(5) ————— An assignment of a mortgagee's rights under a mortgage is not an assignment of an "actionable claim" within the meaning of s. 135 of Act No. IV of 1882. *MOTI RAM v. JETH MAL.*

[XIV-13]

VILAYAT ALI v. GULLO.

[V-282]

(6). ————— Mortgage by conditional sale—Person claiming under s. 135 not obliged to pay amount paid by assignee before judgment.] Held that a person who is entitled to claim the benefit of s. 135 of Act IV of 1882, does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. *Rani v. Ajudhia Prasad* (I. L. R., 16 All., 315), *Muchiram Barik v. Ishan Chunder Chuckerbutti* (I. L. R., 21 Cal., 568), *Jani Begam v. Jahangir Khan* (I. L. R., 9 All., 476), *Hakimunnissa v. Deo Narain* (I. L. R., 13 All., 103) and *Nila Kanta v. Krishnasami* (I. L. R., 13 Mad., 225), *PHUL CHAND v. CHHOTE LAL AND OTHERS.*

[XVIII-54]

ACT V OF 1882 (Easements).

(1). s. 4.—Easement—Right to celebrate *Holi*.] A, a Muhammadan, purchased a house adjacent to a piece of waste land on which, after such purchase, he caused a *tazia* to be erected, at the time of the *Muharram*. J. and others, Hindus, instituted a suit against A, alleging in their plaint that, for a long time previously they had been in the habit of going upon the land at the time of *Holi* festival, for the purpose of burning the *Holi* and celebrating the ceremonies incident thereto, and praying that the defendant "be restrained from improper interference, and that the plaintiffs be put in possession, by maintaining the observance of the *Holi* rights, according to the ancient usage, on the land." It was found that the plaintiffs had, for a period of twenty years prior to the institution of the suit, exercised the right of going on to the land at the time of the *Holi* festival, without interruption or interference. It was also proved that neither the plaintiffs nor the defendant had any proprietary right in the land, and that it belonged to the *samindars* of the *kasba*, who did not appear to object to its use by the defendant and other Muhammadans at the time of the *Muharram* for the erection of *Tazias*. Held that the plaintiff's claim to a right by custom appeared to

ACT V OF 1882, s. 4.—(continued.)

be a claim of the nature described in *Mounsey v. Ismay* (34 L. J., Ex. 52) and *Abbot v. Weekly* (1 *Levinge*, 176) and could not strictly be regarded as for an easement, the right not being set up in respect of any dominant tenement to which it was appertenant over a servient tenement subject to it. Held further, that inasmuch as the nature of the right claimed was to come on the land for a few days at one period of the year, it by no means followed that the plaintiffs were entitled to object to the defendants' use of the land at another period; and that, looking to the extent and nature of the said right, and to the form in which the plaint was shaped, the laying of a *tazia* upon the land at the *Muharram* could not be held to be any interference with such right sufficient to afford a cause of action on which to come into Court. *ASHRAF ALI v. JAGAN NATH AND OTHERS.*

[IV-186]

(2). ————— Right to put *tazia*.] The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his *kolhi*, and for demolition of a *chabutra* thereon. The defendants denied the plaintiff's title and alleged that they always used the *chabutra* as a sitting place, and that during the *moharram* the *tazias* and *alam*s were exhibited upon the *chabutra* and a *takht* was placed upon it. The Court of first instance found that the defendants had right to use the land in the manner claimed during the *moharram*. The lower appellate Court on the question of defendant's right to use the said land in the manner claimed by them found as follows:—"That various *mirasis*, whose connection with each other is not established, have within a period of twenty years or so placed *tazias* upon the land and sung there." Held that this finding of fact did not necessarily in law lead to the conclusion that there was a local custom by virtue of which the easement now claimed by the defendants was acquired. Where a local custom excluding or limiting the general rules of law is set up a Court should not decide that it exists unless such Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned. *KUAR SEN v. MAMMAN AND OTHERS.*

[XV-10]

(1.) s. 13.—Transfer of adjacent properties to different persons—Easement.] The owner of a house, having built up a door which gave communication between one half of the house and the other, mortgaged each half separately to separate mortgagees. One of such mortgagees reopened the door communicating with the other mortgagee's portion of the house. Held that a

ACT V OF 1882, s. 13.—(continued.)

good action would lie on behalf of the other mortgagee against him who had opened the door to compel him to close it. *LACHMI NARAIN v. JETHU MAL.*

[XIV-129]

(2).—[The plaintiffs were owners of an hotel and the defendant of certain adjacent property. The two properties had at one time been united and at that time the manager of the hotel on behalf of the owner used to obtain water for the purposes of the hotel from a certain spring by means of a road which ran over what subsequently became a portion of the defendant's land. There was another, but smaller and much less convenient path from the hotel to the spring. The plaintiffs became owners of their portion of the property in 1886, and the defendant of his portion in 1888. The plaintiffs continued to use the abovementioned road through the defendant's property for the purpose of getting water for the hotel until 1889, when the defendant refused to permit them any longer to use the road. The plaintiffs accordingly sued the defendant for a declaration of their right of way over the said road; but refused to put in evidence the deed under which they became owners of the hotel property. *Held*, upon these facts, that the plaintiffs were not entitled to any right of way over the land in question. Owing to the non-production by the plaintiffs of their title deed it must be presumed as against them that the evidence afforded thereby would be unfavorable to their claim, and no right of way in favor of the plaintiff could be shown to arise otherwise, either as an easement of necessity or as an easement the intention to grant which might be inferred. *Charu Surnokar v. Dokouri Chander Thakoor* (1. L. R., 8 Cal., 856) considered. *Maharani Rajroop Kuar v. Syed Abul Hossein* (L. R., 7 I. A., 240); *Kay v. Oxley* (L. R., 10 Q. B. 360), *Polden v. Bastard* (L. R., 1 Q. B. 156); *Worthington v. Gimson* (2. E. and E. 618, S. C. 29 L. J. Q. B. 116); *Hinchcliffe v. Earl of Kinnoul* (5 Bing. N. C. 25); *Morris v. Edgington* (3 Taunton 24); *Barkshire v. Grubb* (18 Ch. D. 616) and *Bayley v. G. W. R., & Co.* (26 Ch. D. 434) referred to. *H. WUTZLER AND ANOTHER v. MAJOR SHARPE.*

[XIII-151]

(1). s. 15.—S. 26, *Act XV of 1877 not exhaustive—Customary easement*] S. 26 of the Limitation Act (XV of 1877) is not exhaustive of the modes in which an easement or analogous right can be acquired, but merely deals with the acquisition of an easement by prescription. Therefore a suit to enforce a right of easement acquired otherwise than by prescription can not be defeated by the circumstance that the interference with the plaintiff's right occurred beyond two years prior to the suit. In a suit for the removal of certain erections which the plaintiff alleged to interfere with his

ACT V OF 1882, s. 15.—(continued.)

enjoyment, as an inhabitant of the *mohalla*, of a well and *chabutra* which had, many years before, been dedicated to the use of the inhabitants of the *mohalla*, and to have the defendants restrained from obstructing the exercise of such enjoyment, the Court made a decree, declaring the well and *chabutra* open to the user and enjoyment of all the inhabitants of the *mohalla*, and that no person had power to make any construction or encroachment thereon, directing the removal of any such encroachment by the defendant, and restraining him from doing any thing to obstruct the user and enjoyment of the property in future. *SHANKAR LAL v. MOTAR MAL AND OTHERS.*

[IX-138]

(3).—*Prescriptive easement—As against trespasser.*] The owner of a house, the light coming to which is obstructed by an erection made upon adjoining land by a person who, *qua* such adjoining land is a trespasser, may have an action against the person causing such obstruction even though he has not obtained by prescription an easement of light. But where the person causing such obstruction is the rightful owner of the adjoining land or acting with his permission, no such action as aforesaid will be against him unless the plaintiff has acquired an easement. *Jeffries v. Williams* (20 L. J., Ex. 14) and *Footoor Achanna v. Vanamala Venkamma* (5 Mad. L. J. 25) referred to. *DHUMAN KHAN v. MUHAMMAD KHAN.*

[XVII-22]

(3).—*As an easement.*] Plaintiff owned two pieces of land *A* and *D*, the latter he had purchased about ten years before the suit was instituted. He claimed a right of way over another piece *B* situate between the two. It, however, appeared that up to the year 1881 he had claimed this plot of land as his own. *Held* that no right of easement could under the circumstances be established. Because so long as the plaintiff claimed the plot as his own he necessarily set up no pretensions as to a right of way over it, as an easement, and if his vendor had that right and plaintiff claimed through him it was lost to him on account of his claim to the plot *B* as owner, a right of ownership and easement being incompatible. *JALAL-UDDIN v. ASAD ALI.*

[III-66]

(4).—[*B* claimed an easement upon the land of *A*. It appeared that for a period of twenty years before April, 1877, such easement had been enjoyed by *B*. From April, 1877, to July, 1878, *B* had been in possession of such land as a trespasser. This suit was instituted by *A* in October, 1879. It was contended by *A* that the possession of *B* from April, 1877 to July, 1878, even as a trespasser, over the servient tenement had the effect of extinguishing the easement as the seizin of the two tenements had been

ACT V OF 1882, s. 15.—(continued)

united in the same person and that being so it was contended that B did not enjoy the easement *qua* easement, within two years next before the suit. *Held* that an easement may be acquired in ways other than those provided in the Limitation Act. That in the present case it may reasonably be presumed that such lengthened and undisturbed possession had a legal origin in an express or implied grant by, or in some agreement between the owners of the two tenements. *SHEIKH BHUSAI v. MATA PRASAD.*

[II-78]

(5) s. 15, Exp (1.) *Tenant.* A tenant cannot as against his landlord acquire by prescription an easement in favor of the land which he holds as such tenant over other land belonging to his landlord. *UDIT SINGH AND OTHERS v. KASHI RAM.*

[XII-88]

(1). s. 18.—*Customary easement—Right to celebrate holi.*

See s. 4, No. (1).

(2). ————— *Right to lay tazia.*

See s. 4, No. (2).

(8). ————— *In a bathing ghat.* *Held* that no exclusive right of occupation could be acquired by prescription in any specific portion of a bathing *ghat* the use of which was dedicated to the public. *Husain Ali v. Matukman (I.L.R., 6 All., 39), Tyron v. Smith (9 A. and E. 406) and Turner v. Ringwood Highway Board (L.R. 9, Eq. 418)* referred to. *THE MUNICIPAL BOARD OF CAWNPORE v. LALLU AND ANOTHER.*

[XVIII-25]

(4). ————— *Right of privacy.* *Held* that the right of privacy if established by local custom is a right which the Courts in India are bound to maintain. *LACHMAN PRASAD v. JAMNA PRASAD AND OTHERS.*

[VII-295]

(5). —————] A customary right of privacy, under certain conditions, exists in India and in the N.-W. P. and is not unreasonable, being merely an application of the maxims, *sic uteretur ut alienum non laedat* and *aedificare in tuo proprio solo non licet quod alteri noceat*. A substantial interference with such a right, where it exists, if without the consent or acquiescence of the owner of the dominant tenement affords such owner a good cause of action. Each case in which such a right is in dispute, must be decided upon its own facts, the primary question in all cases being whether the privacy in fact, and substantially exists, and has been and is in fact enjoyed. If this is answered in the negative,

ACT V OF 1882, s. 18.—(continued.)

no further question arises. If in the affirmative the next question is whether the privacy has been substantially interfered with by acts done by the defendant without the consent or acquiescence of the person seeking relief against such acts. In the case of a building for *purdah* purposes newly erected without the acquiescence of the owner of an adjacent building site, a custom preventing such owner from so building as to interfere with the privacy of the first new building would be unreasonable and consequently bad in law. But if such adjacent owner, without protest or notice, allowed his neighbour to erect and consequently to incur expenses in connection with a building for the use of *pardahnashin* women, a custom preventing him from interfering with the privacy of such new building would not be unreasonable in India. The Indian case law relating to the right of privacy reviewed. *GOKAL PRASAD v. RADHO.*

[VIII-135]

(6). —————] The customary right of privacy which prevails in various parts of the North-Western Provinces is a right which attaches to property and is not dependent on the religion of the owner thereof. *ABDUL RAHMAN v. D. EMILE. D. EMILE v. ABDUL RAHMAN.*

[XIII-217]

(7). —————] Where a right of privacy is claimed it must be shown in such case that the right actually exists and is enjoyed in respect of the specific premises on behalf of which it is claimed. No such right can in respect of a *baithak* or sitting room appropriated to males. *SITAL OJHA v. REKHA AND OTHERS.*

[XII-159]

s. 23.—*Right to alter mode of enjoyment.* Where the defendants, who were found to have a right of letting the rain-water flow generally from their roof on to the plaintiff's land, collected all such water and discharged it on to plaintiff's land through one spout:—*Held* that this amounted to an alteration of the easement rendering it more onerous on the plaintiff's land and that the original condition of the roof should be restored. *ABDUL GHAFUR AND ANOTHER v. ABDUL MAJID.*

[XII-239]

s. 28 (c). *Extent of easement.* The plaintiff in this case, alleging that the defendant was building a second storey to his house, thereby obstructing the light of his (plaintiff's) house and rendering it less fit for use for the manufacture of embroidery which he had carried on for fifty years sued the defendants for the demolition of the upper storey and for an injunction restraining him from raising his house any higher. *Held* that the proper issue in the suit was, does the defendant's house as so far built, or will it, if its erection is proceeded with

ACT V OF 1882, s. 28 (c).—(continued.)

appreciably darken the room in which the plaintiff carries on his trade as a weaver and render him less able to do so than before. *NUR MUHAMMAD V. ALIM-ULLAH*.

[III-256]

s. 35.—Injunction—Damages.] Where the plaintiff had for over twenty years carried the business of manufacturing a particular kind of cloth in a certain house, and the defendant built in the neighbourhood of that house in such a manner as to render the plaintiff's house practically useless for the purposes of his manufacture; it was held that the plaintiff was entitled to injunction and not merely to damages. *Aynsley v. Glover* (L.R. 18 Eq. 544) and *Holland v. Worley* (L.R., 26 Ch. D., 585) followed. *Dhunjibhoy Cowasji Umrigar v. Lisboa* (I.L.R. 13 Bom., 252) and *Ghanasham Nilkant Nadkarni v. Moroba Ram Chandra Pai* (I.L.R., 18 Bom., 476) referred to. *YARO V. SANA-ULLAH*.

[XVII-43]

s. 46.—Extinction of easement by unity of ownership.] It is true that a man cannot acquire a right of easement upon his own land and this principle may possibly extend to joint co-sharership of land. But the mere circumstance of one becoming a joint co-sharer after a right of easement has been acquired does not extinguish the right. Therefore under sec. 46 of the Easement Act absolute ownership does, but a qualified ownership does not extinguish a right of easement. *JAMALUDDIN AND ANOTHER V. KAMALUDDIN*.

[VII-260]

s. 60.—License—Revocation.] In a suit by a *zamindar* to have his right declared to build a house on some waste land in the *mauza*, the defendants, who were tenants in the *mauza*, resisted the claim on the ground that they had built wells, and water-courses on the land, and had a right also to use it as a threshing-floor and for stacking cow-dung. Held that the defendants having acquired no right adverse to the plaintiff as owners, by prescription or otherwise, in the land, their right of use could only be as licensees of the plaintiff; and although he could not interfere with their right to the wells, which were works of a permanent character, and on which the defendants had incurred expenses, he could revoke the license as to the other use claimed of the land, and his claim to build the house should therefore be decreed. *THE LAND MORTGAGE BANK OF INDIA V. MOTI AND OTHERS*.

[VI-3]

ACT VI OF 1882 (Companies.)

Director—Fiduciary character.] A director of a company, though he may occupy a fiduciary position with regard to the share-holders collectively, holds no such position with regard to individual share-holders. *Gilbert's case* (L.

ACT VI OF 1882,—(continued.)

R., 5 Ch. 559); and *Gower's case* (L.R., 6 Eq. 77) referred to. *C. WILSON V. M. MACAULIFFE*.

[XV-158]

s. 28.—Applicability of section to company registered under Act X of 1866.] Prior to the 1st May, 1882, the Secretary and Manager of a projected company (which was to be limited by shares) applied to the Registrar of Joint stock companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did every thing that was required to be done by or on behalf of the company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and, owing to delay for which the applicants were not responsible, registration was not effected, and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May, 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, s. 28 of which provided that every share in any company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The share-holders of the company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently, the company having gone into liquidation, the Official Liquidator sought to make the share-holders contributories to the assets of the company as the holders of shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act of 1882. Held that the proceedings for obtaining registration of the company and a grant of a certificate of such registration, commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April, 1882, while Act X of 1866 was in force; that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the company must be taken to have been incorporated under the former Act; and that, the provisions of s. 28 of Act VI of 1882 not being applicable, the share-holders were not liable to be placed on the list of contributories as not having paid the full amount of their shares. The Official Liquidator's application to place the share-holders upon the list of contributories having been *bonâ-fide* made in the liquidation, the Court ordered that the costs of each side should be paid as a first charge out of the estate. *IN THE*

ACT VI OF 1882, s. 28.—(continued.)

MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.

[IX-119]

s. 45.—Member.] The Cotton Ginning Company was registered in 1883 as a limited liability company and in 1886 an order for its winding up was made and it is now in liquidation. One of the promoters of the company, before it was registered, asked the appellants if they would take some shares in the intended company. After some conversation *D P*, one of the appellants, with the assent of his partner, the other appellant, entered their names in a rough memorandum book for 50 shares and requested that a prospectus should be sent to them. Two days after *A P*, one of the appellants, stated that he would pay the deposit in a month. All this however took place prior to the signing of the memorandum of association and the registration of the company. After the company had been registered a call in respect of 80 shares was made upon the appellants when they denied all liability and declined to be members of the company. From that time until the present proceedings nothing was done to test the liability of the appellants. According to the register 50 shares were, in 1883, allotted to the appellants. There is no evidence that any notice of allotment was sent to the appellants. The District Judge of Cawnpore ordered that the appellants should be entered in the list of contributors of the company, in liquidation, as present members in respect of 50 shares. This is an appeal from that order. *Held* that on the facts stated above the appellants did not intend to authorise any one to act as their agent in obtaining an allotment of shares and that after the company was registered the appellants never offered or promised to take any share in the company, and never acted as share-holders or adopted the allotment of the 50 shares. There was therefore no case made out against the appellants. *Held* further that the Court was competent and under the present circumstances justified in granting extension of time to the appellant for giving the notice required by s. 169 of Act VI of 1882. *Held* further that as the appellants were represented at the enquiry and took part in it, and one of them gave evidence in support of their case and no protest or objection was made by them, it was not open to them to object to that inquiry on the ground that it was held on a closed holiday. *AJUDHIA PRASAD AND ANOTHER v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY, LIMITED CAWNPORE.*

[VII-57]

s. 55.—Inspection of register.] Where a person who is entitled under the provision of s. 55 of the Indian Companies Act, 1882, to obtain inspection of the register of share-holders of a company applies for inspection during business hours and not at a time when inspection is prohibited, either under s. 56 or by reasons of any rules framed by the company under s. 55. Such

ACT VI OF 1882, s. 55.—(continued.)

inspection must be granted, and even a temporary refusal, based upon grounds of convenience to the companies' business, will render a director responsible for such refusal liable to the penalty provided for by s. 55. *QUEEN-EMPRESS v. A BEER.*

[XVII-223]

s. 130.—"Court."] *Held* that with regard to a company the registered office of which was at Mussoorie, "the Court," as that term is used in part IV of Act VI of 1882, meant the Court of the District Judge of Saharanpore and not that of the Subordinate Judge and Small Cause Court Judge sitting at Mussoorie or Dehra. *THE HIMALAYA BANK, LIMITED, COMPANY IN LIQUIDATION, v. J. W. QUARRY AND ANOTHER.*

[XV-97]

(1). s. 144—Form of plaint.] *Held* that a plaint in a suit by a Bank in liquidation in which the plaintiff was described as The "Official Liquidator, Himalaya Bank Limited, in liquidation" and which was also subscribed and verified in the same terms was not a valid plaint having regard to the terms of s. 144 of the Indian Companies Act, 1882, and that the defect could not be cured by amendment. *In re Winterbottom (L.R., 18 Q. B. D., 446)* referred to. *GHULAM MUHAMMAD v. THE HIMALAYA BANK LIMITED, IN LIQUIDATION, THROUGH THE OFFICIAL LIQUIDATOR.*

[XV-81]

(2). —————.] In a suit to recover a debt due to a company which had gone into liquidation the plaintiff was described in the plaint as "The Official Liquidator, Himalaya Bank, Limited, in liquidation," and the plaint was subscribed and verified in the same terms. On objection taken by the defendant, the plaint was allowed to be amended, but after the period of limitation prescribed for the suit had expired, so as to read "The Himalaya Bank, Limited, in liquidation, plaintiff." *Held* by the Full Bench that the plaint as originally filed was in substantial compliance with the provisions of Act No. VI of 1882; and that even if it might be considered that the amendment made was necessary, such amendment did not introduce a new plaintiff into the suit so as to let in the operation of s. 22 of Act No. XV of 1877. *Ghulam Muhammad v. The Himalaya Bank, Limited, (L. R., 17 All., 292)* overruled. *In re Winterbottom (L.R., 18 Q. B. D., 446)* distinguished. *MUHAMMAD YUSUF v. THE HIMALAYA BANK, LIMITED.*

[XVI-28]

(3). —Sanction to sell.] The power of the Court under s. 144 (c) of Act VI of 1882 to give sanction to an Official liquidator to sell the property of the company, overrides a private contract against assignment made by the company. *IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED,*

[X-71]

ACT VI OF 1882, —(continued.)

s. 162.—*Appeal.*] No appeal will lie from an order under s. 162, Act VI of 1882, by which a Court declines to continue an investigation commenced by it under that section. *R. WALL AND ANOTHER v. J. E. HOWARD AND OTHERS.*

[XVI-39]

(1.) s. 169.—*Review—Secured and unsecured creditors.*] S. 169 of Act No. VI of 1882 is not intended to refer to a case in which a Judge upon the discovery of fresh matter considers it expedient to pass a fresh order or to review an order passed by him. *In re The National Assurance and Investment Association ex parte Munday* (31 *Beavan* 206) referred to. There being no provision in the Indian Statute law by which in the winding up of a company secured creditors are entitled to any preference over unsecured creditors; in such proceedings the rule of English Law—that secured creditors can only prove for the balance of their debts after deducting the value of their securities, should prevail, as being consonant with justice equity and good conscience. *Waghela Rajsanji v. Shekh Mosludin* (L. R. 14 I. A. 89) referred to. *THE MUSSOORIE BANK, LIMITED, v. THE HIMALAYA BANK, LIMITED.*

[XIII-205]

(2)———*Appeal—Letters Patent.*] No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act VI of 1882 (Indian Companies Act) for extension of time for serving notice of an appeal under that Act; such order not being a judgment within the meaning of s. 10 of the Letters Patent. *Banno Bibi v. Mehdi Husain* (I. L. R., 11 *All.*, 375); *Muhammad Naimullah Khan v. Ihsanullah Khan* (I. L. R., 14 *All.*, 226); *Kishen Pershad Panday v. Tiluckdhari Lall* (I. L. R., 18 *Calc.*, 183); *Lutf Ali Khan v. Asgur Resa* (I. L. R., 17 *Calc.*, 455); *Hurrish Chunder Chowdhry v. Kali Sundari Debia* (L. R., 10 I. A., 4); *Mahabir Prosad Singh v. Adhikari Kunwar* (I. L. R., 21 *Calc.*, 473); *Lane v. Esdaile* (L. R. 1891, *App. Cas.*, 210); *Kay v. Briggs* (L. R., 22 *Q. B. D.*, 343); *The Amstil* (L. R., 2 *P. D. N. S.*, 186) and *Ex parte Stevenson* (L. R. 1892, *Q. B. D. vol. 1.*, 294), referred to. *R. WALL AND ANOTHER v. J. E. HOWARD AND OTHERS.*

[XV-89]

(1) s. 214.—*Appeal—Court-fees.*] An order under s. 214 of Act No. VI of 1882 (Indian Companies Act) is not a decree or an order having the force of a decree and consequently an appeal from such an order to a High Court is properly stamped, with reference to Act No. VII of 1870 (Court Fees Act), Sch. ii, Art 11 (δ), with a Court Fee stamp of Rs. 2. (REFERENCE UNDER s. 28 OF ACT NO. VII OF 1870, FEBRUARY 6.)

[XV-56]

ACT VI OF 1882, s. 214.—(continued.)

(2)———“*Officer—Auditor.*”] An auditor of a company to which Act No. VI of 1882 applies, who is duly appointed by a general meeting of the company and not casually called in as occasion may require, is an officer of the company within the meaning of s. 214 of the abovementioned Act. *In re. (The London and General Bank Ltd., (The Accountant, May 4th, 1895)* referred to. The compensation which, under s. 214 of the Indian Companies Act, 1882, may be assessed against a defaulting director or other officer of a company, is of the nature of damages; it is therefore necessary that the loss to the company in respect of which compensation is asked for should be the direct and not a remote and more or less speculative consequence of the misfeasance or neglect of duty on the part of the director or other officer of the company from whom such compensation is sought. The special proceeding provided for by s. 214 of Act No. VI of 1882 is not subject to the limitation prescribed by art. 36 of sch. ii of the Indian Limitation Act, 1877. *D. CONNELL v. THE HIMALAYA BANK, LD., IN LIQUIDATION.*

[XV-136]

(3.) s. 214, Expl. (ii).—*Legal representative.*] *R W* and others, contributories to a company which had gone into liquidation, filed an application under s. 214 of Act No. VI of 1882, directed against certain officers of the company. That application was dismissed, and an order was also made giving costs against the applicants. The applicants appealed to the High Court against the order of dismissal. Pending this appeal one of the opposite parties died, and it was sought to put his legal representatives upon the record of the appeal as a respondent. *Held*, that in view of explanation II to s. 214 of the Indian Companies Act, 1882, the legal representatives of the said deceased respondent could not be brought upon the record, either in respect of the relief prayed for in the original application or in respect of the order making costs payable by the applicants, as that order could not be separated from the dismissal of the application. *R. WALL AND ANOTHER v. J. E. HOWARD AND ANOTHER.*

[XVI-28]

s. 215.—*Making false balance sheet—Offence.*] *Held* that the making of a false balance sheet by the Directors, Manager and Accountant, of a company dishonestly, that is, to obtain wrongful gain for themselves or to cause wrongful loss to others, where it is made prior to the commencement of the winding up of the company, is not an offence within the meaning of s. 215 of Act VI of 1882. *QUEEN-EMPRESS v. MOSS AND OTHERS.*

[XIV-23]

s. 219.—*Power of High Court to transfer proceedings.*] There is nothing in the Indian Companies Act (VI of 1882) or the High Courts Act (24 and 25 *Vic. C.* 104) or the Letters Patent, which prevents the High Court from calling for the

ACT VI OF 1882, s. 219.—(continued.)

record of the proceedings in the winding up of a company under the Companies Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25 of the Civil Procedure Code. Where, in the proceedings in the winding up of a company under Act VI of 1882, an order was passed admitting the proof of a particular creditor of the company before any liquidator had been appointed. *Held*, that this was an irregularity which by itself would justify the High Court in sending for the record. Where the District Judge conducting the proceedings in the winding up of a company under Act VI of 1882 had, after receiving notice of the admission by the High Court of a petition for transfer of those proceedings to its own file, drafted and placed upon the record an order which it might have been difficult for him to re-consider if the matter again came before him, and where the case appeared to be one in which serious questions of law were likely to arise which it would probably be difficult to discuss adequately in the district Court, in the absence of the authorities upon the subject and of any rules framed by the High Court for dealing with winding up under the Act, and the case was of a kind which would probably come before the High Court in a variety of appeals from orders brought by one side or the other. *Held* that under these circumstances, the case was a proper one for the exercise of the High Court's jurisdiction by calling up the winding up proceedings to its own file. A person who has been appointed liquidator of a company, ought not, after such appointment, to continue to act as vakil of a creditor whose right to prove against the company is in dispute in the liquidation. **IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY LIMITED.**

[VII-7]

s. 9.—It is the duty of the licensee of a salt factory under Act XII of 1882 to see that no salt issued from his factory escapes the payment of the Government revenue, and if any such evasion occurs, he will be criminally liable, unless he can show not only that he is not personally cognizant of the evasion but that he has exercised due care in the supervision of those employed by him in the factory. **IN THE MATTER OF THE PETITION OF LATI RAM.**

[XI-181]

ACT XV OF 1883. (N.-W. P. and Oudh Municipalities.)

(1.) s. 55.—Bye-laws.—Presumption of legality. Where a person was tried for and convicted of a breach of certain bye-laws purporting to have been duly passed by a Municipal Board, it was *held* that the presumption was that such bye-laws had been passed with due regard to the necessary procedure and were not illegal, and that it lay upon the accused to object to their validity and was no part of the duty of a Court exercising appellate or revisional jurisdiction to enter of its own

ACT XV OF 1883, s. 55.—(continued.)

motion into the question whether such rules had been properly framed in accordance with the provisions of the law on that subject. *The Municipality of Sholapur v. The Sholapur Spinning and Weaving Company* (1. L. R., 20 Bom., 732) referred to. **QUEEN-EMPRESS v. RAM CHANDAR.**

[XVII-133]

(2.) s. 55, cl. (c).—Nuisance—Market.—Maintenance. Clause (c) of s. 55 of Act XV of 1883 was not intended to empower a Municipal Board to make rules which would enable it to confiscate private rights without making any compensation, or to treat as nuisances acts which are not in law or with regard to public health or convenience capable of being considered nuisances. The clause was meant to give to Municipal Boards power to make rules for prohibiting the establishment of markets, that is, to prevent new markets being established, and to give them power to control the maintenance of existing markets or of markets which might be established with their sanction. By "maintenance" is meant the keeping up of a market in such a manner as would make it a fit place for the carrying on of a market having regard to public health and public convenience. **GANGA NARAIN v. THE MUNICIPAL BOARD OF CAWNPORE.**

[XVII-65]

(3.) s. 55 (2).—Continuing breach. *Held* that the maintenance of a *chabutra*, the demolition of which had been ordered under s. 42 of the bye-laws of the Allahabad Municipality passed in accordance with s. 55 of Act No. XV of 1883, was not a "continuing breach" within the meaning of paragraph 2 of s. 55 of the said Act. **QUEEN-EMPRESS v. SALIG PRASAD.**

[XV-223]

s. 69.—Complaint. Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied. A District Magistrate, who was also Chairman of a Municipal Board having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November, 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1868, (Municipal Improvements Act, N.-W. P.) which authorized the making of "rules as to the persons by whom, and the

ACT XV OF 1883, s. 69.—(continued.)

manner in which any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes." *Held* that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf. *Held* that the position of the Magistrate of the district in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside. **EMPRESS v. YUSUF KHAN.**

[VI-267]

ACT XIII OF 1885 (Telegraphs.)

s. 25.—The mere fact that an accused person has pointed out the spot, not being a place under his control, where stolen property is found concealed, is not sufficient by itself to justify the conviction of such person for having either received or retained such property knowing it to have been stolen. *Queen-Empress v. Gobinda* (W. N. 1895, p. 226) followed. **QUEEN EMPRESS v. NIRPAT.**

[XV-229]

ACT XVII OF 1886. (Jhansi and Morar).

Legislative power of the Governor-General in Council. Act XVII of 1886 (The Jhansi and Morar Act) is not *ultra vires* of the Governor-General in Council; and the town and fort of Jhansi are subject to the jurisdiction of the High Court, for the N.-W. Provinces in the same manner as the rest of the Jhansi district. The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those Indian territories which were, at the date when the Indian Councils Act, 1861, 24 and 25 Vic. C. 67, received the royal assent (the 1st August, 1861), under the dominion of Her Majesty. In the preamble to the 28 and 29 Vic. C. 17, and in s. 1 of the 32 and 33 Vic. C. 98, Parliament has placed this construction upon s. 22 of

ACT XVII OF 1886.—(continued.)

the Indian Councils Act. Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *The Post Master General of the United States v. Early* (Curtis, 86) referred to. It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. *Empress v. Burah* (I. L. R., 3 Cal., at p. 143) and (I. L. R., 4 Cal., p. 183) referred to. **ABDULLA v. MOHAN GIR AND OTHERS.**

[IX-194]

s. 8—*Continuance of pending suits.* Prior to the cession of the town of Jhansi to the British Government, plaintiff had instituted a suit in the *Subah's* Court in the Gwalior State on a judgment of the British Court in Jhansi district. After the cession, the suit was made over for trial to the Court of the Assistant Commissioner of the Jhansi district. The suit was dismissed by the first Court as barred by s. 13 of the Code of Civil Procedure but remanded by the lower appellate Court for trial on the merits. *Held*, that the recital in part II of Act XVII of 1886 shows that it was intended that suits pending in the Courts of the Gwalior State prior to the cession of the town of Jhansi to the British Government should be continued in the Courts of the Jhansi district after the cession thereof; therefore the present suit, which if it had been originally instituted in a Court of British India could not have been maintained, being an action on a judgment of a Court of British India, was a good and maintainable action in the Court where it was instituted, and is to be deemed to be a properly instituted suit to which in other respects the law of the Courts of British India may now be applied. *King v. Hoare*, (13 M. and W., 504) referred to as illustrating the distinction between an original cause of action and cause of action founded upon a judgment recovered on the original cause of action. **SALONI AND ANOTHER v. HAR LAL.**

[VIII-183]

ACT XXII OF 1886 (Oudh, Rent.)

(1.), s. 3 (5) & (10)—*Rent—Thikadar—Service tenure.* *Held* that the personal services rendered in return for the occupation of land do not constitute rent within the meaning of the definition contained in s. 3, cl. (5) of the Oudh Rent Act, and that a person holding on a service tenure is not a tenant or *thikadar* within the meaning of s. 3, cl. (10) of the Act, liable to summary ejectment by notice under s. 55. **DHAN KUAR AND ANOTHER v. BHAGWATI PRASAD MINOR UNDER THE COURT OF WARDS.**

[XIV-77]

(2.) s. 3 (10.)—*Thikadar—Bhuiukat thika.* *Held* that the holder of a clearing cultivating lease (such as a *bhuiukat thika*), for an unspecified term, though called a *thikadar*, is not a

ACT XXII OF 1836. s. 8 (10).—(continued.) *thikadar* within the meaning of s. 3, cl. (10) of the Oudh Rent Act, but an ordinary statutory tenant under ss. 36 and 37 of the Act, and that notice of ejectment issued to him must be duly stamped under s. 55, cl. (3) of the Act. SWAMI DYAL v. NABI BAKHS.

[XIII-81]

s. 4 (3).—*Reclaimed land—Occupancy right.* Held that a tenant, cultivating land from year to year without a *patta* or contract in respect to the land, is not debarred by s. 4, cl. (3) of the Oudh Rent Act, from a statutory right of occupancy under s. 37 of the Act. HARDIAL SINGH v. BHAYA TRIBHOWAN DAT RAM.

[XIII-77]

s. 5.—*Agreement as to rent.* Held that ss. 5, 33, and 34 of the Oudh Rent Act do not make invalid an agreement as to the amount of rent payable by an occupancy tenant or the period for which the amount agreed upon shall hold good without enhancement. BHABUTI SINGH AND OTHERS v. BAKAR HUSAIN AND OTHERS.

[XIII-23]

s. 33.—*Enhancement of rent.* Held that where an occupancy tenant's *khata* (holding) consists partly of cash-rented fields each separately assessed to rent, and partly of grain rented lands, the landlord's suit for enhancement upon the cash-rented field need not necessarily be dismissed as inadmissible on the ground that all the fields of the *khata* have not been included in it. Held also that when a point is for the first time raised in appeal by either party or taken by the Court, the provisions of s. 542 of the Code of Civil Procedure must be strictly observed, and the appellate Court should not rest its decision upon that point without allowing the opposite party a sufficient opportunity of contesting it. Held also that when a Court is held in camp, a party failing to appear should not be treated as absent unless due notice of the place where, and time when, the case is to be heard, has been given to him and due time allowed to him to appear. MUHAMMAD HUSAIN v. UMRAO AND OTHERS.

[XIII-175]

ss. 33 and 34.—*Agreement as to rent.*

See s. 5.

ss. 33 and 35.—*Determination of rent.* Held that where a decree of Settlement Courts had determined the occupancy of the holders of land to be, from a certain date, a right of occupancy, their right as mortgagees having terminated, the Rent Court was thereafter bound to fix the rent of the land strictly in accordance with the terms of ss. 33, 35 of the Oudh Rent Act. AZIM ALI KHAN v. SHANKAR SINGH AND OTHERS.

[XIII-83]

ACT XXII OF 1836.—(continued.)

ss. 33 and 40.—*Enhancement of rent.* Held that a rent fixed under s. 40 of the Oudh Revenue Act cannot be enhanced in a suit brought under s. 33 of the Oudh Rent Act. Held also, that use of the word *kabcadari* in a decree made at last settlement is not to be invariably construed to mean right of occupancy. The meaning to be attached to the term must be ascertained from careful consideration of the claim made before, and the judgment recorded by the Settlement Court. BINDHA SINGH AND ANOTHER v. ILAHI KHANAM.

[XIII-75]

ss. 36 and 37.—*Thikadar—Bankat Thika.*

See s. 3 No. (2.)

(10.) s. 37.—*Reclaimed land—Occupancy right.*

See s. 4.

(2.) ——— *Thikadar—Landlord.* Held that the terms of s. 37, Oudh Rent Act, do not preclude the *thikadar*, of a *mahal* from being considered as a landlord. Held further that, in the case of a leased *mahal*, it is for the land owner to show as against the tenants who have been admitted to tenancies by the *thikadar*, (a) that he restricted his *thikadar's* ordinary powers as a landlord and made the restriction known to the tenants: (b) that the transactions between the *thikadar* and the tenants were not made in good faith, in the ordinary course of village business and management. LAL v. RAJA UDEY PARTAP UDYA DAT SINGH.

[XIII-8]

(3.) ——— *Fresh lease—Fresh admission.* Held that the grant of a fresh lease to a tenant who has already occupied land for seven years is a fresh admission to the tenancy under s. 37 of the Oudh Rent Act, although the area and rent of the holding entered in the new lease are the same as previously. BENI MADHO BAKHSI SINGH v. DEBI KURMI.

[XIII-78]

s. 40.—*Enhancement of rent.*

See ss. 33 and 40.

s. 52.—“*Decree.*” Held that an order passed in a summary revenue case in 1861, maintaining an ordinary tenant in occupation at the rent he was then paying, was not a decree of Court within the meaning of section 52 and 71 of the Oudh Rent Act. MCLAINI BIBI v. NAIR RAM.

[XIII-3]

(1) s. 54.—*Suit to eject—Tenant-at-will.* Held that in the case of tenants to whom s. 54 of the Oudh Rent Act applies, ejectment by suit is not a form of procedure recognized or

ACT XXII OF 1886, s. 54.—(continued.)

permitted by the Rent Act; and that suits of this kind can not be brought under s. 108, cl. (4). **HASAN ASKARI v. BALMAKUND.**

[XIII-5]

(2)———*Suit to eject—Tres passer.*] *Held* that an occupant under s. 127 of the Oudh Rent Act may be treated as a tenant, and may therefore, under s. 54 and the following sections, be ejected by notice. **DILRAJ KUAR v. SALAR BAKHSH AND ANOTHER.**

[XIII-5]

(1) s. 55.—*Rent—Thikadar—Service tenure.*]

See s. 3, No. (1)

(2)———*Thikadar—Bhuinkat Thika.*]

See s. 3, No. (2).

(3)———*Ejectment—Notice—Particulars.*] *Held* that where a notice of ejectment is drawn up in regard to the plots, areas and rent of land recorded against a tenant in accordance with the rent-roll, it should not be cancelled as informal because on inquiry it turns out that one of the plots contained in it is held on a tenure from which a tenant can not be ejected by notice under s. 54 of the Rent Act. The plot so held should be struck out of the notice, and the ejectment, if otherwise lawful, allowed in respect to the rest. **BHAN PERTAB SAHI v. RAM LAL.**

[XIII-186]

s. 56 (b)—*Heritable occupancy.*] *Held* that if in a suit to contest a notice of ejectment under s. 108, cl. (8) of the Oudh Rent Act, heritable occupancy is claimed by virtue of a cultivating lease, the terms of the document must make it clear that the tenure created thereby was a heritable one, other than the ordinary statutory tenure. **NABI BAKHSH AND OTHERS v. MUHAMMAD MOHSIN ALI.**

[XIII-82]

s. 71.—“*Decree.*”]

See s. 52.

(1). s. 108 (2)—*Equitable rent—Determination of.*] *Held* that a suit for determination of a fair and equitable rent may not be separately brought under s. 127 of the Oudh Rent Act, the fair and equitable rent payable under that section being determinable in a suit for arrears of rent under s. 108 (2) of the Act. *Held* also that a suit for arrears of rent payable under s. 127 of the Oudh Rent Act cannot lie against a person whose occupation of the land has been judicially determined to have been *prima facie* not without consent of the landlord. **BHABHUTI AND OTHERS v. KUAR SUMER SINGH AND ANOTHER.**

[XIII-21]

ACT XXII OF 1886, s. 108.—(continued.)

(2). s. 108, cl. (8)—*Rent Act Rulings II and X of 1871 and XVII of 1874 explained and re-affirmed.* **MAIN SINGH v. MUHAMMAD MUMTAZ ALI KHAN.**

[XIII-118]

(3). s. 108 (9 c)—*Illegal ejectment.*] *Held* that an ejectment by means of a notice which has been held by a competent Court to be illegal, is an illegal ejectment within the terms of s. 108, (9 c), Oudh Rent Act. **KHARESURI v. MAHARAJA PERTAB NARAIN SINGH.**

[XIII-4]

(4).———*Compensation—Cause of action.*] *Held* that in a suit for compensation for illegal ejectment brought by a tenant or under-proprietor under s. 108 (9) (c) of the Oudh Rent Act, the cause of action under s. 129 of the Act will continue to accrue till the date of the tenants' or under-proprietor's recovery of occupancy. **KASHI NATH SINGH, MINOR UNDER THE GUARDIANSHIP OF MUSSAMMAT SUKHDAI v. SHAMJU AND ANOTHER**

[XIII-17]

(5). s. 108 (10)—*Admission.*] *Held* that the acceptance of the rent of land by a landlord from the occupant is not necessarily proof of the admission of the occupant to a statutory tenancy by the landlord. The circumstances under which the rent was accepted must be taken into account before it can be construed as such an admission. **TILAK KUAR v. RAGHUBAR SINGH, KACHHWAHA.**

[XIII-16]

s. 116.—*Third appeal to the Board of Revenue.*] *Held* that the terms of s. 116 of Act XXII of 1886, as amended by Act XX of 1890, must be construed with reference to the provisions of the Code of Civil Procedure, and that there can be no third appeal to the Board of Revenue in suits under the Oudh Rent Act. **RAM CHARAN LAL v. NAZNIN BEGAM.**

[XIII-4]

(1) s. 127.—*Suit to eject—Trespasser.*]

See s. 54, No. (2).

(2)———*Equitable rent—Determination of.*]

See s. 108, No. (1).

s. 129.—*Compensation—Cause of action.*]

See s. 108, No. (4).

s. 135.—*Enhancement of rent.*]

See s. 33.

ACT VII OF 1887.—(Suits-valuation.)

s. 4.—*Valuation*] *Held* that as up to the present time no rules have in these Provinces been framed for the determination of the value

ACT VII OF 1887, s. 4.—(continued.)

of land or interest in land, suits relating to which would fall under the Court Fees Act, 1870, s. 7, paragraphs 5 and 6 and paragraph 10, clause (d). The only restriction placed upon valuation by Act VII of 1887 is according to s. 4 of the Act not in force and does not apply and the Court is left without any guide. It was therefore for the plaintiff to put his own valuation on the relief which he claims. *Keshava Sanabhaga v. Lakshmi Narayana*, (J. L. R., 6 Mad., 192) dissented from. **SHEO DENI RAM AND ANOTHER v. TULSHI RAM AND OTHERS.**

[XIII-147]

s. 8.—Valuation of suit. A suit to eject a tenant at fixed rates is a suit for the possession of land within the meaning of paragraph 5, s. 7 of the Court Fees Act, 1870, and the valuation of such suit for the purposes of Court Fees and of jurisdiction is the value of the subject matter of the suit, that is to say, of the tenant right, not of the land itself nor of merely one year's rent. **RAM RAJ TEWARI v. GIRNANDAN BHAGAT AND OTHERS.**

[XII-240]

See also

RADHA PRASAD SINGH v. PATTAN OJAH AND ANOTHER.

[XIII-148]

s. 11.—Under-valuation—Merits. Where the value of the subject matter of a suit originally heard by a Deputy Collector was more than Rs. 5,000, but an appeal was preferred to and decided by the District Judge, without any objection on the ground of under-valuation,—*held*, with reference to s. 11 of Act VII of 1887 that the High Court in second appeal could not entertain any such objection. **KISHEN LAL v. V. RUP CHAND AND ANOTHER.**

[IX-169]

SHEODENI RAM AND ANOTHER v. TULSHI RAM AND OTHERS.

[XIII-147]**ACT IX OF 1887. (Provincial Small Cause Courts)**

See also Act XI of 1865—

(1). **s. 15.—Breach of contract.** (Act XI of 1865.) The plaintiff sued in a Court of Revenue to recover Rs. 98 principal and Rs. 28-11-9 interest, total Rs. 126-11-9, balance of contract money from 21st March, 1879, to 1st September, 1881, in respect of produce of gardens and scattered trees situate within the limits of the "Allahabad cantonments." The Judge of such Revenue Court being doubtful whether the suit was cognizable by the Revenue Court the case was referred to the High Court under s. 205 (a) of Act XII of 1881. The Revenue Court made the following order in the matter:—"B is a contractor of the fruit of trees

ACT IX OF 1887, s. 15.—(continued.)

situate within the limits of the Allahabad Cantonment. On an inspection of the *kabuliyat*, executed by the aforesaid contractor and the evidence of D H a cantonment servant, it appears that the contract with the defendant was not made in respect of any particular land with the area, number, or name of the field specified but the terms of the contract were that the defendant was entitled to the fruits of all trees the property of Government situate within the limits of the Allahabad cantonments, and that he should pay to the plaintiff the contract money, which in fact is the value of the produce of the trees. In this case I doubt whether such a claim can be instituted in a Revenue Court under s. 93 (a) of Act XII of 1881 and the reason of my doubt is that the money for the recovery whereof this suit is instituted does not come within the definition of "rent" as given in s. 3 (2) of the said Act inasmuch as this money is not due from the defendant in respect of any holding or use or occupation of any land, but it is only the value of the fruit of trees sold to the defendant nor does this contract money come within the definition of rent on account of rights of pasturage forest rights, fisheries, &c., as mentioned in s. 93 (a) of the aforesaid Act. The Court was of opinion that this suit did not fall under cl. (a), s. 93 of Act XII of 1881, but that the agreement was in the nature of a contract an action for a breach of which was cognizable in the Small Cause Court. **THE SECRETARY OF STATE IN COUNCIL FOR INDIA v. BINDABAN.**

[I-162]

(2).—**Implied contract—(Act XI of 1865.)** B borrowed Rs. 349-8 from J S under a mortgage, of which Rs. 149 were left with J S to meet the debt due to S. Subsequently S, who held a decree for Rs. 297-14-6 proceeded to execute it by attachment and sale of the property mortgaged to J S, J S, to save the property from sale paid the amount and brought the present suit against the heirs of B to recover from them the difference between Rs. 149-8 and Rs. 297-14-6. *Held* that the suit being one for money due under an implied contract, below the amount of Rs. 500, was cognizable in a Court of Small Causes and consequently no second appeal in the case would lie. **JAGAT RAJ AND ANOTHER v. JAGRAJ SINGH AND OTHERS.**

[I-96]

(3).—**Quasi contract—(Act XI of 1865.)** The plaintiff stated that on the 24th April, 1877, the plaintiff had obtained a decree for possession of a moiety of a village called A and for mesne profits such decree being affirmed by the lower appellate Court on the 13th May, 1878, and by the High Court on the 4th February, 1879; that by an order dated the 5th April, 1880, he had been awarded Rs. 253-7-7 as the mesne profits for 1281-83 Fasli (October, 1873, September, 1879), that the defendant had wrongfully retained

ACT IX OF 1887, s. 15.—(continued.)

possession and made collections during 1284-1286 *Fasli* (October, 1876,—September, 1879), that the plaintiff had obtained possession from the Court on the 14th June, 1878, and that he claimed Rs. 253-7-7 being the mesne profits for 1284-1286 *Fasli*. *Held* that the suit was cognizable by a Court of Small Causes as one of a *quasi* contract for money had and received by the defendant for the use of the plaintiff and that it did not fall within clause (h) of s. 93 of Act XVIII of 1873. *RAM LAL v. MUTTRA DAS*.

[I-109]

(4).—*Suit to recover hag-i-chaharum wrongfully realized.* (Act XI of 1865.) The manager of a certain estate under the superintendence of the Court of Wards claimed and realized from certain tenants on the estate one-fourth of the price of six trees cut down and sold by them. This claim was based on ancient custom and the provisions of the *wajib-ul-uruz*. These tenants brought the present suit to recover the money so paid by them, Rs. 20, alleging that neither by custom nor under the *wajib-ul-uruz* was the *zamindar* entitled to claim one-fourth of the sale proceeds of trees cut down and sold by the tenants. *Held* that the suit was one cognizable in a Court of Small Causes. The claim was in the nature of one for money had and received by the defendant for the use of the plaintiffs (W. N. 1881, p. 96) approved. *KEDARI AND OTHERS v. THE COURT OF WARDS*.

[I-108]

(5).—*Suit to recover from decree-holder money paid as price of property sold.* *Held* that a suit to recover from a decree-holder money paid as the price of property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. *MAKUND RAM v. BODH KISHEN*.

[XVII-198]

(6).—*Set off exceeding Rs. 500.*—(Act XI of 1865.) In a suit brought before the Small Cause Court, for Rs. 339, defendant claimed a set off of Rs. 706. The Small Cause Court Judge dismissed the suit on the ground that the set off claimed exceeded the pecuniary jurisdiction of the Court. *Held* that this was no ground for the dismissal of the suit. *KISHEN SAHAI AND ANOTHER v. BEHARI LAL AND ANOTHER*.

[V-7]

s. 21.—*Process for enforcement of decree.*—(Act XI of 1865.) An application by a decree-holder for money paid into Court by the judgment-debtor is "a process for enforcement of the decree" within the meaning of s. 21 of Act XI of 1865. *AMOLAK RAM AND OTHERS v. THE BOM-*

ACT IX OF 1887, s. 21.—(continued.)

BAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY.

[VIII-59]

(1.) s. 23.—*Question of title—Return of plaint.* When in a suit heard by Court of Small Causes any complicated question as to title to immoveable property is involved it would be the wiser course to act under s. 23 of the Provincial Small Cause Courts Act (IX of 1887). A Court of Small Causes can not dismiss a suit otherwise within its jurisdiction merely because a question of title as to immoveable property incidentally arises. It can either return the plaint, under s. 23, to be presented to a Court having jurisdiction to determine title, or dispose of the suit on the merits. *LALLA SINGH v. MAHPAL SINGH*.

[IX-149]

(2.) —————.] A suit was brought in a Court of Small Causes upon a bond in which Rs. 501 was made payable by instalments, to recover Rs. 300, representing three unpaid instalments. The Court dismissed the claim on the ground that the plaintiff had failed to prove the execution of the bond. *Held* that the suit involved no question of "title" within the meaning of s. 23 of Act IX of 1887 and that the Court was therefore not bound by the provisions of that section to return the plaint. *Sem-ble.*—The word "may" in s. 23 of the Act is not mandatory. *Jai Devi v. Mathura Das* (W. N. 1888, p. 193) referred to. *FATMA v. BANDHU LAL*.

[IX-4]

(1.) s. 25.—*Revision—Ground of.* S. 25 of the Provincial Small Cause Courts (Act IX of 1887) was not intended to give in effect a right of appeal in all Small Cause Court cases either on law or fact. The revisional powers given by that section are only exerciseable where it appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. *Muhammad Nizam-ud-din Khan v. Hira Lal* (W. N. 1890, p. 121), and *Masum Ali v. Mahsin Ali* (W. N. 1890, p. 201) approved. *MUHAMMAD BAHAR v. BAHAL SINGH*.

[XI-80]

(2.) —————.] S. 25 of Act No. IX of 1887 was not intended to give what would practically be an appeal in every case from the decision of a Court of Small Causes, but the discretion to be exercised thereunder should be guided by the same considerations as those which govern the application of s. 622 of Act No. XIV of 1882. *Muhammad Bakar v. Bahal Singh* (J. L. R., 13 All., 277) and *Raghunath Sahai v. The Official Liquidator of the Himalaya Bank* (J. L. R., 5 All., 139) referred to. *SARMAN LAL v. KHUBAN AND OTHERS*.

[XIV-183]

ACT IX OF 1887, s. 25.—(continued.)

(3) *Wrong determination of a question of limitation.* An application under section 25 of Act IX of 1887 to set aside a decree ought not to be entertained except in cases in which a similar application under section 622 of the Code of Civil Procedure would be allowed. Such an application will not lie where the sole ground is whether the first Court was or was not right in its decision on a question of limitation. *RAGHUNATH SAHAI v. THE OFFICIAL LIQUIDATOR OF THE HIMALAYA BANK LIMITED.*

[XIII-59]

SARMAN LAL v. KHUBAN AND OTHERS.

[XV-112]

(4) *That the judgment does not comply with sec. 203, C.P.C.* The High Court has no power to act under s. 25 of Act No. IX of 1887 merely because the judgment in a suit tried by a Court of Small Causes does not comply with the provisions of s. 203 of the Code of Civil Procedure when the decree in the suit is unassailed and so on the face of it a good decree. *Malik Rahmat v. Shiva Prasad* (L. R., 13 All., 533) dissented from. *RAM CHANDAR v. JAI RAM AND ANOTHER.*

[XII-160]

(5) *That plaintiff discloses no cause of action.* The plaintiff sued in a Court of Small Causes for damages for non-acceptance of a dog, which he alleged the defendant had purchased from him. Neither in the plaint nor in his evidence did the plaintiff state what were the terms agreed upon as to delivery of the dog. *Held* that, inasmuch as the conditions of delivery were an essential part of the contract of sale, no cause of action was disclosed by the plaintiff's pleadings and that this was a good ground for an application in revision under s. 25 of Act No. IX of 1887. *F. WILSON v. R. SAINT.*

[XVII-138]

(6) *Whether defendant was surety.* *Held* that the question whether the defendant was merely a surety or jointly liable with the plaintiff was not one which would justify the exercise of the revisional powers of the Court under s. 25 of Act IX of 1887. *SYED HASAN v. MIR KHAN.*

[XI-102]

(7) *Jurisdiction.* Unless the facts from which want of jurisdiction on the part of a Subordinate Court may be inferred are patent upon the face of the record the High Court will not interfere in revision. *MIHR ALI SHAH v. HUSEN TAFAZZAL.*

[XII-69]

s. 5.—The plaintiff filed his suit as a Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers. During

ACT IX OF 1887, s. 35.—(continued.)

the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers. In consequence of this the District Judge made an order under section 25 of the Code of Civil Procedure transferring all cases above the value of Rs. 50 then pending before the Subordinate Judge in his capacity as a Small Cause Court to the Munsif to be tried as Munsif's Court cases. The Munsif had Small Cause Court powers up to Rs. 50. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed. *Held* that, granted that the suit was a Small Cause Court suit (which was not decided), whether s. 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887) was applicable, it would remain throughout a Small Cause Court suit and be subject to the incidents of such a suit. *MANGAL SEN v. RUP CHAND AND ANOTHER.*

[XI-96]

Sch. ii.—Suits cognizable by Court of Small Causes.]

See s. 15, No. (1)–(5).

sch. ii, Art. (11) *Determination of right to immoveable property.* The fact that a suit for money depends for its proper decision on the determination of a right to immoveable property, does not make that, a suit for the determination of such right, consequently such a suit is cognizable by a Court of Small Causes. *Jai Devi v. Mathura Das* (W. N. 1888, p. 193) referred to. *CHRIDDU v. MUSAHIB JAN.*

[XVI-159]

Sch. ii arts. (11), (15) & (16). The suit, out of which this application for revision under s. 622, Civil Procedure Code, and under s. 25 of Act IX of 1887 has arisen, was a suit for the recovery of Rs. 120-2-3, on the allegations that a contract to sell had occurred between the parties; that at that time defendant had agreed that the deed of sale; should be attested by her reversionary heirs; that upon such draft, sale-deed being prepared; she received a sum of Rs. 100 as earnest money, and that the plaintiffs paid Rs. 15 for the stamp, Re. 1 to the scribe, and Rs. 4-2-3 for certain repairs, upon the understanding that the defendant would get the sale-deed attested by her reversioners and registered. *Held* that the suit was cognizable by the Small Cause Court and clauses 11, 15 or 16 of sch. ii of Act IX of 1887 do not apply. *JAI DEVI v. MATHURA DAS AND ANOTHER.*

[VIII-193]

Sch. ii, art. 13.—*Nankar.* A suit for the recovery of money on account of a *nankar* allowance is a suit to enforce the payment of fees known as "*hakk*" described in Art. 13 of sch. ii of Act No. IX of 1887; and it is not necessary in such a case in order to render art. 13 applicable that the money should be payable "by

ACT IX OF 1887, sch. ii, art. 13.—(continued.)

reason of an interest in immoveable property or in an hereditary office." **GOPI SINGH AND OTHERS v. BHAROSA SINGH AND OTHERS.**

[XIV-113]

Sch. ii, arts. (15) and (16). Determination of right to immoveable property.]

See art. (11).

Sch. ii, art. 19.—Suit for declaratory decree.]

A suit by a Muhammadan to obtain a share in property distributable under the terms of a certain endowment is a suit of the nature contemplated by clause (18) of schedule ii of the Provincial Small Cause Courts Act (IX of 1887) and therefore not cognizable by a Court of Small Causes. **MIHR ALI SHAH v. HUSEN TAFAZ-ZAL.**

[XII-69]

Sch. ii, art. (20).—Suit under s. 283, C. P. C.] Plaintiffs in this suit claimed certain moveable property or Rs. 80 its value, on the ground that it belonged to them and that the defendant had wrongfully attached it as the property of his judgment-debtor. An objection, preferred by the plaintiff, to the Court executing the decree, had been disallowed. *Held* that the suit was brought with reference to s. 283, Civil Procedure Code, and was therefore not cognizable by a Court of Small Causes. **ELIAH v. SITA AND OTHERS.**

[III-115]

Sch. ii, art. 29 (c).—Partnership—Retired partner.] A suit by a retired partner, for money alleged to have been agreed to be paid to him by the continuing partners in consideration of his retirement is not excluded from the jurisdiction of a Court of Small Causes. **FAUJI LAL v. CHANGA MAL.**

[XVII-136]

Sch. ii, art. 31.—Suit for damages for eviction from land.] A suit to recover damages on account of the alleged wrongful eviction of the plaintiff from immoveable property is not a suit falling within clause 31 of sch. ii to Act No. IX of 1887, though the profits of the property may be a measure of the damages claimed. **Kunjo Behary Singh v. Madhub Chundra Ghose (I.L. R. 23 Cal., 884) followed.** **PRASADI LAL v. INDAD HUSEN.**

[XVIII-10]

Sch. ii, art. 38 & 41.—Suit upon award.] The members of the family of a deceased Muhammadan entered upon a private arbitration resulting in an award under which it was provided that the four sons of the deceased should contribute each an equal sum monthly towards the maintenance of certain female members of the family. The award also provided that the said sums were to be paid to one of the brothers (the plaintiff) to be distributed by him, and that in case of default the plaintiff should have a right to realize the amounts due from his

ACT IX OF 1887,—sch. ii, arts 38 & 41. (continued.)

brothers or their property. On default being made the plaintiff filed a suit in the Court of Small Causes for Rs. 67 As. 8 principal, and Rs. 4 pies 9 interest, as arrears due to him for maintenance paid under the award and obtained a decree for the principal sum, *viz.* Rs. 67-8. The defendant then applied to the High Court for revision under s. 25 of Act IX of 1887 mainly on the plea of want of jurisdiction. *Held* that the suit in question was a suit cognizable by a Court of Small Causes, being a suit on an award, and was not a suit within the purview of either art. 38 or art. 41 of schedule ii of the Small Cause Courts Act. **MASUM ALI v. MOHSIN ALI.**

[X-201]

ACT XII OF 1887 (Bengal Civil Courts.)

s. 6.—Transfer of District and Sessions Judge—jurisdiction.] On the 24th August, 1881, one K, District and Sessions Judge of Mirzapur, was transferred to Benares. On the 27th August, 1881, he was appointed to be also in charge of the Mirzapur Session Judgeship. *Held* that he had no power to hear civil cases and appeals within the Mirzapur district. **SADHO RAM v. AJUDHIA PRASAD AND OTHERS.**

[II-104]

s. 10.—Subordinate-Judge in temporary charge of District Court—jurisdiction.] An application, for the execution of a decree made by a District Judge was presented to the Subordinate-Judge who was in charge of the District Judge's Office under s. 8 of Act VI of 1871. The Subordinate-Judge granted the relief asked by the decree-holder, *viz.* delivery of certain immoveable property and arrest of the judgment-debtor. *Held* that the order passed by the Subordinate-Judge was *ultra vires* but that as no appeal lay in the case to the High Court the appeal must be dismissed. **SALIMUNNISA v. DILDAR HUSSAIN.**

[II-19]

s. 15, cl. (3).—Vacation.] *Held* that the entertaining and deciding upon a matter within the ordinary jurisdiction of the Court on a closed holiday is at the furthest an irregularity (which does not *ab initio* vitiate the proceedings) the right to object to which may be waived by the conduct of the parties. **RAM DASS CHAKRABATI v. THE OFFICIAL LIQUIDATOR OF THE COTTON GINNING COMPANY, LIMITED, CANNING.**

[VII-34]

s. 17.—Munsif—Small Cause Court suit.] A Munsif having certain Small Cause Court powers went on leave, and his place was filled by an officiating Munsif who had not such powers. A plaint was presented to the officiating Munsif and registered by him as a plaint in a regular suit. Before the suit was decided the first Munsif returned and completed the trial of the suit as a Munsif's suit. In appeal the Subordinate Judge, holding that the suit was a Small Cause Court suit, returned the plaint to be

ACT XII OF 1887, s. 17.—(continued.)

presented to the proper Court, *viz.*, to the Munsif as a Small Cause Court. *Held* that the Munsif was right in continuing the trial of the suit as a Munsif's suit; but that under the circumstances, the order of the superior Court having become final, he was bound to retry it as a Small Cause Court suit. *BENI RAM v. BANKE LAL AND ANOTHER.*

[XIV-123]

ss. 18 and 19.—*Concurrent jurisdiction of Subordinate Judge and Munsif.* *Held* that the object of ss. 19 and 20 of the Bengal Civil Courts Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000. Where a Subordinate Judge had tried a suit which a Munsif might have tried *held* that the Subordinate Judge had not acted without jurisdiction. *NIDHI LAL v. MAZHAR HUSAIN.*

[V-1]

(1.) ss. 19 and 21.—*Value of suit—Suit for redemption—(Act VI of 1871.)* A deed of mortgage was executed by P, T and S for Rs. 4,000. A, the purchaser of the share of S, brought a suit for recovery of possession of one third of the mortgaged property against the mortgagees, who had purchased the shares of P and T, the other mortgagors. *Held*, with reference to the terms of s. 20 of Act VI of 1871, that the "subject matter in dispute" in suits of this kind was the amount of the mortgage debt and the mortgagee's rights which were sought to be paid off; that from the terms of the plaint it was obvious that in the present case the subject matter in dispute was Rs. 1,333-5-4, the one third of the original mortgage sum of Rs. 4,000, and that it was therefore beyond the limits of the Munsif's pecuniary jurisdiction. It is a rule of construction that while in cases of taxation every thing must be strictly construed in favor of the subject, in questions of jurisdiction, the presumption is in favor of giving jurisdiction to the highest Court. *AMANAT BEGAM v. BHAJAN LAL.*

[VI-146]

(2) ————— (Act VI of 1871.)] This was a suit for redemption in which the mortgage debt alleged to be Rs. 968 was said to have been satisfied from the usufruct. The defendant's case was that there had been no mortgage but that he was and had been absolute owner. The valuation of the property was admittedly Rs. 8,000. The suit being dismissed by the Subordinate Judge the plaintiffs appealed to the High Court. *Held* following *Gobind Singh v. Kullu*, (I. L. R., 2 All., 778) and *Amanat Begam v. Bhajan Lal* (I. L. R., 8 All., 438) that this first appeal did not lie to this Court. *AJGAR SINGH AND OTHERS v. BARMHA SINGH.*

[VII-262]

(3) ————— (Act VI of 1871.)] The purchaser of the equity of

ACT XII OF 1887, ss 19 & 21.—(continued.)

redemption of certain land sued to redeem the same. He made the mortgagor and vendor of the land a "proforma" defendant. *Held* that the value of the subject matter of the suit was not the market value of the land, but the amount of the mortgage-money. *KUBERE SINGH v. ATMA RAM.*

[III-47]

(4) ————— (Act VI of 1871.)] The integrity of a joint usufructuary mortgage having been broken in consequence of the mortgagee having purchased the right of several of the mortgagors, one of the mortgagors sued in the Munsif's Court to recover his share of the mortgaged property, alleging that the mortgage had been redeemed. The value of the mortgagee's right *qua* such share was under Rs. 6,000. The mortgagee set up as a defence to such suit that a bond under which a sum exceeding Rs. 1,000, was due, had been tacked to the mortgage, and that until such sum had been satisfied the plaintiff could not recover possession of his share. *Held*, on the question whether the Munsif had jurisdiction, that value of the subject matter of the suit was the value of the mortgagee's right *qua* the plaintiff's share; and as the value of such right did not exceed Rs. 1,000 even if it were held that the mortgaged property was further incumbered with, such suit was cognizable in the Munsif's Court. *The principal laid down in Gobind Singh v. Kullu* (I. L. R., 2 All., 778) followed. *BAHADUR v. NAWAB JAN.*

[I-85]

(5) ————— *Value of suit—Suit for partition of family property—(Act XVII of 1871.)* In a suit instituted in the Court of a Munsif by a member of a Muhammadan family to have her share of the family property partitioned, the value of the plaintiff's share was found to be less than Rs. 1,000, and the value of the whole family property exceeded Rs. 1,000. The lower appellate Court decreed partition not only of the plaintiff's share, but also of the shares of the defendants *inter se* though such partition was not asked for. *Held* that the subject matter in dispute in the suit, within the meaning of section 20 of the Bengal Civil Courts Act (VI of 1871) was the share which the plaintiff asked to have partitioned; that it was immaterial that that share was at the date of the suit a portion of family property which exceeded Rs. 1,000 in value; and that the Munsif therefore had jurisdiction to hear the suit. *Vyadinatha v. Subramanaya* (I. L. R., 8 Mad., 235); *Kirty Churn Mitter v. Aunah Nath Deb* (I. L. R., 8 Calc., 737); *Sheikh Khurshed Hussain v. Nahar Fatima* (I. L. R., 3 Calc., 551) and *Ram Chandra Narain v. Narain Mahadev* (I. L. R., 11 Bom., 216) distinguished. *Held* also that the lower appellate Court had no jurisdiction to partition as amongst the defendants the residue of the

ACT XII OF 1887, ss. 19 & 21.—(continued.)

property left after the partitioning off of the plaintiff's share. *HIKMAT ALI v. WALIUNNISSA AND OTHERS.*

[X-128]

(6).—*Suit for cancellation of bond—(Act VI of 1871.)* The value of the subject matter of a suit for the cancellation of a bond is to be determined with reference only to the principal amount, and not that amount together with the interest payable thereon when the suit is instituted. *GULAB RAI v. MANGLI LAL.*

[III-216]

(7).—*For cancellation of lease and demolition of building—(Act VI of 1871.)* Certain co-sharers of a joint village sued to have a lease of certain land which the other co-sharers had granted, set aside and to have the buildings erected on such land by the lessees demolished, on the ground that the lease had been granted without their consent. *B* sued *N* claiming *inter alia* possession of certain land and to have certain buildings erected thereon by the defendants demolished. *Held*, with reference to the abovementioned suits, that in estimating their value for the purposes of the Bengal Civil Courts Act the value of the buildings should not be taken into account. *BINDESHARI AND ANOTHER v. NANDA.*

[II-44]

(8).—*To set aside deed of gift—(Act VI of 1871.)* A Hindu widow executed a deed of gift of her deceased husband's entire immoveable property. One of the next reversioners sued the donee, in the Munsiff's Court to set aside the deed of gift, so far as a portion of such property was concerned. The portion of the property in suit did not exceed Rs. 1,000 but the whole property comprised in the deed of gift did. *Held* that the Munsiff was competent to hear the suit. *BHUP v. NAWAL.*

[II-130]

(9).—*To set aside adoption.* The value for the purposes of jurisdiction of a suit to set aside an adoption is not the value of the property which may possibly change hands if the adoption be set aside, but the value put upon his plaint by the plaintiff. *SHEO DEVI RAM AND ANOTHER v. TULSHI RAM AND OTHERS.*

[XIII-147]

(10).—*To eject a tenant.* *Held* that the valuation of a suit to eject a tenant at fixed rates for the purposes of the jurisdiction is the value of the subject matter of the suit, *i. e.* of the tenant right not of the land itself nor of merely one year's rent. *RAMRAJ TEWARI v. GIRNANDAN BHAGAT AND OTHERS.*

[XII-240]

ACT XII OF 1887, ss. 19 & 21.—(continued.)

(11).—*Suit under s. 283, C. P. C. (Act VI of 1871.)* This was a suit for a declaration of the plaintiff's ownership of a certain bond, attached by the defendant in execution of a decree against a third person and to obtain its release from the attachment. The bond was for Rs. 2,300, but the defendant's decree was for Rs. 647. *Held* that the bond being in the possession of the plaintiff and the interest of the plaintiff being only to protect it from sale, the "subject matter" of the suit was Rs. 647 and the suit was therefore cognizable by the Munsiff. *LACHMI NARAIN v. GULAB CHAND AND ANOTHER.*

[IV-114]

(12).—*(Act VI of 1871.)* In a suit to have it declared that certain property valued at Rs. 400 was liable to sale in execution of the plaintiff's decree for Rs. 1,500,—*held* that in this case the value of the property determined the jurisdiction, that it was immaterial that the amount of the decree was higher than the limit of the Munsif's jurisdiction, and that the case was therefore triable by the Munsif. *Gulsari Lal v. Jadann Rai (I. L. R., 2 All., 799)* distinguished. *DURGA PRASAD v. RACHLA KUAR AND OTHERS.*

[VI-328]

(13).—*(Act VI of 1871.)* When in a suit under s. 283 of Act No. XIV of 1882, the claimant objector makes the judgment-debtor or his representative a party as defendant to the suit, the property attached must be regarded as the subject matter of the suit, and the value of the suit, within the meaning of ss. 19 and 21 of Act No. XII of 1887, must be the value of the property attached, whether such value exceeds or is less than the amount which is sought to be realised by the sale of the property in execution of the decree. *DWARKA DAS v. KAMESHAR PRASAD AND ANOTHER.*

[XV-3]

(14).—*Value of suit—Appeal as to costs only (Act VI of 1871.)* *Held* that an appeal from the decree of a Subordinate Judge, which would ordinarily have lain to the High Court, does not become cognizable by the District Judge because the appeal relates merely to the question of costs. *HEMANCHAL SINGH v. H. MAXWELL AND OTHERS.*

[III-134]

(15).—*(Act VI of 1871.)* In a suit to recover property valued at more than Rs. 5,000 plaintiff obtained a decree for costs which amounted to Rs. 1,197. Execution having been ordered by the Subordinate Judge for the amount of costs, the judgment-debtor appealed to the Judge of the district. The Court following the Full Bench decision reported at page 108 of the High Court's Reports for 1873, observed that the Judge had no jurisdiction to entertain an appeal. *PHULA KUAR v. SHIB LAL.*

[II-2]

ACT XII OF 1887, ss. 19 & 21.—(continued.)

(18). ———— (Act VI of 1871.) Certain judgment-debtors appealed to the High Court for the order of a Subordinate Judge confirming a sale in execution of a decree. The High Court dismissed the appeal and awarded Rs. 144 as costs to the decree-holder. The decree-holder applied for execution of this decree for costs which was allowed. The judgment-debtor appealed to the District Judge who reversed the order. *Held* by the High Court in appeal that an appeal from the Subordinate Judge's order lay to the High Court and not to the District Judge as jurisdiction was governed by the value of the subject matter in dispute in the appeal in which the order for costs was made and not by value of the costs for which execution was taken out. **RAM DAS V. LALA RAM AND ANOTHER.**

[III-38]

(17). ———— *Appeal—Mesne profits* (Act VI of 1871.) In execution of a decree the Subordinate Judge made an order respecting the amount of mesne profits made payable by the decree, the amount being in dispute, and the disputed amount exceeding Rs. 5,000. *Held* that an appeal from the order would lie to the District Judge and not to the High Court. *A. W. P. H. C. Rep.*, 1873, p. 108 followed. **RAM KIRPAL V. RUP KUAR**, (1. L. R., 3 All., 633) distinguished. **RAM KIRPAL V. RUP KUAR.**

[VI-236]

(18). ———— *Value assigned by plaintiff—Value found by Court.* For the purpose of determining the proper appellate Court in a Civil Suit the "value of the subject matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that either purposely or through gross negligence the true value of the suit has been altogether mis-represented in the plaint. **MAHABIR SINGH AND ANOTHER V. BEHARI LAL AND OTHERS.**

[XI-107]

(19). ———— [The pecuniary jurisdiction of a Civil Court on its original or appellate side is, ordinarily speaking, governed by the value stated by the plaintiff in his plaint, and if a suit, having regard to the valuation in the plaint, is within the jurisdiction, such jurisdiction is not ousted by the Court finding that a decree for a sum exceeding the limit of its pecuniary jurisdiction should be given to the plaintiff. There is nothing in Act No. XII of 1887, to confine the sum for which a Civil Court may pass a decree to the limit of its jurisdiction to entertain a suit. **MAHABIR SINGH V. BEHARI LAL** (1. L. R., 13 All., 320) referred to. A purchaser of immoveable property from a judgment-debtor is not a representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure where the decree against the judgment-debtor is a simple money decree and creates no charge

ACT XII OF 1887, ss. 19 & 21.—(continued.)

upon specific property. Where money is due by an agent or vendee to his principal or vendor, the principal's or vendor's claim against his agent or vendee may be attached and sold in execution of a decree against the principal or vendor as a debt under s. 266 of the Code of Civil Procedure, and it is not necessary that the exact amount due to the principal or vendor should be ascertained prior to attachment and sale. **MADHO DAS V. RAMJI PATAK.**

[XIV-84]

(20). ———— *Value of suit—Value assigned by plaintiff—That assigned by defendant.* Question of jurisdiction, whether with reference to the nature of the suit or with reference to the pecuniary limits of the claim, are matters to be governed by the statements contained in the plaint in the cause. The valuation of the claim as preferred by the plaintiff, and not as set up by the plea in defence, would govern the action, not only for the purposes of the original Court, but also for the purposes of appeal, and indeed throughout the litigation. **JAG LAL V. HAR NARAIN SINGH.**

[VIII-218]

s. 21.—*Appeal heard by District Judge without jurisdiction.*—(Act VI of 1871.) A brought a suit in the Subordinate Judge's Court and valued it at certain sum. His suit being dismissed he appealed to the District Judge. The Judge upheld the Subordinate Court's decree; then he preferred an appeal to the High Court and urged that the subject matter of the suit being over Rs. 5,000, the appeal lay to the High Court and not to the District Judge. *Held* that all the proceedings before District Judge must be quashed, but that the appellant having himself gone to the District Judge must pay the respondent's costs. **NIHAL CHAND V. UDEY RAM.**

[VI-106]

(1). s. 22 (1).—*Transfer.*—(Act VI of 1871.) The District Judge after hearing an appeal adjourned the case in order to take further evidence. Subsequently, he transferred the case to the Subordinate Judge for disposal. *Held* that under s. 26 of Act VI of 1871 the District Judge was competent to transfer the case even at so late a stage. **SADHO RAM AND ANOTHER, V. UMDA BEGAM.**

[III-220]

(2). s. 22 (3).—*Transfer—Rent suits.* Clause (3) of s. 22 of Act XII, 1887, makes ss. 206, 208 of Act XII of 1881 applicable to appeals in suits within s. 93 of Act XII of 1881, when such appeals have been transferred under s. 22 of Act XII of 1887 by a District Judge and are being heard by such Subordinate Judge. **BABU NANDAN PRASAD V. CHANGUR.**

[XIV-113]

(3). ———— (Act VI of 1871). A Subordinate Judge to whom an

ACT XII OF 1887, s. 22 (3).—(*continued.*) appeal is transferred under the Bengal Civil Court Act (VI of 1871) has not the power to dispose of it in the manner provided by ss. 206, 207, 208 of the N.-W. P. Rent Act, 1881; the District Judge alone has the power to dispose of appeal in that manner. *Ram Parshad v. Rai Kishan*, (I. L. R., 6 All., 36) followed. *LODHI SINGH v. ISHRI SINGH*.

[IV-90]

s. 24—"Subject to the rules—Judge." The words in s. 24 of the Bengal Civil Court Acts (XII of 1887) "subject to the rules applicable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore orders passed under that section by a Subordinate Judge in proceedings under the Bengal Minor's Act (XL of 1858) transferred to him under s. 23 (2) (b) of the former Act, are appealable to the High Court and not to the Court of the District Judge. *SOHNA v. KHALAK SINGH AND ANOTHER*.

[XI-1]

(1). **s. 37—Muhammedan Law—Missing person** (Act VI of 1871). The rule contained in s. 108 of Act I of 1872 governs the case of a Muhammadan who has been missing for more than seven years when the question of his death arises in cases to which under the provisions of s. 24 of Act VI of 1871, the Muhammadan Law is applicable. *MAZHAR ALI AND OTHERS v. BUDH SINGH AND ANOTHER*.

[IV-333]

(2). ———— **Gift**—(Act VI of 1871.) Held that s. 24 of Act VI of 1871 did not make it obligatory to apply the strict Muhammadan Law as to gifts in transaction of modern times. *HAFIZA BIBI v. SAHIBUNNISSA BIBI*.

[VII-22]

(3). ———— **Pre-emption**—(Act VI of 1871.) Held that in a case of pre-emption, where the pre-emptor and vendor are Muhammadans and the vendee a non-Muhammadan, the Muhammadan Law is to be applied to the matter, in advertance to the terms of s. 24 of Act VI of 1871. *Sheikh Kudratullah v. Mahini Mohan Shaha* (4 B. L. R., 134) dissented from. *GOBIND DAYAL v. INAYATULLAH, BRIJ MOHAN LAL v. ABDUL HUSAIN KHAN*.

[V-228]

(4). ———— **Native law—Test of religion**—(Act VI of 1871). To entitle a person to have the Hindu or Muhammadan law applied to him under the first paragraph of s. 24 of Act VI of 1871, he must be an orthodox believer in the Hindu or Muhammadan religion. The mere circumstances that he calls himself or is called by others a Hindu or Mahomedan as the case may be is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to

ACT XII OF 1887, s. 37.—(*continued.*)

establish his religion, his privilege to the application of its law fails also, and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871 according to justice, equity, and good conscience. *RAJ BAHADUR AND OTHERS v. BISHEN DAYAL*.

[II-74]

BUDDHI BIBI v. BABU RAM AND OTHERS.

[XI-65]

(5). ———— **Rule contained in s. 10 of Act IV of 1882.** (Act VI of 1871.) Held that the rule contained in s. 10 of Act IV of 1882 was not binding upon the Court in a case in which the question was one of succession or inheritance to be governed by s. 24 of the Bengal Civil Courts Act. *BHAIRON MISR AND OTHERS v. PERMESRI DAYAL AND OTHERS*.

[V-136]

Miscellaneous.—*One Subordinate Judge overruling the decision of another.* Where there are two Subordinate Judges, in the same place, one of such Judges is not competent to overrule the decision of the other. The Court is one, though there are separate officers. *Deo Kishen v. Bansi* (I. L. R., 8 All., 172), distinguished. *KHARAG PRASAD BHAGAT AND ANOTHER v. DARDHARI RAI AND OTHERS*.

[XII-25]

SURAJ DIN v. CHATAR.

[I-55]

RAM KIRPAL v. RUP KUARI.

[VI-286]

ACT V OF 1888 (Inventions and Designs).

s. 4—Invention—Improvement. Held that the putting together of materials previously known so as to produce an article which, though it might be in some respects superior, was practically very similar to several other articles of the same kind previously in use, and where the combination of such materials did not involve the exercise of any special inventive power would not be sufficient to sustain a patent for such an article. *THE ELGIN MILLS COMPANY v. THE MUIR MILLS COMPANY*.

[XV-113]

(2). **s. 29.—Particulars of breaches**—(Act XV of 1859.) A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25 of the Civil Procedure Code,

ACT V OF 1888,—(continued.)

and tried it. The plaintiff did not, as required by s. 34 of Act XV of 1859, deliver with his plaint particulars of the breaches complained of in the suit. In his plaint, after describing his inventions, he alleged generally that the defendant had made and used them at a certain place without his license. *Held* that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit. *Held* also that, as required by s. 34, Act XV of 1859, the plaintiff should have delivered with his plaint particulars of the breaches complained of, that the general allegation as to infringement contained in the plaint did not amount to such particulars; and that under these circumstances the plaintiff came into Court with a case which could not be tried. **PETMAN v. BULL.**

[II-62]

s. 30.—Invention—Improvement.]

See s. 4

ACT VII OF 1889 (Succession Certificate.)

ss. 1 & 4.—Retrospective effect—Applicability of s. 4 to suits under s. 88 of Act IV of 1882.] S. 4 of Act No VII of 1889 made no change in the substantive law, but enacted merely a rule of procedure. Inasmuch, therefore, as "no one has a vested right in any particular form of procedure," the above-mentioned section is applicable to suits instituted before the coming into force of Act No. VII of 1889. *Ganga Sahai v. Kishan Sahai* (I. L. R. 6 All., 262) followed. *The Republic of Costa Rica v. Erlanger* (L. R. 3 Ch., D. 69); *Warner v. Murdoch* (L. R., 4 Ch. D. 752; and *Wright v. Hale* (5 H. and N. 227) referred to. S. 4 of Act No. VII of 1889 applies to suits for sale under s. 88 of the Transfer of Property Act, 1882. *Ammanappa v. Gurumurthi* (I. L. R., 16 Mad., 64) distinguished. *Kanchan Modi v. Bagnath Singh* (I. L. R., 19 Calc., 336) dissonant from. **FATLH CHAND AND OTHERS v. MUHAMMAD BAKHSH AND OTHERS.**

[XIV-74]

(1). **s. 4—Res judicata.]** The principle of res judicata has no effect upon the provisions of s. 4 of Act VII of 1889. It imposes a duty on the Court which the Court is bound to perform, no matter what the proceedings between the parties, or any agreement between the parties may be. But the Court instead of dismissing an application for execution should give reasonable time to the applicants to perfect their title by the production of one or other of the documents specified in s. 4 of Act VII of 1889. **BEHARI LAL AND ANOTHER v. MAJID ALI.**

[XVII-29]

(2). **—Institution of suit without certificate—(Act XXVII of 1860).]** It is not an im-

ACT VII OF 1889,—(continued.)

perative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate that such legal representative should first obtain a certificate under Act XXVII of 1860. **LACHMIN v. GANGA PRASAD AND ANOTHER.**

[II-122]

(3). **—Failure to obtain certificate within time given by Court. (Act XXVII of 1860).]** The plaintiffs in this suit sued the defendants on a bond, claiming as the heirs of the deceased obligee. The defendants, denied that the plaintiffs were the heirs of the deceased obligee, and contended that they should have obtained a certificate under Act XXVII of 1860, before suing. There being good reason to doubt the validity of the title of the plaintiffs, the lower appellate Court postponed the decision of the case for a certain time in order to give the plaintiffs an opportunity of obtaining such certificate. The plaintiffs failing to avail themselves of this opportunity, the lower appellate Court dismissed the case. The High Court on second appeal, refused to disturb the lower appellate Court's decision. **BATASI AND ANOTHER v. MOHESH AND OTHERS.**

[III-133]

(4). **—Application for execution of decree without certificate. (Act XXVII of 1860).]** *Held*, following *Lachmin v. Ganga Pershad* (W. N. 1882, p. 122), that the possession of a certificate under Act XXVII of 1860 is not "an imperative condition precedent to the institution of execution proceedings by the representative of a deceased decree-holder"; but that in each case the Court should consider whether the objections to execution are vexatiously raised, or they are *bona fide* objections on the part of the judgment-debtor to the title of the person seeking to execute the decree. **HORI LAL v. HARDEO, AND ANOTHER.**

[II-191]

(5). **—[** Though under certain circumstances a Court may be prohibited by Act No. VII of 1889, from granting execution of a decree unless a certificate of succession as provided by the Act is produced before it; it does not therefore follow that under such circumstances an application for execution is a bad application because it is unaccompanied by a certificate. *Brojo Nath Surma v. Isswar Chunder Dutt* (I. L. R., 19 Calc., 482) followed. **MANGAL KHAN AND OTHERS v. SALIM ULLAH KHAN AND OTHERS.**

[XIII-197]

(6). **—[** In cases where a certificate of succession is required before execution of a decree can be taken out, all that is necessary is the certificate should be produced before an order for execution can be made. It is not necessary that the certificate should be produced along with the application

ACT VII OF 1889, s. 4.—(continued.)

for execution. *Brojo Nalk Surma v. Isswar Chandra Dutt* (I. L. R., 19 Calc. 482) and *Mangal Khan v. Salim Ullah* (W. N. 1893, p. 197) referred to. *KALIAN SINGH v. RAM CHARAN.*

[XV-148]

(1) s. 5.—*Jurisdiction*—(Act XXVII of 1860.) The petitioners applied to the district Court at Agra, for a certificate under Act XXVII of 1860, in respect of certain money due to their deceased father, some of which were at Agra and some at Allahabad. The district Court granted them a certificate limited to the money of the deceased at Agra. *Held* that the Court should have granted a certificate in respect of the whole of the property of their deceased father that might be found in the N.-W. Provinces. The certificate should be recalled and a fresh one granted. *PETITION OF TRIBENI SAHAI AND ANOTHER.*

[II-69]

(2) ————— (Act XXVII of 1860.) The application out of which this petition for revision has arisen was made to the Subordinate Judge of Agra, under s. 3 of Act XXVII of 1860. The Subordinate Judge refused it for want of jurisdiction inasmuch as the deceased had not "ordinarily resided within the district of the Agra Court, though some of the property left by the deceased was within the district. The deceased resided within the territory of the Raja of Bharatpore. The certificate under s. 3 of Act XXVII of 1860, may be given either by the district Court within whose jurisdiction the deceased ordinarily resided, or if at the time of his death he had no fixed place of residence then by the Court within whose jurisdiction any part of the property is situate. *Held* that as the place where deceased resided was within the jurisdiction of no Court the alternative clause would apply and the Agra Court had jurisdiction to grant the certificate. *SRI GOSWAMI GOPAL LALJI v. SRI GOSWAMI JAIDEO LALJI AND ANOTHER.*

[V-39]

ss. 6 and 7.—*Grant of certificate to minor.* *Held* that a certificate of succession may be granted under Act VII of 1889 to a minor through his next friend. *Kali Koomar Chatterjee v. Tara Prosunno Mookerjee* (5 C. L. R. 517) referred to. *RAM KUAR AND ANOTHER v. SARDAR SINGH.*

[XVIII-64]

(1) s. 7 (4).—*Joint certificate to servant claimants*, (Act XXVII of 1860.) A certificate under Act XXVII of 1860 should not be granted to several persons jointly, but, where there are several claimants to the certificate, the district Court should determine which of such persons has the best title to the certificate, and grant the same accordingly. *MADAN MOHAN v. RAM DIAL, AND ANOTHER.*

[II-215]

ACT VII OF 1889, ss. 6 & 7.—(continued.)

(2).—*Separate certificates to several heirs.* Under Act VII of 1889 a separate certificate cannot be applied for and granted to each and every heir to a fractional share in the estate of a deceased person so as to qualify him to separately recover his share from the creditor or creditors of the deceased. *SHAMSH-UNNISSA v. WAJID ALI.*

[X-91]

(3). —————.] A District Court acting under section 7 of Act No. VII of 1889 must, if there are several applicants, elect to which, if any, a certificate should be granted. It is not competent to such Court to grant separate certificates to different persons for partial collection of the debts in respect of which a certificate is sought. *SHITAB DEI v. DEBI PRASAD.*

[XIII-191]

(1) s. 8.—*Certificate for portion of debt.* There is nothing in the Succession Certificate Act, 1889, to preclude a judge from granting a certificate for partial collection of the debts of a deceased person, security being furnished by the applicant to a proportionate amount. *IN THE MATTER OF THE PETITION OF GHANSHAM DAS AND ANOTHER.*

[XIII-84]

(2) —————.] A Court may legally grant to an applicant under Act No. VII of 1889, a certificate for the collection of a specified debt or specified debts of a deceased person. The Court is not bound to grant a certificate only for the collection of the whole of the debts of the deceased. *IN THE MATTER OF THE PETITION OF INDARMAN.*

[XV-152]

(3). —————.] A certificate for collection of debts under Act No. VII of 1889 may be given for the collection of any one or more separate debts of the deceased; but not for the collection of part only of a debt. Where, however, a portion of a debt in respect of which a certificate is sought has been paid off it is not necessary for the applicant to pay duty on more than the unsatisfied portion of the debt. *MUHAMMAD ALI KHAN v. PUTTAN BEGAM AND OTHERS.*

[XVI-198]

s. 9.—*Conditional grant of certificate—Security—Alienation*—(Act XXVII of 1860.) C L applied for a certificate under Act XXVII of 1860 in respect of the debts due to the estate of his deceased brother S L, amounting to Rs. 1,000. P P the son of the deceased's nephew objected to the grant of the certificate on the ground that the deceased and the applicant had not been on good terms, that before his death the deceased had made a verbal gift of all his property to the objector, and that it was probable that the objector would bring a suit in

ACT VII OF 1889, s. 9.—(continued.)

the Civil Court. The district Court made an order granting the applicant the certificate but at the same time requiring him to deposit Rs. 2,000 as security under section 5 of Act XXVII of 1860 and bind himself not to alienate any of the landed or other property of the deceased until the case in the Civil Court was settled, and the objector to bring the suit within one year. The objector appealed to the High Court. The Court observed that the order of the lower Court in respect of the security being given not to alienate landed estate of the deceased person and binding a certain person to bring some suit within a year were not orders that could be made under Act XXVII of 1860. **PADAM PRASAD v. CHOTEY LAL.**

[I-157]

s. 10.—Certificate for portion of debt.

See s. 8, No. (1), (2) and (3).

(1.) **s. 16.—Effect of certificate.** (*Act XXVII of 1860.*) A judgment-debtor sued for a declaration that the son of the deceased decree-holder, to whom a certificate had been granted under Act XXVII of 1860 in respect of the debts due to his father's estate, was not competent to apply for execution of the decree, as, being illegitimate, he was not the legal representative of the deceased decree-holder. *Held* that the suit was not maintainable, the certificate under Act XXVII of 1860 being, under s. 4 of the Act, conclusive of the defendant's representative character, and a full indemnity to all persons paying their debts to him. **GAURA v. GAYA DIN.**

[II-66]

(2.) *Act XXVII of 1860.* *Held* that the effect of a certificate, under Act XXVII of 1860, is to entitle the person so obtaining the certificate to the right of collecting debts and to give full receipts to the debtors of the deceased. Such right is purely personal and can not be subjected to the law of inheritance. **BANNSI AND OTHERS v. TIKA AND OTHERS.**

[VII-248]

(1.) **s. 19.—Appeal—Person entitled to—**(*Act XXVII of 1860.*) *Held* that a person who did not appear in the Court of the District Judge to oppose an application for the grant of a certificate under Act XXVII of 1860 was not in a position to contest the order of the district Court, in the character of an appellant. **TAFESHRA KUARI v. AJUDHIA KUARI.**

[I-162]

(2.) *Grant of certificate by High Court—*(*Act XXVII of 1860.*) *Held* that the High Court may grant a certificate for the collection of debts due to a deceased person in supersession of a certificate granted by the District Judge and this the High Court can do both on appeal

ACT VII OF 1889, s. 19.—(continued)

from the order of the District Judge or on petition. **GANGIA v. RANGI SINGH.**

[VII-9]

(3.) *Appeal—Order refusing certificate—*(*Act XXVII of 1860.*) *Held* that an appeal does not lie from an order refusing to grant a certificate for the collection of debts under s. 6 of Act XXVII of 1860. **GULRAJ AND ANOTHER v. DHARAP NATH.**

[III-248]

(4.) *Appeal—Order requiring security—*(*Act XXVII of 1860.*) A certificate for the collection of debts was granted by the District Judge to A. wife of the deceased, on condition of her giving security to B, daughter of the deceased. *Held* that no appeal lay from such order to the High Court under s. 6 of Act XXVII of 1860. The fresh certificate contemplated by s. 6 means a certificate to a person other than the person to whom the first certificate was granted. **NAURANGI KUNWAR v. RAGHUBANSI KUNWAR.**

[VII-20]

(5.) *An order on an application for a certificate of succession requiring security as a condition precedent to the granting of the certificate is not an order "granting, refusing, or revoking a certificate" and, being such, no appeal will be against it.* **THAKURAN AND ANOTHER v. MANNI LAL AND ANOTHER.**

[XI-45]

(6.) *An order on an application for a certificate of succession under Act VII of 1889, to the effect that a certificate will be given to the appellants on their furnishing security to the amount of Rs. 20,000, is not an order "granting, refusing, or revoking a certificate" within the meaning of s. 19 of the above mentioned Act, but merely an interlocutory order. Held that no appeal will lie from such order as aforesaid.* **BHAGWANI AND ANOTHER v. MANNI LAL AND ANOTHER.**

[X-198]

(7.) *As to costs.* In cases under the succession certificate Act where an appeal is prohibited by s. 19 no appeal will lie as to costs alone. **RAM GHULAM v. SHIB DIN.**

[XII-35]

ACT XIII OF 1889 (Cantonments).

(1.) **s. 2.—Breach of cantonment rule—**(*Act XXII of 1864.*) The accused was convicted of offences (i) under s. 188, for disobedience to an order duly promulgated by a public servant under the cantonment rules which

ACT XIII OF 1889, s. 2.—(continued.)

provided, that every non-resident owner of a house in the cantonment should provide a duly constituted agent for the same. It appeared however that he was not the owner of the house. (ii) under s. 17 of Act XXII of 1864. The offence was only triable by the Cantonment Magistrate alone, while the accused was tried and convicted by the District Magistrate. *Held* that the convictions under none of the sections could be sustained. **EMPRESS v. F. TODD.**

[II-52]

(2). ————— (Act XXII of 1864 and Act III of 1880.) The petitioner, *K*, was convicted and sentenced for being drunk and riotous in his master's compound. *Held* that the compound was not a "public place" within the meaning of rule 63 of chapter III of the cantonment rules made under s. 17 of Act XXII of 1864 and kept in force by s. 2 of Act III of 1880. **EMPRESS v. KALLAN KHAN.**

[VII-19]

(3). ————— (Act XXII of 1864 and Act III of 1880.) The prisoner in this case, *L*, was convicted by the Joint Magistrate for an offence under s. 17 of the Cantonment Regulations framed under Act XXII of 1864, which are deemed to have been made under Act III of 1880, s. 27, and sentenced to pay a fine of Rs. 5, or in default, one week's simple imprisonment. The conviction was based on the ground that the accused was a clearly registered prostitute and had not gone to the hospital for inspection. The Sessions Judge finding that *L* was not a consenting party to her registration as a prostitute, and that she did not carry on the occupation of a prostitute, referred the case to the High Court under s. 438 Criminal Procedure Code. *Held* that in the findings arrived at by the Court of Session the conviction was bad and must be set aside. **EMPRESS v. LATIFAN.**

[VII-219]

ACT VIII OF 1890 (Guardians and Wards).

s. 4 (1). — *Minor—Muhammadan*—(Act XL of 1858.) The rule of law, contained in s. 26 of Act XL of 1858, is limited by its terms to "the purposes of that Act," which provides exclusively for the care of the persons and property of minors possessed of property which has not been taken under the protection of the Court of Wards, and it is to such persons only, when they have been brought under the operation of the Act, as in it provided, that the prolongation of non-age under s. 26 applies. **DAMODAR DAS v. WILAYAT HUSAIN.**

[V-214]

(1). s. 7.—*Guardian of property—Joint Hindu family.* It is not competent to a Court under Act No. VIII of 1890 to appoint a guardian of the property of a minor who is a member of a joint Hindu family. **Virupakshappa**

ACT VIII OF 1890, s. 7.—(continued.)

v. Nilgangava (I. L. R., 9 Bom., 309) and *Sham Kuar v. Mohanunda Sahoy* (I. L. R., 19 Calc., 301) referred to. **JHABBU SINGH v. GANGA BISHAN.**

[XV-119]

(2). —————.] Ordinarily it is inexpedient that a guardian to the property of a minor should be appointed when the minor, being a member of a joint Hindu family, does not possess any property or any interest in any property other than an interest in the joint property of the family. *Jhabbu Singh v. Ganga Bishan* (W. N. 1895, p. 119), referred to. **GURGA v. MOHER SINGH.**

[XVI-30]

(3). ———— *Appointment of guardian—Discretion of Court*—(Act XL of 1858.) A district Court dismissed two applications, one made under Act XL of 1858, and the other under Act IX of 1861, for a certificate of guardianship and for the custody of a female minor, on the ground that, under s. 27 of the former Act, no person other than a female could be appointed guardian of a female. The Court took no further steps in the matter of the minor's guardianship and custody. *Held* that this was a mistake, and that it was the duty of the Court, upon the facts brought to its notice, to provide for the minor's guardianship and custody. **HARSUKH MAL v. CHANDERMAN.**

[VIII-124]

(4). ————— (Act IX of 1861.) The words in s. 3 of Act IX of 1861, "and thereupon proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor," confer on the Court an absolute discretion to make an order as to custody or guardianship, or to refrain from making such an order where the circumstances do not call for such an order being made. Where a minor Hindu over the age of sixteen, who had embraced Christianity and left the house of his elder brother by whom he had been maintained and brought up, appeared to be well able to take care of and provide for himself, and preferred to be left as he was, and had sufficient mental capacity to judge what was best for himself, the Court refused to make any order upon an application by the brother for his custody and guardianship. **SARAT CHANDRA CHAKRABATI v. FORMAN AND ANOTHER.**

[X-80]

(5). ————— *Judicial enquiry*—(Act XL of 1858.) An application being made to the District Judge by a mother for a certificate of guardianship to her minor son which was opposed by a counter-application, the Judge called upon the Collector for a report as to the character and qualifications of the lady under s. 8 of Act XL of 1858. The report being submitted the Judge decided the question upon that very report without taking any further

ACT VIII OF 1890, s. 7.—(continued.)

evidence. *Held* that no judicial enquiry within the meaning of s. 6 of the said Act had been held. *RANI KUAR v. BABBU SINGH.*

[VII-235]

(6).—(Act XL of 1858).] The expression "enquire summarily" in s. 6 of the Bengal Minors Act (XL of 1858) does not mean that the Court is to act on mere hearsay or the report of a *Tahsildar* deputed by the Collector to make inquiry. In dealing with cases under the Act, District Judges should as far as possible adopt and follow the rules ordinarily applicable to judicial proceedings, so as to supply a record from which a Court of appeal may be able to ascertain whether an order appealed has been rightly passed or not. *Rani Kuar v. Babbu Singh* (W. N. 1887, p. 235), referred to. Where the only materials to support an order of a District Judge directing the Collector to take charge of the estate of a minor under s. 12 of the Act were to be found in a *Tahsildar's* report, and the order was passed in opposition to a petition by the mother of the minor, but the petitioner was not afforded an opportunity in the Judge's Court of giving evidence to rebut the allegations made against her, or of cross-examining the *Tahsildar* on his report,—*held* that upon such materials it could not be said that there was "no near relative willing and fit to be entrusted with the charge of the property of the minor," which, under s. 9, must be found before the power to appoint the Collector under s. 12 could arise. *Held* also that the mere circumstance that the mother of the minor was a *parda-nashin* lady was not necessarily a disqualification to her having charge of the property of her son. *Deo Kuar's case* (W. N., 1881, p. 27) and *Lal Kuar v. Shib Singh* (W. N., 1881, p. 102) referred to. *KAITKI v. THE COLLECTOR OF BADAUN.*

[IX-170]

(7).—(Act XL of 1858). The appellant applied, under Act XL of 1858, for a certificate to administer to the estate of her minor son. Her application was not opposed, and it did not appear that there was any male relative of the minor, who was fit to act who was willing to do so. The District Judge, without stating any objections to the appellant personally, refused the application on the ground that he considered that she should not be the sole administratrix. He at the same time appointed her to the guardianship of the minor. The Court under the circumstances, and considering that the Act provided safeguards for the proper administration of the estate, decided that the appellant should be granted a certificate. *IMTIAZ BEGAM.*

[I-14]

(8).—(Act XL of 1858).] The grand-mother of a minor applied under Act. XL of 1858 for a certificate to adminis-

ACT VIII OF 1890, s. 6.—(continued.)

ter to his estate. The district Court made no enquiry into the fitness of the applicant but disposed of her application on the ground that it would be "useless and inexpedient." *Held* that the reason for refusing the application was not sufficient and the application must be reconsidered. *ATI KUAR v. THE COLLECTOR OF GORAKHPUR.*

[I-16]

(9).—(Act XL of 1858).] The appellant applied for a certificate of administration to the estate of her minor sons under Act XL of 1858. The district Court refused to grant her a certificate on the ground that she was not a fit person to take charge of the landed estate of the minor, as she was not likely to do the best for the minors, and directed the Collector to take charge of the estate. *Held* that the order was bad as no reason had been recorded for considering the appellant unfit. *DEO KUAR.*

[I-27]

s. 9.—*Jurisdiction*—(Act IX of 1861).] An application was made to the District Judge of Allahabad under s. 1 of Act IX of 1861 by a relative of a minor, alleging that the minor, had by the acts and with the connivance and assistance of the defendants, at Allahabad been removed from the plaintiff's custody and guardianship at Allahabad, and praying for the minor's restoration thereto: At the time when application was made, the minor was at Lahore. *Held* that under s. 4 of Act IX of 1861, read with s. 17 of the Civil Procedure Code, the application was cognizable by the District Judge of Allahabad, where the cause of action arose; and that, even apart from s. 17 of the Code, the minor having been in the custody and guardianship of a person within the jurisdiction of the Judge of Allahabad, that officer had full jurisdiction to deal with the application. *SARAT CHANDRA CHAKRABATY v. FORMAN AND ANOTHER.*

[X-80]

s. 10.—*Appointment of guardian ad litem enures for the whole of lis*—Where a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made unless and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant; the Court will appoint the guardian so named in absence of any special and valid objection to such person. *JWALA DEI v. PIRBHU,*

[XI-192]

(1). s. 12 (3a).—*Person claiming to be husband* (Act IX of 1861).] Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she

ACT VIII OF 1890, s. 10.—(continued.)

is so, Act IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court. *BALMUKUND v. JANKI AND ANOTHER.*

[I-6

(2). ————— (Act IX of 1861.)] *P* whose minor wife had refused to return to co-habitation with him on the ground that he was out of caste in consequence of having committed a criminal offence applied to the district Court under Act IX of 1861 for the custody of her person. *Held* that that Act did not apply to such a case. See also *Balmakund v. Janki*, (I. L. R., 3 All. ante p. 403.) *PAKHAN-DU v. MANKA AND OTHERS.*

[I-14

(1). s. 17.—*Matters to be considered in appointing guardian—Propinquity, Act XL of 1858.*] The grant of a certificate of guardianship under s. 7 of the Bengal Minor's Act (XL of 1858) should not be based exclusively on considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed as guardian. *SOHNA v. KHALAK SINGH AND ANOTHER.*

[XI-1

(2). ————— *Parda lady*—(Act XL of 1858.)] *Held* that the mere circumstance that the applicant was a *pardanashin* lady was not necessarily a disqualification to her having charge of the property of the minor. *Deoknar's case* (W. N. 1881, p. 27) and *Lal Kuar v. Shib Singh* (W. N. 1881, p. 102) referred to. *KAITKI v. THE COLLECTOR OF BADAUN.*

[IX-170

(3). ————— (Act XL of 1858.)] An application for a certificate under Act No. XL of 1858 in respect of the person and property of 4 minors was made by the applicant who was the aunt of one, the mother of another and step-mother of the remaining minors. Her application was opposed by another male relation of the minors who contended that a certificate should be granted to him by virtue of the will of the minor's ancestor. The District Judge refused to give the certificate to either, and directed the Collector to take charge of the estate, and to appoint a guardian of the persons of the minors. His reasons were:—The applicant is a *parda* woman. I think from certain papers that the objector will be better guardian of the property than the applicant and the Collector of the district than either, and not putting much faith in the will I direct the Collector to take charge of the estate of all the minors. *Held* that the mere fact that the applicant was a *parda* lady was no ground for rejecting her application and the Judge should have made inquiries into her fitness of capacity. The property appeared to be a small one and it seemed scarcely necessary to tax it with the

ACT VIII OF 1890, s. 17.—(continued.)

expense of administration by the Collector. The appeal must be allowed and the District Judge directed to hold an inquiry as to the appellant's fitness to be put in charge of the minors. *LAL KUAR v. SHIB SINGH.*

[I-102

(4). ————— *Muhammadian child over 9 years—Guardian—Father and mother*—(Act IX of 1861.)] The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years. An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal. *Held* that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed. *Held* also that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application. *IDU v. AMIRAN.*

[VI-122

(5). ————— *Male illegitimate child—Prostitute as guardian.* (Act IX of 1861.)] *Held* that a prostitute was not a fit person to be the guardian of even a male illegitimate child of four years. Her application therefore under Act IX of 1861 against the father of the child for its custody must be refused. *RAJAN BEGAM v. RAFIULLAH KHAN.*

[VII-239

(1). s. 19 (a).—*Person claiming to be husband.*]

See. s. 12, Nos. (1) and (2).

ACT VIII OF 1890. —(continued.)

(2). s. 19 (b).—*Appointment of guardian where father is alive.* (Act XL of 1861). No such restriction as is imposed by s. 27 of Act XL of 1858, prohibiting the appointment of a guardian of any minor whose father is living and is not a minor, applies to persons applying under s. 1 of Act IX of 1861. Where the father of a minor was old and unable to work from age and weakness, and the minor's elder brother had been maintaining and educating the minor at his own expense:—*Held* that, under the circumstances, the brother was competent to apply under s. 1 of Act IX of 1861, and to ask for a certificate of guardianship. SARAT CHANDRA CHAKRABATI v. FORMAN AND ANOTHER.

[X-80]

(1) ss. 29 and 30.—*Mortgage without sanction—Ratifications by minor.* (Act XL of 1858).] A minor cannot ratify a mortgage of his immoveable property made by his guardian appointed under Act XL of 1858, without the sanction of the Civil Court, such a mortgage being under s. 18 of that Act void *ab initio*. MANJI RAM v. TARA SINGH.

[I-97]

(2). —————. *Nullity.*—(Act XL of 1858).] *Held* that a mortgage by the certificated guardian of a minor, of the minor's property, without first obtaining the sanction of the District Judge, under s. 18 of Act XL of 1858, was not absolutely null and void so as to entitle the minor to the property without first making any restitution to the mortgagees for money spent for the benefit of the minor. Such cases fall within the class of cases in which it has been decided that if a person sells or mortgages property belonging to another, having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate. If it is to remain. *Held* further that s. 65 of the Contract Act would apply to such cases. GIRRAJ BAKHSH v. KAZI HAMID ALI.

[VII-62]

s. 35.—“Assign the bond”—*Suit without assignment.* (Act XL of 1858).] B, having been granted by a district Court a certificate under Act XL of 1858 in respect of the estate of a minor, the Judge of such Court called on her to furnish security, and certain persons accordingly gave security bonds to the Judge on her behalf. Subsequently B's certificate was taken from her, and was granted to A, who brought a suit on the minor's behalf against B's sureties for the value of the property entrusted to B. The security bonds in question were not assigned by the Judge to A. *Held* that, inasmuch as the plaintiff was seeking to enforce contracts which were never made with him or any other person in the character of legal representative of the minor, he had no legal status to maintain the suit. Also that no

ACT VIII OF 1890, s. 35.—(continued.)

equitable rights were created in the minor by the bonds, which would render the suit maintainable. *Quere.*—Whether the Judge of a district Court is competent to call upon a person to whom he grants a certificate under Act XL of 1858 to furnish security; and whether, where he has done so, and security bonds have been given to him, he can assign them in the manner provided in s. 257 of the Succession Act, 1865. AMAR NATH GUARDIAN OF LACHEMI NARAIN, MINOR v. THAKUR DAS AND OTHERS.

[III-12]

s. 36.—*Liability of representative of guardian to render account.* (Act XL of 1858).] *Held* that under s. 21 of Act XL of 1858, the Judge has no power to require the heirs of a person to whom the certificate to administer the estate of a minor has been given under the Act, to render an account for all moneys received and disbursed by him in the capacity of guardian. The provisions are personal to the guardian himself and refer to cases in which his certificate has been recalled for incompetency, etc., and not where his appointment has lapsed through death. RAMESHAR TEWARI v. KISHUN KUMAR.

[II-6]

(1). s. 39.—*Removal of guardian.—Failure to produce accounts.* (Act XL of 1858).] The appellant, who claimed the right to have charge of the property of a minor under a deed of gift appointing him manager of such property, in conjunction with the respondent, until the minor came of age, had applied under Act XL of 1858, for a certificate of administration, and the same was granted to him on the 4th of September, 1878. The order granting the certificate stated that “accounts were to be produced whenever called for.” In January, 1881, or about that time, the respondent applied to the district Court that the certificate granted to the appellant might be revoked, as he had not furnished any accounts since the same had been granted to him and had “ruined” a portion of the minor's property. The appellant stated, with reference to the complaint that he had not furnished any accounts that he did not know that he was obliged to do so. He produced accounts for two years. The district Court revoked the certificate which had been granted to the applicant. *Held* that the appellant had in no way complied with the requirements of s. 16 of Act XL of 1858 and that there was no ground to interfere with the district Court's order. The district Court must proceed under s. 16 of Act XL of 1858. BRIJ MOHAN LAL v. GANGA DHAR.

[I-44]

(2). —————. *Failure to furnish inventory.* (Act XL of 1858).] On the 14th June, 1882, the petitioner obtained a certificate of administration to the estate of a minor under Act LX of 1858. On the 12th March, 1883,

ACT VIII OF 1890, s. 39.—(continued.)

the district Court ordered him to return the certificate on the ground that he had failed to furnish the inventory required by s. 16 of the Act within the time mentioned in that section. *Held* that the order of forfeiture was bad as there was nothing on the face of the record to justify it. **PETITION OF GHULAM CHISHTI KHAN.**

[III-206]

(3). ————— *Guardian appointed under will, (Act XL of 1858)*] *Held* that the Court was competent under section 21 of Act No. XL of 1858 to revoke a certificate of administration granted under section 7 of the same Act, although the person to whom the certificate had been granted, had been under a will, appointed guardian of the minor and manager of the property in respect of which the certificate had been granted. **RAM PARGASH v. RUKMINA.**

[I-151]

BRIJ MOHAN LAL v. GANGA DHAR.

[I-44]

(4). ————— *Recommendation of Collector. (Act XL of 1858).*] *A*, the paternal uncle of certain minors, applied for and obtained a certificate of administration to the estate of such minors on his furnishing certain security in 1880, and the objections of *B*, the maternal uncle of the minors, were disallowed. Subsequently six months after, the certificate, granted to *A*, was recalled and one was granted to *B*. This was done simply on the recommendation of the Collector in whose district the property of the minor was situate. *Held* that there was no "sufficient cause" within the meaning of s. 21 of Act XL of 1858 for recalling the certificate. **MUHAMMAD RAZA v. RAZA ALI.**

[I-4]

s. 41.—Discharge of guardian on minor's attaining majority. (Act XL of 1858).] An application for the cancellation of a certificate of guardianship made by a minor, in respect of whom a guardian had been appointed under Act XL of 1858, on the ground that he had already attained the age of majority, was disallowed by the District Judge on the ground that the Act contained no provision for cancellation of a certificate on the minor's attaining the age of majority and the applicant had therefore no *locus standi* to maintain such an application. *Held* that although the Act was not very clear, the phrase "any sufficient cause," in s. 21 of Act XL of 1858, must be held to include the power of the Court to recall the certificate granted, on an application, such as this, if it is well founded in fact. **IRTAZA ALI v. SHAIDA ALI.**

[VIII-279]

s. 45.—Penalty for failure to furnish accounts—(Act XL of 1858).] The appellant, a

ACT VIII OF 1890, s. 45.—(continued.)

guardian appointed under Act XL of 1858, produced his accounts and tendered his resignation. On the objection of the respondent, the District Court, on the 31st May, 1880, ordered the appellant to produce accounts in the form desired by the respondent, but did not fix a time within which he should do so. On the 12th July, 1880, the accounts were produced by the appellant. On the 14th July, 1880, the appellant, without being called on to explain his dilatoriness in obeying the order of the 31st May, was fined Rs. 200 for the delay in submitting the accounts. The Court did not in its order assign any reason for considering the delay wilful. On the 18th August, the Court accepted the appellant's resignation and appointed the respondent, his successor. The appellant appealed from the District Court's order of the 14th July, 1880. The Court observed that s. 23 of Act XL of 1858 appeared applicable to the case. The appellant having resigned his trust, was not entitled to a discharge until he had accounted to his successor. But no successor to the appellant had been appointed when the latter was fined. It is doubtful whether the provisions of s. 22 are applicable in proceedings under s. 23 of the Act. Under all the circumstances the appeal should be decreed. **UMRAO SINGH v. MEWA.**

[I-24]

(1) **s. 47.—Appeal—Order disallowing objection to produce account—(Act XL of 1858).**] The appellant in this case to whom a certificate of administration in respect of the property of a minor had been granted under s. 7 of Act XL of 1858, was served with notice to produce accounts. He objected to this notice but the District Judge disallowed the objection. He thereupon appealed to the High Court from this order. *Held* that the order not being one within s. 22 or 28 of the Act no appeal would lie. **ALI AHMAD KHAN.**

[IV-318]

(2). ————— *Investment of money. (Act XL of 1858).*] In this case, the certificated guardian of a minor applied to the District Judge for sanction to invest a sum of money belonging to the estate of the minor in mortgage of landed property, yielding interest at 12 *per cent. per annum*. The Judge did not approve of the proposed investment and ordered the money to be invested in Government Security. The guardian appealed to the High Court. *Held* that the Judge's order was right. **MUHAMMAD HUSAIN v. NAJJU.**

[I-37]

(1). **s. 52.—Age of majority—(Act XL of 1858).**] A minor of whose person or property a guardian has been appointed under Act XL of 1858 does not attain his majority when he completes the age of eighteen years but when he completes the age of twenty-one years. **KHWAHISH ALI v. SARJU PRASAD.**

[I-30]

ACT VIII OF 1890, s. 52.—(continued.)

(2.)—*Act IX of 1861.* Under s. 3 of Act IX of 1875 a person under the age of 18 is a minor within the meaning of Act IX of 1861. **SARAT CHANDRA CHAKRABATI v. FORMAN AND ANOTHER.**

[X-80]**ACT IX OF 1890 (Indian Railways).**

s. 72—"Risk note"—*Legality.* The contract embodied in what is commonly known as a "risk note," i. e., a contract whereby in consideration of goods being carried by a Railway Company at a reduced rate the consignor agree that the company shall be free of all responsibility for any loss or damage to the goods, is a valid and legal contract within the terms of s. 72 of Act No. IX of 1890. **Suniokeh Rai v. East India Railway Company N.-W. P. H. C. Rep. 1867, p. 200** distinguished. **EAST INDIA RAILWAY COMPANY v. BUNYAD ALI.**

[XV-150]

s. 101—*Negligence—Punishment.* Where a railway servant had by his negligence been the cause of an accident in which several lives were lost; *held*, that a sentence of three months simple imprisonment was inadequate, and that it ought to be enhanced. **QUEEN-EMPRESS v. JAGGANNATH.**

[X-171]

s. 105.—*Knowledge—(Act IV of 1879)* The accused in this case was convicted of an offence under s. 45 of the Indian Railways Act (IV of 1879) on the following findings of fact:—That the accused was in charge of the Khaga station; that it was his duty before despatching the down mail to obtain line-clear message from Sirathu; that he did not do so, but concocted one and made it appear as if it had been received in due course; that he handed it to the driver of the mail as his warrant to proceed on his journey. *Held* that there was no evidence to justify the inference of the "knowledge" required by s. 45. **EMPRESS v. SRI KISHEN.**

[II-172]

s. 113—*Travelling without pass or ticket—Offence.* A passenger who travels in a train without having a proper pass or ticket with him has not committed an "offence." He cannot therefore be legally sentenced to imprisonment in default of payment of the excess charge and fare which may be recovered under the provisions of s. 113, cl. (4) of Act No. IX of 1890. **QUEEN-EMPRESS v. RAM PAL.**

[XVII-196]**ACT XI OF 1890 (Cruelty to Animals).**

s. 6 (1)—*Permits.* *Held* that the word "permits," as used in s. 6, clause (1), of Act XI of 1890, implies knowledge of that which is permitted. **QUEEN-EMPRESS v. LALTA PRASAD.**

[XVIII-20]**ACT IV OF 1893 (Partition).**

s. 3.—"Any other share-holder." Under s. 3 of Act No. IV of 1893, the person at whose instance an order for sale of property sought to be partitioned is made is not entitled to apply for leave to purchase the share or shares of the other party or parties entitled to partition. Under s. 3 of the said Act also the Court is not competent to order the whole of the property in question to be sold at a valuation, but only the share or shares of the applicant or applicants for sale. **MANGAL SEN v. RUP CHAND AND ANOTHER.**

[XV-231]**ACT I OF 1894 (Land Acquisition).**

s. 9.—*Mortgages—Failure to put in claim—Right to attach compensation money, (Act X of 1870).* B. M. and others, mortgagees, obtained a decree under s. 88 of the Transfer of Property Act, 1882, for the sale of the mortgaged property. Before execution of that decree some of the mortgaged property was taken up by Government under the provisions of the Land Acquisition Act 1870. The mortgagees never put in any claim with regard to the mortgaged property in response to the notification made under section 9 of the last mentioned Act; but subsequently sought to attach in the hands of the Collector the compensation money about to be paid to the mortgagor. On these facts it was *held* that the mortgagees were not entitled to attach such money in execution of their decree under the Transfer of Property Act, 1882. **BASA MAL AND OTHERS v. TAJAMMAL HUSAIN.**

[XIII-223]

(1.) s. 18.—*Reference.—In cases where Collector claims the land on behalf of Government (Act X of 1870).* The scope and object of the Land Acquisition Act (X of 1870) is to provide a speedy method for deciding the amount of the compensation payable by the Collector, when such amount is disputed, and the person or persons to whom it is payable. S. 15 of the Land Acquisition Act contemplates a reference when the question of the title to the land arises between the claimants who appear in response to the notice issued under s. 9, and who set up conflicting claims one against another as to the land required, which the District Judge as between such persons can determine. The Collector has no power to make a reference to the District Judge under s. 15 in cases in which he claims the land in question on behalf of Government or the Municipality, and denies the title of other claimants, and the District Judge has no jurisdiction to entertain or determine such reference. **IMDAD ALI KHAN v. THE COLLECTOR OF FARUKHABAD.**

[V-242]

(2.)—*(Act X of 1870.)* The Collector has no power to make a reference to the District Judge under s. 15 of Act No. X of 1870 in cases in which he claims the land in respect of which such reference is made on behalf of Government, and denies the

ACT I OF 1894, s. 18.—(continued.)

title of other claimants, and the District Judge has no jurisdiction to entertain or determine such reference. *Imdad Ali Khan v. The Collector of Farukhabad* (L. L. R. 7 All. 817) followed. *THE CROWN BREWERY, MUSSOORIE v. THE COLLECTOR OF DEHRADUN.*

[XVII-78]

s. 23 and 24.—Matters to be considered and neglected in determining compensation. (*Act X of 1870.*) Where land is compulsorily sold under the provisions of Act X of 1870 (Land Acquisition Act). It is incumbent on the party claiming compensation on the ground that the land is, or may become, of value in a certain specific character, to prove, either that the land is of that character, or that there are strong probabilities of the land coming to possess that character within a reasonable time. "Strong probabilities," mean such probabilities as would induce an ordinarily prudent man to invest in the said land on the faith of them. In the case last mentioned the proper compensation is the estimated future market value of the land in the character shown by the claimant, discounted to represent a present payment. *DHANI AND OTHERS v. THE SUPERINTENDENT OF DEHRADUN.*

[X-129]

s. 49.—Acquisition of part of house—(Act X of 1870.) The Local Government having appropriated for public purposes under the Land Acquisition Act (X of 1870) some of the out houses attached to a dwelling house, and part of the compound in which they were situate, without taking the house with its other out-houses or appurtenances or the rest of the compound, the owner objected, under s. 55 of the Act, that the Government should take the whole of such property or none. *Held*, applying the s. 55 the interpretation placed by the Courts in England upon the corresponding s. 92 of the Land Clauses Consolidation Act (VIII and IX, Vic C. 18), that the section was applicable, and the objection must be allowed. *Grosvenor v. The Hampstead Junction Railway Company* (26 L. J., N. S., Ch. 731); *Cole v. The West London and Crystal Palace Railway Company* (28 L. J., Ch. 767); and *King v. The Wycombe Railway Company* (29 L. J., Ch. 462) referred to. *Held* also that the rule was not in England restricted to small or confined areas, and that the test was not whether the part appropriated could be severed from the rest of the property without inconvenience to the owner. *KHAIRATI LAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

[IX-104]

s. 53.—Procedure of Court—(Act X of 1870.) This was an appeal from the decision of a District Judge in a case referred under the Land Acquisition Act of 1870. In remanding the case for a new trial the High Court made the following observations.—"The learned Judge failed to appreciate the mode in which referen-

ACT I OF 1894, s. 53.—(continued.)

ces to his Court under s. 15 of the Land Acquisition Act should be dealt with and disposed of. No oral evidence was taken and the opinions expressed by assessors and himself are simply based partly upon personal knowledge, partly upon documents which are improved, and partly upon what they had heard out of Court. S. 36 of the Act contemplates that the procedure to be adopted, in such cases should, as far as practicable, be the same as that which is adopted in the trial of ordinary civil suits, "the parties interested" being treated as plaintiff and the Collector of Shahjahanpore as a defendant." *BANSI LAL v. THE COLLECTOR OF SAHARANPORE.*

[IV-88]

s. 54.—Appeal.—One claimant denying the title of the other. (*Act X of 1870.*) Under s. 39 of Act No. X of 1870 the fact that one of the persons concerned denies altogether the right of another of such persons to share in the compensation awarded will not prevent an appeal lying from the order of a District Judge apportioning compensation. *Kishan Lal v. Shankar Singh* (*Weekly Notes*, 1888, p. 170) overruled. *HUSAINI BEGAM v. HUSAINI BEGAM AND OTHERS.*

[XV-135]

*Per contra.—**KISHAN LAL v. SHANKAR SINGH.*

[VIII-170]

Act XII of 1896 (Excise.)

(1). **s. 3 (g) and (h).—Fermented liquor—Tari—(Act XXII 1881.)** Certain *pasis*, having extracted the juice from palm trees, sold it to passers-by. *Held* that they were not guilty of any offence under ss. 39 and 12 of Act XXII of 1881, as there was nothing to show that the *tari* was "fermented" in the sense of ss. 39 and 3 of the above Act. *EMPRESS v. AJAIB AND OTHERS.*

[III-238]

(2) **s. 3 (g).—Chandu—(Act XXII 1881.)** *Held* that the illegal manufacturing or preparing of *chandu*, which is a preparation of opium, was, having regard to the terms of s. 3 (h) of Act XXII of 1881, not an offence under s. 38 of that Act. *EMPRESS v. GANESHI AND ANOTHER.*

[IV-213]

s. 44.—Excise-officer—Police officer invested with powers of excise officer (Act XXII of 1881.) *Held* that a Police officer invested by the Local Government with some of the powers given by s. 34 of Act No. XXII of 1881, was not authorized to make a complaint or a report of the nature referred to in s. 47 of the Act. *Held* also that an excise officer who had himself taken proceedings against a person accused of an offence under the excise act was not competent to try such person in respect of the same matter. *QUEEN-EMPRESS v. RAM CHARAN AND OTHERS.*

[XVI-105]

ACT XII OF 1896, s. 44.—(continued.)*Per contra.***QUEEN-EMPRESS v. MAKUNDA AND ANOTHER.****[XVII-162]****s. 48 (1. c.)—Chandu.]****See s. 3, No. 2.****s. 49.—Fermented liquor—Tari.]****See s. 3 No. (1)**

ss. 49 & 52.—Illicit sale—Sale by servant of license holder—(Act XXII of 1881.) Held that where the holder of an out-still license left his servant temporarily in charge of his shop and he sold liquor there, neither the license-holder nor the servant were guilty of any offence under Act No. XXII of 1881. **QUEEN-EMPRESS v. GUMNA AND ANOTHER.**

[XIV-201]

s. 52.—Sub-letting benefits of license (Act XXII of 1881.) Held that the sub-letting the benefits of a license, granted under Act XXII of 1881, in contravention to an express prohibition against such sub-letting, contained in the license, was an offence punishable under s. 42 of the Act. **DEBI PRASAD v. RUP RAM AND OTHERS.**

[VIII-215]

s. 57.—Excise officer—Police officer invested with powers of excise officer (Act XXII of 1881.) Held that an officer invested with powers under ss. 27, 28 and 29 of Act. No. XXII of 1881, who had power in certain events to take the case before a Magistrate under s. 32, was an "excise officer" within the meaning of s. 47 of the Act. **Queen-Empress v. Ram Charan (W. N. 1896, p. 105) overruled. QUEEN-EMPRESS v. MAKUNDA AND ANOTHER.**

[XVII-162]*Per contra:—***QUEEN-EMPRESS v. RAM CHARAN AND OTHERS.****[XVI-105]****ACT X OF 1897 (General Clauses)**

(1.) s. 3 (25.)—Immoveable property—Standing crops—(Act I of 1868.) Standing crops are immoveable property in the sense of the General Clauses Act (I of 1868). *Madayya v. Yenkata (L. L. R., 11 Mad., 193) approved. CHEDA LAL v. MULCHAND. MINDAI v. KUNDAN SINGH.*

[XI-174]**UMED RAM v. DAULAT RAM.****[III-157]**

(2.)—Immoveable property—"Khet naishakar"—(Act I of 1868.) One B executed a deed in lieu of Rs. 100 in favor of one C and as a collateral security hypothecated his "Khet naishakar." The deed was registered. C transferred the bond to A by an endorsement on the deed but it was neither stamped nor registered.

ACT XII OF 1896, s. 3 (25.)—(continued.)

In the meantime B cut down the sugar-cane crops and sold the same to F and G. The present suit was brought by A against B, F and G for the recovery of Rs. 100 due on the bond. The suit was met by the plea that the endorsement being unregistered could not transfer the bond. Held that the property hypothecated was *naishakar*, the word *Khet* indicating only a measure which is moveable property and consequently no registration was necessary. **KALKA PRASAD v. CHANDAN SINGH AND OTHERS.**

[VII-270]

(3) s. 3 (26.)—Imprisonment—(Act I of 1868.) Held that imprisonment in s. 488, Criminal Procedure Code, may, having regard to s. 2, cl. 18, of Act I of 1868, be either simple or rigorous. **EMPRESS v. NARAIN.**

[VII-54]

(1) s. 6.—Repeal of enactment—Effect—(Act I of 1868.) Prior to the 1st of May, 1882, the Secretary and Manager of a projected company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force and forwarded the memorandum and articles of association with the necessary stamp fees and did everything that was required to be done by or on behalf of the company to obtain a certificate under that Act. No order was passed by the Registrar on this application until the 6th May, and owing to delay for which the applicants were not responsible registration was not effected and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile on the 1st May, 1882, the Indian Companies Act (VI of 1882), repealing Act X of 1866, came into force. Held that the proceedings for obtaining registration of the company and a grant of a certificate of such registration, commenced within the meaning of s. 6 of Act I of 1868 when the memorandum and articles of association, were received in the Registrar's office in April 1882 while Act X of 1866 was in force, that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings, and consequently the company must be taken to have been incorporated under the former Act. **IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY LIMITED.**

[IX-119]

(2.)—(Act I of 1868.) An order rejecting an application under s. 351, C.P.C., for a declaration of insolvency, was passed on the 14th April, 1888, on which date, under the first para. of s. 589, C. P. C., an appeal from such orders lay to the High Court. On the 1st July, 1888, the C. P. C. amendment Act (VII of 1888) came into force, s. 56 of which repealed the first para. of s. 589 of the Code. In August, 1888, an appeal was

ACT XII OF 1896, s. 6.—(continued.)

presented to the High Court from the order of the 14th April. *Held*, applying the provisions of s. 6 of Act I of 1868, that the insolvency proceedings out of which the appeal arose having commenced before Act VII of 1888 came into force, the repeal of the first para. of s. 589 did not alter the *forum* of appeal or take away the right of appeal from the orders specified in s. 588 (17) and that the appeal therefore lay to the High Court. **ASHFAQ HUSAIN v. KALIAN DAS.**

[IX 106]

(3). ————— (*Act I of 1868*). *Held* that Act IV of 1882 did not affect retrospectively proceedings commenced under Regulation XVII of 1806 nor could it affect a right obtained under the regulation before the Act came into force. **GOKUL SINGH AND OTHERS v. BIRJ LAL.**

[V-130]

(1). **Miscellaneous—"Value"—(*Act I of 1887*).** *Held* that the "amount" of the subject matter of the suit mentioned in cl. (13) of s. 3 of Act I of 1887 must mean the amount, that is, the amount in money, which the plaintiff claims to recover in his suit and not the amount which the Court may give him a decree for, and that for purposes of jurisdiction the amount of the subject matter of the suit must consequently mean the amount as stated by the plaintiff in his plaint. On the same principle the words "value of the subject matter of the suit" in the same clause must mean the value of the subject matter of the suit as stated by the plaintiff in his plaint. **MAHABIR SINGH AND ANOTHER v. BEHARI LAL AND OTHERS.**

[XI-107]

MUHAMMAD ABDUL KADIR v. HUSAIN KHAN AND ANOTHER.

[XIV-55]

MADHO DAS v. RAMJI PATAK.

[XIV-84]

(2). ————— (*Act I of 1887*).] For the purposes of determining the proper appellate Court in a Civil suit the "value of the subject matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appears that either purposely or through gross negligence the true value of the suit has been altogether misrepresented in the plaint. **MAHABIR SINGH, AND ANOTHER v. BEHARI LAL AND OTHERS.**

[XI-107]

ACT VIII of 1897. (Reformatory Schools)

See also Act V of 1876.

(1) s. 16—*orders not subject to appeal or revision.*] *Held* that the High Court has no power to interfere in appeal or revision with an order for

ACT XII OF 1896, s. 16.—(continued.)

detention in a Reformatory School passed in substitution for an order of transportation or imprisonment. **QUEEN-EMPRESS v. HIMAI.**

[XVII-230]

QUEEN-EMPRESS v. GOBINDA.

[XVII-230]

(2). —————.] The prohibition contained in s. 16 of Act No. VIII of 1897, does not apply to an order for detention in a Reformatory School passed when the person to whom it relates has not been convicted of any offence and sentenced to any term of imprisonment or transportation for which detention in a Reformatory School could be substituted. **QUEEN-EMPRESS v. BILLAR.**

[XVII-231]

CIVIL PROCEDURE CODE (ACT XIV OF 1882).

s. 2—"Stamped"—"*Person referred to.*" (*Act X of 1877*).] *Held* that the word "stamped" in s. 2 of Act X of 1877 is not limited to the person who is not able to write (like the word marked) and that the expression "person referred to" means person referred to in the subsequent section of the Code as being required to sign or verify certain documents and that it was not a condition precedent to such person being able to use a stamp that he should be unable to write his name. **MAHARAJA OF BENARES v. DEBI DIAL NAMA.**

[I-36]

(1) s. 11.—*Birt-jaijmani.*] The plaintiff in this suit alleged that the defendant had executed a *kabuliyat* in his favor, whereby he agreed to give the plaintiff Rs. 41 for the privilege of receiving certain payments that might be made to the plaintiff in a certain mahal by way of "*birt-jaijmani*." The Munsif dismissed the suit on the ground that *birt-jaijmani* was not transferable. *Held* that the suit was maintainable. **BINDHA LAL v. SAMPAT MISIR.**

[III-168]

(2). —————.] Amongst the *Maha-brahmans* of a particular village an agreement obtained that some of them should collect and receive offerings during certain months; that during those months the others should refrain from receiving any offerings, and that in certain other months the other *Maha-brahmans* should collect and receive the offerings and they should refrain from collecting offerings. *Held* that this was a good agreement and sufficient to support an action for damages by the persons entitled to the offerings in a particular month as against the persons who had received those offerings contrary to the agreement. **OOCHI AND ANOTHER v. ULFAT AND OTHERS.**

[XVIII-23]

CIVIL PROCEDURE CODE, s. 11.—(continued.)

(3)——*Management of the temple—Suit to partition.* Held that rights as joint trustees to the management of and superintendence of worship at certain temples, none of the trustees having any personal pecuniary interest in the temples or their income, could not be made the subject of partition by a Civil Court, that is to say, a Civil Court is not competent to grant decree declaring that each of such trustees in a rotation should for a certain definite period enjoy exclusively the rights of management and superintendence. *Mitta Kunth Audhicarry v. Neerajun Audhicarry* (14 B. L. R., 166); *Mancharam v. Pranshankar* (1 L. R., 6 Bom., 298); *Limbabin Krishna v. Ramabin Pimpler* (1 L. R., 13 Bom., 548); *Ananda Moyi Chaudrani v. Baikant Nath Rae* (8 W. R., 193); *Pranshankar v. Pran Nath* (1 Bom. H. C. Rep., 12) and *Ram Coondur Thakoor v. Tarck Chunder Turkoruthur* (19 W. R., 28) referred to. SRI RAMAN LALJI MAHARAJ v. SRI GOPAL LALJI MAHARAJ AND OTHERS.

[XVII-103]

(4)——*Suit for jactitation of marriage.* Held that a suit for jactitation of marriage will lie in a Civil Court in British India, and is not within the ruling of the Privy Council in *Raja Nilmony Singh v. Kally Churn Bhatta-Charji* (L. R., 2 I. A., 83.) MIR AZMAT ALI v. MAHMUDUL NISA.

[XVII-204]

(1) s. 12.—“*Same relief.*”—*Second suit for rent for a subsequent year.* The pendency of litigation regarding rent, *malikana*, or other demand for one year does not, under s. 12, C. P. C., bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Ss. 12 and 13 of the Code compared. BALKISHAN AND ANOTHER v. KISHAN LAL.

[IX-42]

(2)——*Applicability of s. 12 to execution proceedings.* A decree was passed at Cawnpore against a judgment debtor who had property both in the Cawnpore and the Lucknow districts. The decree-holder applied both for attachment of the property in the Cawnpore district and also for a certificate to enable him to execute the decree in the Lucknow district through another Court; and the certificate was granted as prayed, and certain property was attached at Lucknow. While that property was still under attachment, the decree-holder caused other property to be attached at Cawnpore, whereupon a third party objected to such attachment on the ground that the property attached did not belong to the judgment-debtor, but was *wakf*, of which the objector had the custody. No objection to the attachment of any property was raised at any time by the judgment-debtor. Held that execution proceed-

CIVIL PROCEDURE CODE, s. 12.—(continued.)

ings at Cawnpore were not barred by s. 12 read with s. 647 of the Civil Procedure Code, by reason of the grant of certificate for execution of the decree at Lucknow. *Saroda Prosad Mullick v. Lutchnesput Doorgur* (14 Moo. I. A. 529), referred to. GAYA PERSHAD v. GANGA NARAIN AND ANOTHER.

[IX-205]

s. 13.—

1. Same cause of action.
2. Matter in issue.
3. Matter directly and substantially in issue.
4. Same parties.
5. Representative.
6. Competent Court.
7. Finally decided.
8. Explanations.
9. Applicability of s. 13 to execution proceedings.
10. Miscellaneous cases.

(1) Same cause of action.

(1.) s. 13.—*Second suit for redemption.* In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage debt had now been satisfied from the usufruct. Held, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct. MUHAMMAD SAMI UDDIN KHAN v. MANNU LAL AND OTHERS

[IX-136]

(2.)——— . ———— .] Held that a mortgagor whether under a simple or a usufructuary mortgage who has obtained a decree for redemption and allows such decree to lapse by reason of his not paying in the decretal amount within the time limited for payment by the decree, cannot subsequently bring

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

a second suit for redemption of the mortgage in respect of which such decree was obtained. *Sheikh Golam Husain v. Musammat Alla Rakhee Beebee* (N.W. P. H. C. Rep. 1871, p. 62) and *Maleji v. Sagaji* (I. L. R., 13 Bom., 567) followed. *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet* (I. L. R., 10 Bom., 461) referred to. *Muhammad Samiuddin Khan v. Mannu Lal* (I. L. R., 11 All., 386); *Sami Achari v. Somasundram Achari* (I. L. R., 6 Mad. 119); *Periandi v. Angappa* (I. L. R. 5 Mad. 423) and *Ramunni v. Brahma Dattan* (I. L. R., 15 Mad., 366) dissented from. **DAVID HAY v. RAZI- UDDIN AND OTHERS.**

[XVII-24

ANRUDH SINGH v. SHEO PRASAD AND OTHERS.

[II-114

(3) ———— [Act X of 1877.] The respondent brought a suit against the appellants and one G for possession of two houses in which he eventually obtained a decree against G alone, the appellants' shares of the houses being exempted. When the respondent applied for possession of the houses in execution of his decree, the appellants objected on the ground that the whole of the houses did not belong to G. This objection was disallowed, and the respondent was put in possession of the houses. He subsequently sued the tenant of one of the houses for rent. The appellants applied to be made parties to this suit, but the application was rejected. The respondent obtained a decree in this suit. The appellants next took up their residence in this house with the connivance of the tenant. The respondent thereupon charged them with criminal trespass, and was referred by the Magistrate to the Civil Court. The respondent accordingly brought the present suit against the appellants for possession of the house. The Court observed that the respondent's right of suit was distinct from that in the former suit, and there was no bar to this suit, with reference to the former suit or the execution proceedings in that suit under ss. 13 or 244 of the Civil Procedure Code. **KALKA PRASAD AND OTHERS v. RAM RATAN.**

[I-64

(4) ———— [Act X of 1887.] A brought a suit against B for Rs. 559-7-3 due on an account. The parties having agreed out of Court to refer the matter to arbitration the Court adjourned the hearing for four days and some time after hearing that the matter had been settled by the arbitrators dismissed the suit for default. A brought this suit against B on the award claiming Rs. 642. Held that the suit was not barred by s. 13, Civil Procedure Code. **SANNU PARWAR v. BRIJ LAL.**

[I-23

(5) ————.] Where the plaintiff in an action for trespass has obtained a decree and a mandatory injunction against the defendant, he can not bring a fresh suit against the defendant

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

without proof of a fresh cause of action. He has his remedy in the enforcement of the mandatory injunction. **JAWIRI v. H. A. EMILE.**

[X-232

(2.) Matter in issue.

(6) ———— [Matter in issue—Subject matter—(Act X of 1877).] The obligee of a bond payable by instalments sued the obligor for four instalments, claiming with reference to the terms of such bond interest on such instalments from the date of such bond. The obligor contended in that suit that, on the proper construction of the bond, the interest on such instalments should be calculated from the dates of default. The obligee obtained a decree for interest as claimed. The obligee subsequently again sued the obligor for four instalments, again claiming interest on such instalments from the date of such bond. The obligee contended again in the second suit that interest should only be calculated from the dates of default. Held the question as to the date from which interest due on the defaulting instalments was exigible under the terms of such bond was *res judicata*. It is the "matter in issue," not the "subject matter" of the suit, that forms the essential test of *res judicata* in s. 13 of Act X of 1877. **PARLAWAN SINGH v. RISAL SINGH AND OTHERS**

[I-110

(3) Matter directly and substantially in issue.

(7) ————.] A finding in a judgment to operate as *res judicata*, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree or some operative part of it was made, otherwise the finding must be considered either as superseded by the decree, or as entirely immaterial, or as no more than incidental and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit. The finding of fact to operate as *res judicata*, need not have been the sole finding of fact upon which the decree was made, but it must have been a material and necessary finding of fact, material and necessary in the sense that the fact must have been found as it was found in the judgment, and could not have been found otherwise, for the decree as it was made to have been a good result in law from the fact or facts so found. Further, if there were two findings of fact, either of which would justify in law the making of the decree which was made, that one of such two findings of fact which should in the logical sequence of necessary issues have been first found, and the finding of which would have rendered the other of such two findings unnecessary for the making of the decree which was made, is the finding which can operate as *res judicata*. A matter can not be said to be "directly and substantially

CIVIL PROCEDURE CODE, s. 13.— (continued.)

issue" within the meaning of the first paragraph of s. 13 of Act No. XIV of 1882 unless and until it is, or becomes, material for the decision of the suit to find as to it. The framing of issues under s. 146 of Act No. XIV of 1882, on which at that stage of the suit the right decision of the case appears to depend, does not of itself make the matter to which such issues relate "directly and substantially in issue" within the meaning of s. 13, although, when the finding upon any one or more of the issues is sufficient for the decision of the suit, it may be desirable that the Court should state in its judgment its finding or decision upon each separate issue which it had framed. The following cases were referred to:—*Krishna Behari Roy v. Brojeswari Chowdransee* (L. R., 12 I. A. 283); *Soorjomonee Dayee v. Suddanund Mohapatra* (L. R., 1 A. Supp. Vol. 212); *Raja Run Bahaddor Singh v. Mussumut Lachoo Koer* (L. R., 12 I. A. 23); *Radha Madhub Holdar v. Manohar Mukerji* (L. R. 15 I. A. 97); *Shaikh Enactoolai v. Saikh Ameer Baksh* (25 W. R. C. R. 225); *Niamut Khan v. Phadu Buldia* (I. L. R., 6 Cal. 319); *Jamait-un-nissa v. Lutf-un-nissa* (I. L. R., 7 All., 606); *Man Singh v. Narayan Das* (I. L. R., 1 All., 489); *Lachman Singh v. Mohan* (I. L. R., 2 All. 500); *Ram Gholam v. Sheotahal* (I. L. R., 1 All., 266); *Anusuyabai v. Sakharam Pandurang* (I. L. R., 7 Bom. 464); *Devarakonda Narasamma v. Dzuvarakonda Kanaya* (I. L. R., 4 Mad., 143); *Ghela Ichharam v. Sankalchand Felka* (I. L. R., 18 Bom., 597); *Tarakant Banerji v. Puddomoney Dassee* (5 W. R., P. C., 63); *Robinson v. Dulip Singh* (L. R., 11 Ch. D. 798). SHIB CHARAN LAL v. RAGHUNATH.

[XV-47]

(8).———.] S sued K for four bonds, alleging that the same had been satisfied. K had formerly sued S on two of these bonds. S had alleged in defence of that suit that those two bonds, as also the other two, had been satisfied. It was decided in that suit that not one of the bonds had been satisfied. *Held* by Petheram, C.J., and Oldfield, Brodhurst and Duthoit, J.J., that the only issue in the former suit which had to be decided being whether the bonds on which that suit was brought had been satisfied or not, the second suit was, under s. 13 of the Civil Procedure Code, *res judicata* only in respect of those bonds, and not in respect of other two bonds. The Court which tried the former suit had not jurisdiction to try the subsequent suit.

Per MAHMOOD, J.—This being so, if the word "suit" in s. 13 were taken literally, it might, with some plausibility, be contended, that there was no *res judicata* in respect of any of the bonds. The word "suit," however, must be understood to mean such a matter as might have formed the subject of a separate suit independently of the special provisions of the Civil Procedure Code, such as s. 45, which enables the plaintiff to unite several causes of action in one and the same suit. Adopting

CIVIL PROCEDURE CODE, s. 13.— (continued.)

this interpretation, it was clear that the two bonds which were the subject of the former suit could not be allowed to form the subject of litigation again. As to the other two bonds, which were not the subject matter of the former suit, they did not in the former suit, constitute a "matter directly and substantially in issue," within the meaning of s. 13; and even if they were "directly and substantially in issue," the decision in the former suit would not support the plea of *res judicata*, because the Court which tried that suit was not a Court of jurisdiction competent to try the subsequent suit in which the plea was raised. SHEORAJ RAI v. KASHI NATH AND OTHERS.

[V-15]

(9).———*Recurring liability—Malikana dues.*] For the purposes of the rules of *res judicata* it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. *The Rajah of Pittapur v. Sri Rajah Ravi Bachi Sitaya Garu* (L. R., 12 I. A., 16) referred to. On the 17th August, 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291, and 1292 *Fasli*. On the 5th October, 1885, the Munsif dismissed the suit. On the 10th March, 1886, the Subordinate Judge on appeal reversed the Munsif's decree, and decreed the suit. On the 21st June, 1886, the defendant appealed to the High Court, which on the 4th July, 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June, 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 *Fasli*, which accrued after the institution of the former suit. By judgments dated respectively the 21st August, and 27th November, 1886, the lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March, 1886, in the former suit, operated as *res judicata* and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May, 1887, the defendant appealed to the High Court, and on the 16th May, 1888, (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July, 1887), the appeal came on for hearing. *Held* that the effect of the High Court's judgment dismissing the former suit on the 4th July, 1887, was not affected by the circumstance that the second suit was brought

CIVIL PROCEDURE CODE, s. 13.—

(continued.)

for recovery of *malikana* for a different year inasmuch as that judgment went to the root of the plaintiff's title to *malikana*, and its scope was not limited to the particular item then claimed. *BALKISHAN AND ANOTHER v. KISHAN LAL.*

[IX-42]

(10).—[Incidental decision of title in *S. C. C. suit.*] Held that the incidental decision of a question of title in a suit of the nature cognizable by a Small Cause Court has not the effect of *res judicata*. *CHET RAM v. GANGA.*

[VI-44]

RAHAT ALI AND ANOTHER v. ALLADI.

[III-203]

(11).—[.] In 1882 *M* sued *K* for damages for trespass on his land by making a road on it. The principal issue in this suit was, whether the road in question was on the plaintiff's land or the defendant's. The suit was decided in defendant's favour, the Court holding that all land to the north of a certain ravine (the boundary line) belonged to the defendant. Held that this decision had the effect of *res judicata* between the parties as to the boundary. In my opinion having regard to the special circumstances of the case the question of what was the dividing boundary of the two parcels of land was a matter directly and substantially in issue in the former suit. *MELWILL v. KHUOJEZ.*

[VI-3]

(4). Same parties.

(12).—[*Benamidar.*] A *benamidar* suing for the recovery of immoveable property on title can sue in his own name, and when such a suit is instituted by a *benamidar* it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*. *Prasunno Coommar Roy Chowdhry v. Gooroo Churn Sein* (3 *W. R.*, 159) and *Hari Gobind Adhokari v. Akhiy Kumar Mozumdar* (1 *L. R.*, 16 *Calc.*, 364) dissented from, *Fuzeelun Beebee v. Omdah Beebee* (10 *W. R.*, 469) and *Meheroonissa Bibee v. Hur Churn Bose* (10 *W. R.*, 220) distinguished. *Gopee Krishn Gosain v. Ganga Persad Goswain* (6 *Moo.*, 1 *A.*, 53) explained. *Ram Bhargose Singh v. Bissesser Narain Singh* (18 *W. R.*, 454); *Gopi Nath Choubey v. Bhegawat Pershad* (1 *L. R.*, 10 *Calc.*, 697) and *Shangara v. Krishnan* (1 *L. R.*, 15 *Mud.*, 267) referred to. *NAND KISHORE LAL v. AHMAD ATA AND ANOTHER. ANMOLI BIBI AND ANOTHER v. AHMAD ATA AND ANOTHER. BHOLI BIBI v. AHMAD ATA AND ANOTHER.*

[XV-160]

KHUB CHAND v. NARAIN SINGH.

[I-79]

(13).—[Cross appeals—Substitution of names.] Where in a suit decreed in part in

CIVIL PROCEDURE CODE, s. 13.—

(continued.)

the first Court, and pending cross appeals, the plaintiff died, and a party was substituted as his legal representative in the plaintiff's appeal, but no application was made by the defendants for substitution in their appeal, and both appeals were subsequently decided in the plaintiff's favor, held that the title of the person added as legal representative in the plaintiff's appeal to execute both decrees as such legal representative was *res judicata* and was not affected by the defendant's omission to bring such person on the record in their appeal under s. 368 of the C. P. C. *SAONLI BIBI AND ANOTHER v. KAPUR CHAND.*

[VIII-83]

(14).—[Different character.] One *R* gave *R R* a mortgage on certain immoveable property agreeing to pay the interest on the mortgage money annually. *R* subsequently sold the property to *N M*, after which the property was sold in execution of a decree against *N M* and was purchased by *H D*. The balance of the proceeds of the execution sale after the satisfaction of the decree was appropriated by *N M*. In 1875 *R R* sued *R*, *N M* and *H D* for the annual interest due to him under his mortgage. In this suit it was held *N M* was primarily liable as he had appropriated the surplus proceeds of the execution sale, and that the property in the hands of *H D* was liable only in case of *N M*'s default. Thereupon *N M* paid such surplus proceeds in Court which was drawn out by *R R*. Subsequently in 1877 *R R* again sued *N M* and *H D* for the annual interest and got a decree similar to that he had obtained before. In 1880 *R R* brought the present suit against *R*, *N M* and *H D* for the principal amount due on his mortgage claiming to recover the same by sale of the mortgaged property. Both the lower Courts overlooked the fact that *N M* had paid over the surplus proceeds. The first Court decreed the claim in the terms of the two previous decrees. The lower appellate Court exempted the property in the hands of *H D* on the ground that he was a purchaser in good faith. On second appeal by *R R* it was held that the property was liable in the hands of *H D* and that the previous judgments did not operate as *res judicata* as the position of the parties assumed an entirely different character when *N M* paid in Court the surplus proceeds of the execution sale. The claim must therefore be decreed against the mortgaged property. *RATAN RAI v. HANUMAN DAS.*

[I-139]

(15).—[Person arrayed on the same side.] The fact that a question in issue between plaintiff and defendant was formerly decided in a suit in which plaintiff and defendant were arrayed together on the same side as co-defendants does not, except under very exceptional circumstances, constitute that question

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

res judicata. BISHNATH SINGH AND OTHERS *v.* BISHESHAR SINGH AND ANOTHER.

[XI-34]

LALLA *v.* MANNU.

[X-177]

BHAGWANT SINGH AND ANOTHER *v.* TEJ KUAR AND OTHERS.

[VI-12]

SITAL PRASAD AND ANOTHER *v.* BANSIDHAR.

[II-168]

MUHAMMAD ZAHYA KHAN *v.* MIRDAD KHAN AND OTHERS.

[VII-246]

(16) ———— [Act X of 1877.] On the death of one S K, a Muhammadan, B, his widow, C, his daughter, Sh. K, his son, and A, his nephew, got, by mutual agreement their names recorded in the revenue registers each for one-fourth of the estate left by him. Subsequently M, mother of Sh. K, alleging herself to be the lawful wife of S K sued B, C, Sh. K and A for her share in the estate by exclusion of A whom she did not admit to be an heir. B, C and A resisted the suit on the ground that M was not married to S K and that Sh. K was not his son. M obtained a decree to the exclusion of A. Subsequently C died and A got his name recorded in the revenue registers against her share. Thereupon Sh. K brought the present suit against A alleging that he and not A was the heir of C A set up as a defence, to this suit that M was not Sh. K's wife nor was Sh. K his son. Held that although the parties to the present suit were co-defendants in the former yet as a fact they were opposed to each other, Sh. K being on one side and supporting the case of his mother and A on the other. The judgment therefore in the former suit operated as *res judicata*. *Gujju Lall v. Fatteh Lal*, (I.L.R. 6 Cal., 171) followed. SHADAL KHAN *v.* AMINULLAH KHAN.

[I-137]

(17) ————.] Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff there must be such an adjudication and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants, but for this effect to arise there must be conflict of interests amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants. *Ram Chandra Narayan v. Narayan Madhev*. (I.L.R., 11 Bom., 216) followed. *Cottingham v. Earl of Shrewsbury* (3 Hare's Rep. 62) referred to. AHMAD ALI *v.* NAJABAT KHAN AND OTHERS.

[XV-156]

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

DOST MUHAMMAD KHAN AND OTHERS *v.* SAID BEGAM AND OTHERS.

[XVII-199]

(5). Representative.

(18) ———— [Representative-Transferee.] One N brought a suit against a *lambardar* for her share in the profits of a certain *mahal*, her claim being based upon an assignment executed in her favour on the 29th of July, 1889, by one B as heir to one M. Prior to that assignment a suit had been commenced by the *lambardar* against B and one KB for possession of other property alleged to have been of M in her lifetime and in this suit it was ultimately found, but subsequently to the abovementioned assignment in favour of N, that KB and not B was the heir to M. Held that the last mentioned suit did not operate as *res judicata* in respect of the present plaintiff's claim under her assignment from B. NIAZ ULLAH KHAN *v.* NAZIR BEGAM.

[XII-246]

(19) ————.] Held that a mortgagee can not be bound by a decision relating to the mortgaged property in a suit instituted after his mortgage and to which he was no party. He can not be treated as a party claiming under his mortgagor (who was a party to the suit) within the meaning of s. 13, Civil Procedure Code, which section must be interpreted as if, after the words "under whom they or any of them claim" the words "by a title arising subsequently to the commencement of the former suit" had been inserted. SITA RAM *v.* WILAYATI BEGAM AND OTHERS.

[VI-101]

(20) ————.] Certain persons, claiming by right of inheritance to C, sued B, N, A, K, and others for possession of certain immoveable property, and, on appeal to the High Court, in August, 1876, their claim was decreed in full. In the course of the litigation which ended in that decree, Z purchased certain immoveable property from B, N, A, and K. Z was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited it from D, that the figures of the total of C's property given in the plaint in the former suit were erroneous, that the property now in suit was not affected by that decree, and that he had been improperly dispossessed of it. It appeared that there was in fact a mistake in the total of the extent of C's property as stated in the plaint in the former suit. Held that the plaintiff, having purchased *pendente lite*, was bound by the decree of the High Court against the persons through whom he claimed, that the claim in the former suit having been decreed in full, the property now in suit was then decreed to the present defendants, and that the claim of the plaintiff to go behind that decree could not

CIVIL PROCEDURE CODE, s. 13.—

(continued.)

be entertained. *HUKM SINGH AND OTHERS v. ZAUKI LAL.*

[IV-177]

(21) ————— (*Act X of 1877*.) *P*, one of the heirs to the estate of a deceased Muhammadan, mortgaged such estate to *B*. Subsequently *X*, also an heir, sued *P* for her share of the estate, claiming by right of inheritance and obtained a decree. Then *Y*, *X*'s sister, sued *P* and *B* for possession of her share and obtained a decree against *P*; but as against *B* her suit was dismissed. *X* and *Y* then sold their shares to *A* who brought this suit against *B* for possession of such shares. *Held* that the question of *B*'s right to the possession of such shares as mortgagee was *res judicata*. *MATA DIN AND ANOTHER v. SADIK HUSAIN.*

[II-14]

(22) ————— (*Hindu son*.) Where a son in a Hindu joint family sought to recover from an alienee of his father, land which he alleged to have been joint family property and to the alienation of which he had been no party. *Held* that the defendant could not plead that the suit was barred by the principle of *res judicata* by reason of the father having been defeated in a similar suit against him inasmuch as the son was not claiming through his father within the meaning of s. 13 of the Code of Civil Procedure. *MAHADEO v. MAHNGU AND ANOTHER.*

[XIII-168]

(23) ————— (*Judgment creditor—Judgment-debtor*.) In the proceedings necessary to establish the validity of a claim to property attached or an objection to an attachment, under s. 278 *et seqq* of the Code of Civil Procedure, the judgment-creditor does not represent the judgment-debtor so as to render a subsequent claim to the property attached a matter of *res judicata* as between the judgment-debtor and the objector. *LALLU v. MANNU.*

[X-177]

(6). Competent Court.

(24) ————— (*Competent Court*)

See. s. 13, Nos. (8), (10), (11).

(25) —————.] The word " a Court of jurisdiction competent to try," as used in s. 13 of the Code of Civil Procedure, mean a Court having jurisdiction not only as to the amount but also as to the nature of the suit. *Misir Raghohar Dial v. Sheo Baksh Singh* (*J. L. R.*, 9 *Cut.*, 439) referred to. *SHEIKH HASRU v. RAM KUMAR SINGH AND OTHERS.*

[XIV-18]

(26.) ————— (*Decree of Revenue Court—Under s. 95 (f) of Act X of 1881.*) The plaintiffs, who claimed to be tenants of certain land under a lease from the *samindar*, alleging that the defendant

CIVIL PROCEDURE CODE, s. 13.—

(continued.)

was their sub-tenant under section 36 of the N.-W. P. Rent Act, 1881, caused a notice of ejectment to be served upon the latter under the provisions of that Act. The defendant did not make an application under that Act contesting his liability to be ejected, and the plaintiffs applied under sections 40 and 95 (f) of that Act for assistance to eject him. The Revenue Court trying this application rejected it on the grounds that the defendant was not a sub-tenant of the plaintiffs, but a co-sharer in their tenancy. The plaintiffs thereupon sued the defendant in the Civil Court for declaration that the latter was not a partner with them in the lease, and for possession of the land by his ejectment therefrom. *Held* that the relief sought in the suit by the plaintiffs was not one which a Revenue Court could give under any of the clauses of section 95 of the Rent Act, which pre-supposes an admitted relation of landholder and tenant and therefore the determination by the Revenue Court of the plaintiff's application for ejectment of the defendant was not the decision of a Court competent to try the suit and was no bar to its maintenance in a Civil Court, within the principle of section 13 of the Code of Civil Procedure. *LODHI SINGH AND ANOTHER v. ISHRI SINGH.*

[IV-90]

(27.) ————— (*Under s. 93 (a) of Act XII of 1881.*) This suit was brought in the Revenue Court for the recovery of rent for the year 1890. The defence was that the defendants were formerly share-holders, but in lieu thereof they had got (by an agreement) the land as *sir* without any liability to pay rent. *Held* that this same defence having been raised by the defendants in a previous suit brought by the plaintiff it was not open to them in the present suit under s. 13 of the Civil Procedure Code. *Held* further that the decision of a Revenue Court on a point within its jurisdiction may have the effect of *res judicata*. *FATIMA BIBI v. SARJU SINGH AND ANOTHER.*

[V-159]

(28.) ————— (*Under s. 93 (b) of Act XII of 1881.*) An occupancy tenant, who had been ejected, under ss. 34 and 93 (b) of Act XII of 1881, sued in the Civil Court for a declaration of his right of occupancy and to have the decree of the Revenue Court directing his ejectment declared of no effect, on the ground that his act was not one of those rendering him liable to ejectment, being authorized by local custom. *Held* that the question of the plaintiff's liability to ejectment on account of the act in question, being a matter the cognizance of which was limited to the Revenue Courts, and the decision of the Revenue Court against him having become final, the plaintiff's suit was barred by s. 13, C. P. C. *Raj Bahadur v. Birnha Singh*, (*J. L. R.*, 3 *All.* 35) distinguished. *RADHA PRASAD SINGH v. SALIK RAI.*

[III-10]

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

(29.) ———— *Applications under s. 39 of Act XII of 1881.*

See Act XII of 1881, s. 96 (b).

(30.) ———— *Under s. 113 of Act (XIX of 1873).* Where a Court of Revenue acting under section 113 of Act No. XIX of 1873, has decided a question of title or of proprietary right such decision being the decision of a "Court of Civil Judicature of first instance" will operate as *res judicata* in a subsequent Civil suit in which the same question is being litigated. **HAR CHARAN SINGH v. HAR SHANKAR SINGH AND OTHERS.**

[XV-164]

See also

HAR CHARAN SINGH v. HAR SHANKAR SINGH AND OTHERS.

[XIV-137]

(31.) ———— *Decree of Revenue Court.*

See Act XIX of 1873, ss. 111-115, Nos. (2), (3) (4), (5), (6), (7), (10).

(7). Finally decided.

(32.) ———— *Finally decided—Plea raised but not adjudicated.* A plea of *res judicata* can not be maintained where the issues pleaded as constituting *res judicata* though raised in a former suit, were not adjudicated upon by the Court in that suit. **YAKUB ALI v. DHANPAT.**

[XII-238]

(33.) ———— *Construction in doubtful cases.* One *B S*, the owner of a one-third share in a certain *manza*, had four sons *TS*, *PS*, *NS* and *US*. *TS* and *PS* died issueless in 1854 or 1855. *NS*, who died in 1859, left *JK* his widow and *J* the widow of a predeceased son. *US* left two sons *HS* and *MS*. *MS* died leaving *IS* and *NS*, the plaintiffs in the present suit. It appears that in 1858 *H S* and *M S* executed a bond in favor of one *H* hypothecating their interest in the property left by *B S*. *H* put the bond in suit and obtained a decree in 1862. In execution of another simple money-decree held by *H* against *HS* and *MS* he caused the property hypothecated in the bond of 1858 to be attached and advertised for sale. Thereupon the plaintiffs, *NS* and *IS*, brought a suit against *MS*, *HS*, *JK*, *J* and *H* for establishment of right in respect of the whole one-third share left by *BS* and for protection from sale of three-fourths of the property now in possession of *MS* (their father) on the ground that the debt was incurred for immoral purposes. This suit was dismissed. Subsequently *H* in execution of his simple money decree sold the right, title and interest of *MS* in the village and purchased it himself and on the same day in execution of his bond decree the right, title, and interest of *HS* himself purchasing. After the death of the two widows the present suit was instituted by the

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

plaintiffs on the ground that on their death the plaintiffs became entitled to the whole of the estate of *NS*. The defendant who was a donee, from *H* pleaded that the suit was barred by s. 13, Civil Procedure Code. The suit was dismissed by both the lower Courts. In appeal to the High Court it was contended on behalf of the plaintiffs that the share of *NS* which was in possession of *J* and *JK* at the time of the former suit was, if not in terms exempted, at least left untouched by the decision therein, and that all that the defendant's donor purchased at the auction-sale was the one-half share of *MS* and *HS* which they inherited thorough their father. *Held* that as it was doubtful from the judgment in the previous suit whether the question as to whether *HS* and *MS* had before the institution of the former suit acquired the interest of *NS* was heard and finally decided in that suit the Court could not hold that the present suit was barred by s. 13, Civil Procedure Code. **NATHU SINGH AND ANOTHER v. BHUPAT RAM.**

[III-190]

(34.) ———— *Dismissal on ground of limitation.* *B* was the auction purchaser of certain land, sold on the 21st April, 1862, in execution of a decree against *X A*, the holder of a mortgage by conditional sale of the same property from *X*, dated the 29th June, 1861, applied in the year 1875 for foreclosure of the same. The mortgage was foreclosed in 1876. In 1877 *B* sued *A* to have the mortgage set aside as fraudulent. This suit was dismissed as barred by limitation on the 24th June, 1878. In 1880 *A* brought the present suit against *B* for possession of the land by virtue of the mortgage and foreclosure proceedings. The defence was that the mortgage was fraudulent. *Held* that the issue had not been finally decided in the previous suit within the meaning of s. 13, Civil Procedure Code. **DILSUKH RAI v. TIKA RAM AND OTHERS.**

[III-100]

(35.) ———— *Dismissal for misjoinder and deficient Court-fee.* The purchaser of certain immoveable property in execution of a decree sued for possession of the same. The suit was dismissed "in its present form," (*ba haisiyat maujudat*) upon two grounds: first, with reference to s. 10 of the Court Fees Act (VII of 1870), that the suit was undervalued and the plaintiff had failed to pay, within the time fixed, additional Court fees required by the Court, and secondly, for misjoinder. The purchaser subsequently brought a second suit. *Held* that dismissal of the former suit was not, under the circumstances, a decision within the meaning of s. 13 of the Civil Procedure Code such as could bar the second suit by way of *res judicata*.

Per MAHMOOD, J.—The object of s. 10, and indeed of the whole of the Court Fees Act, is to lay down rules for the collection of one form of taxation, and the rule that statutes which impose

CIVIL PROCEDURE CODE, s. 13—
(continued.)

pecuniary burdens or encroach upon, or qualify the rights of the subject, must be strictly construed, applies with special force to such provisions of the Act as provide a penalty, whatever its nature may be. S. 10 is simply penal clause to enforce the collection of the Court-fees, and dismissal of a suit under its provisions can not operate as *res judicata*.

Also *Per* MAHMOOD, J.—The condition in s. 13 of the Civil Procedure Code, that the former suit must have been “heard and finally decided,” means that a former judgment proceeding wholly on a technical defect or irregularity, and not upon the merits, is not a bar to a subsequent suit for the same cause of action. It is not every decree or judgment which will operate as *res judicata*, and every dismissal of a suit does not necessarily bar a fresh action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. *Ram Nath Roy Chowdhry v. Bhagbut Mohaputter*, (3 W. R., Act 10, Rule 140); *Shokhee Bewah v. Mehdee Mundul*, (11 W. R., 327); *Dullabh Jagi v. Narayan Lakhu*, (4 Bom., H. C. Rep. A. C. 110); *Rangrav Ravi v. Sidhi Mahomed Ebrahim* (I. L. R., 6 Bom., 482); *Fateh Singh v. Lachmi Koor* (13 B. L. R. Ap. 37); *Roghoonath Mundul v. Fuggui Bundhoo Bose*, (I. L. R., 7 Cal., 214) and *Saikappa Chetti v. Rani Kulandapuri Nachiyar*, (3 Mad. H. C. Rep. 84) referred to. MUHAMMAD SALIM v. NABIAN BIBI AND OTHERS.

[VI-119]

(36).—*Dismissal for claiming inconsistent reliefs.* The plaintiffs in 1884 brought a suit against the defendants in which they asked for exclusive possession of certain land or in the alternative for joint possession. The Munsif dismissed the suit on the ground that the two reliefs were inconsistent with each other and the suit was not properly framed. No appeal was preferred from this decision. In 1885, they brought another suit against the same defendants for joint possession. *Held* that the suit was barred, the Munsif not having reserved to the respondent the right to bring a fresh action. KUDRAT AND OTHERS v. DINU AND OTHERS.

[VII-5]

(37).—*Dismissal for non-joinder.* This suit has been brought for joint possession of a pond in *muza*. The plaintiff had previously instituted a suit against the defendants for possession of the pond. A decree was made in that suit dismissing it in the form in which it had been brought on the ground that all the persons who should have been made parties were not joined in the suit. In this suit it is contended by the defendant that this suit is barred by the previous decision. *Held* that there having been no withdrawal in the former suit s. 373 of the Civil Procedure Code was inapplicable and the former suit

CIVIL PROCEDURE CODE, s. 13—
(condition.)

having been dismissed on a preliminary and technical point it did not affect as a bar under s. 13. SALIG RAM PATHAK v. TIRBHAWAN PATHAK AND OTHERS.

[V-171]

(38).—*Dismissal of suit “as brought.”* *Held* that a judgment which only went so far as to say “that the suit as brought was not maintainable” is not a final judgment within the meaning of s. 13, so as to bar a subsequent suit on the same cause of action. MUHAMMAD ZAHIA KHAN v. MRAD KHAN AND OTHERS.

[VII-246]

MUHAMMAD SALIM v. NABIAN BIBI AND OTHERS.

[VI-119]

SALIG RAM PATHAK v. TIRBHAWAN PATHAK AND OTHERS.

[V-171]

Per contra.—

GANESH RAI v. KALKA PRASAD.

[III-140]

KUDRAT AND OTHERS v. DINU AND OTHERS.

[VII-5]

(39).—*Dismissal with leave to institute fresh suit.* A suit for possession of immoveable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—“This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Mussammat Lachmima in the fields specified in the deed of sale” upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted. *Held* by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect; that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, though the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*. Kudrat v. Dinu (I. L. R., 9 All., 155); Ganesh Rai v. Kalka Prasad (I. L. R., 5 All., 595); Salig Ram Pathak v. Tirbhawan Pathak (W. N. 1885, p. 171) and Muhammad Salim v. Nabian Bibi (I. L. R., 8 All. 282) explained. SUKHI LAL v. BHUKHAI.

[IX-13]

CIVIL PROCEDURE CODE, s. 13—
(continued.)

(40.)—*Withdrawal of suit under s. 373, Civil Procedure Code.*] The plaintiffs to the present suit applied for leave to withdraw from a suit previously brought by them, with liberty to bring a fresh suit under s. 373, Civil Procedure Code. The application was granted and no appeal was preferred from that order of the Court. Subsequently the plaintiffs brought the present suit. *Held* that the order could not have the effect of *res judicata* on the point in issue in the present suit because nothing was then decided. **ABDUL RAHMAN AND ANOTHER v. LAL BEHARI AND ANOTHER.**

[V-151]

(41.)—*Dismissal under s. 42, Civil Procedure Code.*] *A*, claiming to be the adopted son of *P*, brought a suit against *B*, the natural son of *P*, for partition of a portion of *P*'s property. This suit was dismissed for not having properly been framed under s. 42 (the plaintiff not having included the whole of his claim). *Held* that the judgment was not *res judicata* so as to bar another suit for the partition of the whole estate. The decision of other minor issues had not also that effect. **UMRAO SINGH v. PIARE LAL.**

[VI-53]

(42.)—*Dismissal for want of cause of action.*] *A* applied to the Revenue Court for the partition of a village. *B* objected to it on the ground that he was entitled to the entire *manza* by the right of primogeniture. *A* was therefore referred to the Civil Court for the determination of his right to, and possession of, a moiety of the village. This suit was ultimately dismissed on the ground that the Revenue Court ought to have disposed of the application for partition and had no power to decline to grant it. *A* thereupon again applied for partition of the village, but his application was again refused by the Revenue Court on the ground that the village was impartible. He then brought this suit to have it declared that he had equal rights with his brother *B* in the village. *Held* (i) That the suit was not barred by s. 13 of the Code of Civil Procedure, as the dismissal of the suit on the ground that there was no cause of action for the suit, is no adjudication of any right so as to bar the present suit. (ii) That the order of the Revenue Court, declining to give partition, was also no bar, as the Revenue Court was not competent to determine the rights of the parties. **JAGAT SINGH v. DURJAN LAL.**

[IV-2]

(43.)—*Ex-parte decree—Application.*] In August, 1877, when Act VIII of 1859 was in force, an *ex-parte* decree was passed against the present plaintiff. He applied to have it set aside according to the provisions of s. 119 of the said Act, but his application was refused and he did not carry the matter further. He

CIVIL PROCEDURE CODE, s. 13—
(continued.)

then brought the present suit which was virtually to set aside the decree of 1877. *Held* that the suit was *res-judicata*. **AHMAD ALI v. MUMTAZ ALI.**

[II-4]

(45.)—*Suit against Muhammadan widow—Dismissal on ground that dower had not been paid.*] *I* brought a suit against *C*, a Muhammadan widow, for his share of the property left by *C*'s husband, and for the cancellation of a mortgage-deed executed by *C* on payment to *C* of the plaintiff's share of *C*'s dower or Rs. 7-8. This suit was dismissed on the ground that the plaintiff was not entitled to possession until he paid the dower in full and his share of the mortgage debt. Subsequently *I* brought this suit for the same property on payment of the dower and his share of the mortgage debt. *Held* that the suit was not barred by s. 13 of the Civil Procedure Code. **IMAM BAKSH v. CHANDO AND ANOTHER.**

[VI-69]

(8.) Explanations.

(46) s. 13, Expl. (1).—*N* sued *W* for a moiety of a brick kiln, claiming by right of inheritance, and alleging in respect of the other moiety that it was his own property. *W* in her defence to the suit denied that *N* had any right in the kiln and that a moiety of the kiln belonged to him. An issue was framed on the point whether a moiety of the kiln belonged to *W* which the Court of first instance decided in *N*'s favour. *N* eventually obtained a decree for a moiety of the kiln which he claimed by right of inheritance. *W* appealed, contending, *inter alia*, that it was not proved that a moiety of the kiln belonged to *N*. The appeal was decreed, and the decree of the Court of first instance in *N*'s favor was set aside. *W* subsequently sued *N* for the value of bricks which he had wrongfully taken from the kiln. *N* set up as a defence to the suit that a moiety of the kiln belonged to him. *Held* that the issue whether a moiety of the kiln belonged to *N* was *res judicata*, under s. 13, Explanation I, of the Civil Procedure Code. **WILAIT BEGAM v. NUR KHAN.**

[III-110]

(47) s. 13.—*Expls. (1) & (2).* (*Act X of 1877.*) *H*, the proprietor of a one-third share of a certain undivided estate, made a gift of such share to *P*. He subsequently, in February, 1875, gave a mortgage of such share, in his capacity as *P*'s guardian, to *N* and *S*, the two other co-sharers of such an estate. In March, 1878, *P*, having attained his age of majority, brought a suit, as a co-sharer of such estate, under such gift, against *N* and *S* for possession of certain land appertaining to such estate, on the ground that they were using such land as if they were the sole proprietors thereof. The lower

CIVIL PROCEDURE CODE, s. 13. Expls. I and II.—(continued.)

appellate Court, observing that such land was the property of three co-sharers, that the mortgage of *P*'s rights to *N* and *S* did not affect those rights as such, and that *N* and *S* were not justified in using such land as if they were the exclusive proprietors thereof, gave *P* a decree for possession of one-third share of such land. *N* and *S* appealed to the High Court on the ground that *P* should not have been awarded possession, as they were in possession of such land as mortgagees. The High Court remanded the case for the determination of the issue thus raised by *N* and *S*; and the lower appellate Court found that *N* and *S* were in possession of *P*'s share of such estate as mortgagees under the mortgage made by *H* above referred to, and of such land as such. *P* did not take any objection to this finding; and it was adopted by the High Court and embodied in its final decree. In October, 1879, *P* sued *N* for possession of his share in such estate, claiming under the gift from *H*, and alleging that the mortgage of such share by *H* to *N* was invalid. *Held* that, inasmuch as such mortgage was matter substantially in issue in the former suit, the matter in issue in the second suit was *res judicata* under explanations I and II, s. 13 of Act X of 1877. **NIRMAN SINGH v. PHULMAN SINGH.**

[I-117

(48.)———.] *L* was the owner of a four *anna* share in a village. On the 1st March, 1880, his childless widow *R* and his nephew *B*, who had separated from his two brothers and lived for some years with both *L* and *R* sold to *S* one-third of the four-*anna* share. The brothers of *B* sued the vendors and the vendee to enforce a right of pre-emption, alleging that they, as well as *B*, had acquired and entered into exclusive possession of the estate of *L* as his heirs. In the second appeal in this suit the High Court held that, as it was proved that the four-*anna* share was *L*'s separate estate, and *R* had succeeded to it and was in possession of it, and thus the plaintiffs had not established a title to, or acquired possession of, any part of the share, the plaintiffs were not in a position to assert a preferential claim to purchase the property in dispute. The plaintiffs also pleaded that the question of the right and title asserted by them as the actual heirs of *L* should have been tried and determined in the suit; but the High Court rejected this plea on the ground that the suit had been based merely on the allegation of *de facto* possession, and that their claim was to obtain by purchase one-third share only, and not for any remedy in respect of their right to possession by inheritance of the entire four-*anna* estate. Subsequently to the decision, the same plaintiffs, alleging equal rights with *B* as reversionary heirs of *L*, sued the same defendants for a declaration of the incompetence of *R*, the widow, to alienate the property, and that the sale-deed might be declared, as against them, null and of no effect. The cause of action was stated to be the execu-

CIVIL PROCEDURE CODE, s. 13. Expls. I and II.—(continued.)

tion, on the 1st March, 1880, of the deed of sale. *Held* that the plea of *res judicata* failed. The matter now substantially in issue between the parties, *viz.*, the presumptive title of the plaintiffs to possession of the property, had not been "heard and finally decided" in the sense of s. 13 of the Code of Civil Procedure. Such title was not "alleged and denied" by the parties in that suit within *Explanation I*, s. 13. It was not a matter which "might and ought" to have been made the ground of attack in the former suit, within *Explanation II*. The law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court (s. 44, Civil Procedure Code), join causes of action; but he is no where compelled to do so. The cause of action in the second suit, although the date of its accrual was the same, was separate and distinct from the cause of action asserted in the previous suit. **SHEORATAN SINGH v. SHEOSAHAI MISR AND ANOTHER.**

[IV-115

(49.) s. 13. Expl. (2.)] Where a puisne incumbrancer who as such might have claimed redemption of a prior incumbrance, sued only for a declaration as against the auction purchaser under a decree on the prior mortgage of his right to bring the property purchased by them to sale in virtue of his mortgage, it was *held* that he could not subsequently sue for redemption of the prior mortgage. **JHAMMAN AND OTHERS v. DWARKA PERSHAD.**

[XVII-10%

(50.)———.] Where a plaintiff sued for possession of immoveable property as owner, having no title as owner, but a possible title as a mortgagee, it was *held* that he could not in a subsequent suit between the same parties for possession of the same property claim as mortgagee; inasmuch as his title as mortgagee might have formed an alternative ground of attack in the former suit. *Amolak Ram v. Champa Lal* (W. N. 1891, p. 132); *Hasan Ali v. Seraj Husain* (W. N. 1894, p. 64); *Mathura Prasad v. Sambhar Singh* (W. N. 1892, p. 224); *Atchayya v. Bangarayya* (I. L. R., 16 Mad., 117) and *Kamaswar Parshad v. Rajkumari Ruttan Koor* (L. R. 19 I. A., 234) referred to. **IMAM KHAN v. AYUB KHAN AND OTHERS.**

[XVII-143

(51.)———.] Two of the daughters of a deceased Muhammadan sued the remaining heirs for a partition of the inheritance, and a decree for partition was made, which was confirmed on appeal by the High Court. Pending the appeal to the High Court, two other daughters of the deceased, who had been parties defendants in the suit for partition brought a suit by which they claimed a large share in the estate of the deceased as part of the

**CIVIL PROCEDURE CODE, s. 13,
Expl. II—(continued.)**

dower debt due to their mother. In this suit they impleaded as defendants all the surviving descendants of their father. *Held* that the claim for dower should have been made a ground for defence in the former suit by the plaintiffs who were defendants in that suit, and that as no such defence had been set in that suit the claim in respect of the dower debt fell within the pure view of Explanation II to s. 13 of the Code of Civil Procedure, and the suit was barred, not only as against the plaintiffs to the former suit but as against the other defendants to that suit. **DOST MUHAMMAD KHAN AND OTHERS v. SAID BEGAM AND OTHERS.**

[XVII-199]

(52.) —————. *Held* that the holder of three prior mortgages over the same property, who, in answer to suits brought by the holders of other mortgages over that property of dates subsequent to his, has pleaded his rights under one only of the mortgages held by him, was barred by reason of Explanation II to s. 13 of the Code of Civil Procedure from afterwards bringing a suit for sale upon one of his remaining mortgages, which he might and ought to have pleaded as an answer *protanto* to the suits of the other mortgagees. *Mahabir Pershad Singh v. Macnaghien* (L. R., 16 I. A., 107; S. C., I.L.R., 16, Calc. 182); *Kameswar Pershad v. Raj Kumari Ruttan Koer* (I. L. R. 20 Calc. 79); *Kailash Mondul v. Baroda Sundari Dasi* (I. L. R., 24 Cal., 711); *Sheosagar Singh v. Sita Ram Singh* (I. L. R., 24 Calc., 616) and *Matadin Kasodhan v. Kazim Husain* (I. L. R. 13 All., 432) referred to. **SRI GOPAL v. PIRTHI SINGH AND OTHERS.**

[XVII-216]

(53.) —————. [Where the plaintiff to a suit under s. 295, C. P. C., had previously brought a suit in which he sought to follow the property which had been sold under the defendant's decree. *Held* that the present suit was not barred by s. 13. **DOST MUHAMMAD v. AJUDHIA PRASAD.**

[X-21]

(54.) —————. (Act X of 1877.) It was agreed between A and B that the former should sell to the latter a house in consideration of (i) the payment of Rs. 41 and (ii) the transfer of the possession of a plot of land. A refusing to perform this agreement, was sued by B for possession of the house on payment of Rs. 41. The suit which was defended on the simple ground that the agreement was not binding was decreed in favor of B. In the present suit A sought to enforce the agreement as regards the plot of land. *Held* that the claim was barred by s. 13, C. P. C. **BADLI AND ANOTHER v. GAURI DIAL.**

[I-18]

**CIVIL PROCEDURE CODE, s. 13,
Expl. II—(continued.)**

(55.) —————. (Act X of 1877.) B S and his two brothers jointly owned a certain estate in equal one-third shares. The three brothers joined in mortgaging such estate to certain persons who assigned their rights as mortgagees to M. B S's two brothers subsequently sold their shares of such estate to M. B S brought a suit against M to redeem his own share and obtained a decree. He subsequently brought the present suit against M to enforce his right of pre-emption in respect of the sale to the latter by his brothers of their shares. The lower appellate Court held having regard to the case of *Narain Dutt v. Bhairo Bakshpal*, (I. L. R., 3 All., 189) and the cases therein cited, that inasmuch as the plaintiff had not attempted in his first suit against M to enforce his right of pre-emption, he could not do so in his present suit. In second appeal it was contended on behalf of the plaintiff-appellant that the cases referred to by the lower appellate Court were not relevant and there was no provision of the law of procedure barring the present suit. The Court observed that it could not affirm the lower appellate Court's decree dismissing the appellant's claim on the ground of false analogies in connection with ss. 13, 42 or 48 of the Code of Civil Procedure. **BALGAT SINGH v. MINATULLAH.**

[I-163]

(56.) —————. (Act X of 1877.) B who held a decree for money against I, caused certain property to be attached in execution of such decree as the property of his judgment-debtor. M, the wife of I, objected to such attachment, claiming such property as her own. Her objection was disallowed, and she consequently brought a suit against B to establish her right to such property. She died while that suit was pending, leaving by will such property to her sons. That suit proceeded in the names of her sons, who claimed such property under such will. The lower Courts only decided in that suit that such property belonged to M, and not to I, and it was therefore not liable to be sold in execution of B's decree against the latter. They did not consider the question whether M's sons were entitled to such property under their mother's will. In second appeal in that suit B contended that I, as a heir to M, was entitled to a fourth share of such property, and such share was liable to be sold in execution of such decree. M's sons did not contend before the High Court that they were entitled to the whole of such property under their mother's will to the exclusion of I. The High Court allowed B's contention. B brought a fourth share of such property to sale in execution of his decree and purchased it himself. Thereupon M's sons sued him for such share claiming it under their mother's will. *Held* that their mother's will was a matter which should have been made a ground of defence by M's sons in the course of the trial

CIVIL PROCEDURE CODE, s. 13,

Expl. II—(continued.)

of the second appeal, in the former suit between them and *B*, and that, not having been so made, it was *res judicata* in the sense of s. 13, Explanation II, Act X of 1877. *SULTAN AHMAD AND OTHERS v. MAULA BAKSH.*

[I-110]

(57).—In a suit to recover a sum of money due as wages, the plaintiff alleging that the defendant had engaged him to sell cloth on his account at a monthly salary, the defendant claimed a set off as the price of cloth which he alleged the plaintiff had sold on his account on commission. It appeared that the defendant had previously sued the plaintiff to recover the same amount as was now claimed by way of set off, as being due for the price of cloth sold and delivered by the defendant to him; and the plaintiff (then defendant) pleaded that there had been no sale to him, but the cloth had been delivered to him on commission sale. The suit was dismissed on the ground that there was no proof of sale of cloth, and the question whether any sum was due for cloth sold on commission sale was not gone into. The cloth now alleged to have been delivered on commission sale was the same as that alleged in the former suit to have been actually sold to the plaintiff. *Held* that the defendant was entitled, under s. 111 of the Civil Procedure Code, to set off the amount claimed as due for goods sold on commission against the plaintiff's demand; and that the claim for such set off was not barred under the provisions of s. 13. *Held* also that the Court-fee payable on the claim for set off was the same as for a plaint in a suit. *AMIR ZAMA v. NATHU MAL.*

[VI-159]

(58).—The plaintiffs, mortgagees, having obtained an order for foreclosure under the provisions of Regulation XVII of 1806, subsequently got an *ex-parte* decree declaring their right to proprietary possession of the mortgaged property and under that decree obtained possession thereof. More than 12 years after this decree had been executed the mortgagors sued to cancel the foreclosure proceedings on the ground that they had been taken entirely behind their backs and they had no notice of them; this plea had not been taken in the suit which had resulted in the mortgagor's decree for possession. *Held* that the plaintiffs' suit was barred as *res-judicata* and even if this were not so, the defendants had been in adverse possession for more than 12 years. *MOULA BAKSH AND ANOTHER v. TAJAMMUL HUSAIN AND ANOTHER.*

[XII-51]

(59).—Three brothers *T S, N S,* and *B S* jointly owned nine villages including *P, M M, K, J* and *M. N S* left a widow *M K.* In 1870 *T S* mortgaged his share in the nine villages to *M R* who put it into suit, obtain-

CIVIL PROCEDURE CODE, s. 13,

Expl. II—(continued.)

ed a decree, caused the villages, with the exception of *P* and *K* to be sold and purchased them himself in 1875. He also subsequently purchased *M K's* interest in *M M.* In 1871 *T S* again mortgaged the same nine villages, together with his reversionary rights in the estate then held by *M K* to *B S.* In 1879 *B S* put this bond in suit, impleading *M R* also, as purchaser of *M K's* interest in *M M,* as defendant. *B S* obtained a decree, but his claim on *M M* was dismissed. Subsequently *M R* sued *B S* in respect of villages *M* and *J* asserting his right therein as prior mortgagee and purchaser. But this suit was dismissed as barred by s. 13, Civil Procedure Code, on the ground that the question might and should have been raised as part of his defence in the suit of 1879. The present suit was brought by *B S* for possession of *P* against *M R* and the plaintiff desires to apply the same rule of *res-judicata* as to this village as well. *Held* that as at the time the suit of 1879 was brought the defendant *M R* had not possession of the village but only held a decree which he could execute against *P* or part of it, the present suit was not barred by s. 13, Civil Procedure Code. *JAMUNA KUAR AND OTHERS v. BALDEO SAHAI.*

[V-265]

(60).—Where the plaintiff in a suit for pre-emption had, in a former suit against her in which the present defendant had obtained a decree for possession of the property now in question, omitted to assert her pre-emptive right as ground of defence,—*held* that the suit for pre-emption was barred by s. 13, Explanation II, of the Civil Procedure Code. *RAJ BIBI v. SUKHI AND ANOTHER.*

[IX-175]

(61).—(*Act X of 1877.*) The appellant purchased certain property from the widow of one *C* on the 18th November, 1874, and brought a suit against his vendor for possession of such property. The respondent, who represented himself to be the nephew of *C,* and one *C L,* the daughter's son of *C,* were made defendants in this suit. They contended that the widow was not competent to alienate such property. The Court trying this suit, however, declared the sale to the appellant to be valid, and gave him a decree for possession of such property. The respondent subsequently brought the present suit against the appellant in which, with reference to such sale, he claimed to enforce his right of pre-emption in respect of such property. *Held* following the cases of *Baldeo Sahai v. Bateshar Singh* (1 L. R., 1 All., 75), that the suit was barred by the provisions of s. 13 of Act X of 1877, as the claim for pre-emption might and ought to have been made a ground of defence in the former suit, and must be deemed therefore to have been a matter directly and substantially in issue in such suit. *TIWARI GANDHARAP v. PITAM.*

[I-47]

CIVIL PROCEDURE CODE, s. 13, Expl. II.—(continued)

(62). —————.] Explanation II of s. 13 of the Code of Civil Procedure applies to a plaintiff to the same extent as to a defendant. **MATHURA PRASAD v. SAMBHAR SINGH.**

[XII-224]

(63). —————.] *AR* and *PC* in three separate suits obtained decrees against *CL* and others for sale of certain hypothecated property. *CL* never appeared to defend those suits; but when execution of the decrees therein was sought he filed objections, which objections were overruled. *CL* then brought a separate suit for a declaration that the property against which the decree-holders *AR* and *PC* held decrees was not liable to sale by reason of the want of title on the part of the mortgagors to mortgage the sale. In this suit he got a decree in respect of the property dealt with in two of the former suits, but as to the property dealt with in the third his suit was dismissed. He then appealed and the decree-holders also appealed as to the other two suits. *Held* that the matters alleged by the judgment-debtor, plaintiff, were matters which might and ought to have made a ground of defence in the former suits in which he was a defendant and the present suit was therefore barred by the principle of *res judicata*. **AMOLAK RAM AND ANOTHER v. CHAMPA LAL.**

[XI-132]

(64). —————.] *A* brought a suit against certain person's to enforce a mortgage of land situate in villages *X*, *Y* and *Z*. He made *B* also a defendant on the single ground that he set up a title to the village *X*, as a purchaser. *B* might in this suit have defended the claim as regards the land in *Y* and *Z* on the ground of prior mortgage and purchase, but he did not do so and the question was not put in issue and the decree directing the sale of those villages was not made against him. *A* brought the land to sale and became the purchaser. *B* then brought the present suit against *A* for possession of those villages claiming on the ground of prior mortgage and purchase. *Held* that the suit was barred by s. 13, Explanation III, Civil Procedure Code. **GOPI NATH AND OTHERS v. BALDEO SAHAI.**

[III-40]

(65) s. 13, Expl. (3).]—Plaintiff brought a suit for possession of certain land, past and future mesne profits and costs of the suit with interest. The decree in the suit granted in the first two reliefs in part, dismissed the rest of the claim, and was silent as to future mesne profits. The plaintiff subsequently brought this suit for future mesne profits, *i. e.*, profits from the date of institution of the suit to the date of the delivery of possession of the land. *Held* that the suit was barred by section 13, Explanation III, of the Code of Civil Procedure. The provisions contained in sections 211 and 244,

CIVIL PROCEDURE CODE, s. 13 Expl. III.—(continued)

para. 3, do not contemplate a case in which the plaintiff has directly invited a decision upon his right to future *mesne profits*. **NARAIN DAS, ETC., v. KHAN SINGH.**

[IV-159]

(66). —————.] *A* brought a pre-emption suit and got a decree. In that suit he pleaded that out of Rs. 1078 (consideration money) Rs. 350+Rs. 84 had been left with the vendee to meet mortgage on the property and he claimed to pre-empt on the same terms. The decree however made no mention of this Rs. 350+84. *A* therefore deposited the whole sum, and brought this suit to recover it (Rs. 350+84) from the defendant. *Held* that the suit was not maintainable, firstly because the question in this suit could come within the purview of cl. (c) of s. 244 and would thus be barred, and secondly because under Explanation (iii) of s. 13, Civil Procedure Code. This part of the plaintiff's claim must be regarded as dismissed and plaintiff's remedy was by a petition for review, or in the execution proceedings not by a separate suit. **BRAMHAJIT GIR v. BAHADUR.**

[VI-100]

(67). —————.] In execution of a decree upon a mortgage by *S* and *A*, which was passed against the legal representatives of *S* and one only of the legal representatives of *A*, part of the mortgaged property was sold to *H* while as to the remainder, a compromise was effected whereby it was saved from sale by *H* paying the decree-holders Rs. 474. *H* subsequently obtained possession of the whole of the mortgaged property and two suits were brought against him by the other legal representatives of *A*, for possession of their shares and the ejectment of *H*, therefrom. *H* defended these suits on the ground that he stood in the shoes of *S* and occupied the position of one joint mortgagor who had satisfied the other's debt by payment of the Rs. 474, and that unless and until the plaintiffs should pay their proportion of that amount he was entitled to retain possession of the whole of the property mortgaged. These suits were dismissed in the lower Courts, but the High Court on appeal decreed them, merely observing that they were governed by the decision of the Full Bench in *Jafari Begam v. Amir Muhammad Khan* (I. L. R., 7 All. 822). *H* then sued those plaintiffs for Rs. 275 as the contribution which he alleged to be due by them in respect of the Rs. 474. *Held* that, the High Court, in its former decision, must be taken to have held that the plaintiffs in that case were entitled to an unqualified and unconditional decree for ejectment, and that the present claim was *res-judicata* by reason of that decision. **MAZHAR ALI KHAN AND OTHERS v. HADI KHAN.**

[IX-4]

(68). ————— (Act X of 1877).] *A* and *B* sued *C* for a declaration of proprietary right.

CIVIL PROCEDURE CODE, s. 13,
Expl. III—(continued.)

to an eight *anna* share of a certain village and the cancelment of an order refusing an application for partition of such share by *B*. The application for partition had been refused on the ground that she was a Hindu widow having a life-interest only. The fees paid on the plaint was Rs. 10. It appeared that sometime before *C* had sued *A* for a declaration that *A* was not the adopted son of the deceased proprietor. *Held* that the question whether *A* was the adopted son of the deceased proprietor was *res judicata* under Explanation III of s. 13, Civil Procedure Code. **MUNNU LAL AND OTHERS v. HIRA LAL AND ANOTHER.**

[I-13]

(69). **s. 13, Expl. (4).**—A judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication and cannot operate as *res judicata* during the interval preceding the decision of the appeal. Exp. IV of s. 13 commented upon. **Sri Raja Thakur Lapudi Suriyanarayana Rao v. Chellan Kuri Chellamma** (5 *Mad. H. C. Rep.* 176) and **Nilvaru v. Nilvaru** (*I. L. R.*, 6 *Bom.*, 110) referred to. **BAL KISHAN AND ANOTHER v. KISHAN LAL.**

[IX-42]

(70). **s. 13, Expl. (5).**—*Held* that a decree obtained against one member of a joint Hindu family in respect of the joint property does not bind the others who were not parties to the decree. S. 13-Explanation V does not apply to such cases. **RAMANAND v. KAULESHAR AND OTHERS.**

[VII-217]

(71). ———. The plaintiff sued the father and brother of defendant for trespass to a wall. His right to the wall was denied, but he obtained a decree. On executing the decree he was resisted by the defendant, who claimed the wall as his ancestral property and alleged that he was no party to the suit in which decree had been obtained against his father and brother. His claim was registered as a suit under s. 331 of the Code of Civil Procedure. Plaintiff contended that defendant was concluded by the decree obtained against his father and brother. *Held* that a Hindu son in a joint family becomes entitled by reason of his birth and his own right, a right which he can enforce against his father; he does not claim under his father within the meaning of s. 13 of the Civil Procedure Code. *Held* also that the defendants in the former suit did not claim any right in common for themselves and others within the meaning of Explanation V of s. 13 of the Code of Civil Procedure. The case of **Narayan Gop Habbu v. Pandurang Ganu** (*I. L. R.*, 5 *Bom.*, 685) distinguished. **RAM NARAIN v. BISHESHAR PRASAD.**

[VIII-149]

CIVIL PROCEDURE CODE, s. 13—
(continued).

(9) Applicability of s. 13 to execution proceedings.

(72). **s. 13—(Act X of 1877).** *Held*, following **Rup Kuari v. Ram Kirpal Sukul** (*I. L. R.*, 3 *All.*, 141), that the principle of *res judicata* did not apply to proceedings in execution of decree. **ABDULLAH AND ANOTHER v. THE COURT OF WARDS ON BEHALF OF PERTAB CHAND, A MINOR.**

[I-41]

(73). ——— (*Act X of 1877*). This was an appeal by certain judgment-debtors from an order allowing an application for execution of the decree. It was contended that the application was barred by time. The application was admittedly within three years from the date of the last application for execution of the decree but the judgment-debtor asserted that such last application was not made in accordance with law and would therefore not save limitation. *Held* that the High Court was not competent to enter into the legality of that application or to question the propriety of the order passed upon it. The proceeding having been held in a Court having jurisdiction to entertain it and its decision in the execution matter, never having been reversed, cannot be impeached now. **Mungul Pershad Dicit v. Grija Kant Lahiri** (*I. L. R.*, 8 *Cal.*, 51 *L. R.*, 8 *I. A.*, 123) followed. **SHUJAAT ALI AND ANOTHER v. AJUDHIA PRASAD AND OTHERS.**

[II-151]

(74). ——— (*Act X of 1877*). I was admitted in this case by the pleader for the appellant decree-holder that the questions now raised between his client and the judgment-debtor was heard and adjudicated upon in a previous execution proceedings of the same decree, and that no appeal was preferred from the decision then passed. *Held* that accepting the admissions of the appellant's pleader the appeal must be dismissed as barred by s. 13, Civil Procedure Code. **SHEO SAHAI v. NAJAF KHAN.**

[II-128]

(75). ———. A decree of the Agra Sudder Court, for possession of certain land situate in Ghazipore district and mesne profits, was transferred for execution to that Court. After the decree had been so transferred the land, to which it related, was, by Government Notification, transferred to Shahabad district. The Subordinate Judge of Ghazipore therefore transferred the decree for execution to the Subordinate Judge of Shahabad. In the course of execution by the latter Court the judgment debtors objected to the jurisdiction of the Court but the objection was overruled by the High Court and the Privy Council. Later on the Shahabad Court transferred the decree for execution in respect of a specific sum as mesne

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

profits to the district Court at Ghazipore. The judgment-debtor again objected to the execution on the following grounds.

- i. That the Shahabad Court had no jurisdiction to execute the decree.
- ii. That it had no jurisdiction to transfer the decree to the District Judge of Ghazipore.
- iii. That the amount specified by the Shahabad Court as the amount of mesne profits was not correct. *Held* that all the objections were groundless and the first was *res judicata*. **LALU RAI AND OTHERS v. RADHA PRASAD SINGH.**

[III-139]

(76).—Some only of the decree-holders in this applied for execution in January, 1881. Subsequently, one of the decree-holders who had not joined put in a petition to the effect that he had been paid Rs. 200 in satisfaction of the decree. The petition was ordered to be filed. On the 9th February, 1881, the Court struck off the application for execution on the ground that all the decree-holders had not joined and to which the judgment-debtor objected. The Court at the same time directed that the Rs. 200 should be deducted from the amount of the decree. Subsequently the decree-holders (excepting *H* and two others) applied for execution alleging that *H* was not a decree-holder and denying that any payment was made to him and imputing fraud to him and the judgment-debtor. The Court of first instance on the 9th April, 1881, held that it could not enter into the question and payment and gave credit for the Rs. 200. The appellate Court dismissed the appeal on the ground that it should have been brought within one month from the order of the 9th February, 1881. *Held* that the order of the 9th April gave the decree-holders a right of appeal. *Held* further that as the question of payment cannot be said to have been finally decided the Courts were competent to entertain it. **MOTI LAL AND OTHERS v. IBRAHIM KHAN.**

[III-19]

(77).—[Act X of 1877.] A decree for money was passed on the 9th March, 1865. The first application for its execution, made after Act X of 1877 came into force, was dated the 16th December, 1878. On this application an order was made by the Court executing the decree (Munsif) for the sale of certain property belonging to the judgment-debtor. The latter objected to execution of the decree, on the ground of limitation, and the decree-holders filed an answer to the objection. On the 14th July, 1879, the case was struck off, because the decree-holder had not deposited certain process-fees, without the disposal of the objection. On the 1st October, 1879, the decree-holders again applied for the sale of the property and it was ordered to be sold. On the 17th February, the judgment-debtor presented

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

a petition repeating the objection, which on the 13th March, 1880, the Munsif entertained and disallowed. This order was affirmed in appeal by the District Judge, and again by the High Court. Meanwhile the Munsif had struck off the case from the file of execution cases pending in his Court, on the ground that the records had been despatched to the appellate Court. On the 18th September, 1882, the decree-holder again applied for execution of the decree, praying that, "the suit might be restored to its number, and that the judgment debt might be caused to be realised by attachment and sale of the judgment-debtor's property specified in the former schedule." *Held* that the decree-holder was entitled to execution of the decree, and that he could get it under the application which was made on the 1st October, 1879, inasmuch as the matter was made *res judicata* by the decree of the High Court in appeal, and it must be taken that that decree was correctly passed and that the order for sale passed upon it was properly made, and that the sale ought to have taken place. *Held* also that the proper application for the decree-holder to have made in September, 1882, was that the case might be restored to the Munsif, and that the present application might be so dealt with as to affect the same result, because the prayer contained therein referred to the number of the proceedings of October, 1879, and to the schedule of the property then ordered to be sold. **JAWAHIR SINGH v. JADU NATH AND OTHERS.**

[V-69]

(78).—[.] Where an application for execution of decree is struck off the file on an adverse decision on law or on the merits, the order, if not set aside on review or appeal, will operate as *res judicata*. But where the application is struck off merely because *talbana* has not been paid, or some other step is not taken, the order does not bar a further application. **BIJAI SINGH v. HAIYAT BEGAM AND ANOTHER.**

[IX-163]

(79).—[.] The present application for execution of a decree was made within three years from another application for execution of the decree which was granted without any objection on the ground of limitation. *Held* that the Court cannot now go behind those proceedings so as to hold that the former application was beyond time. **KALI CHARAN AND ANOTHER v. SHARAF ALI KHAN.**

[IV-39]

(80).—[.] The dismissal of a petition of objections to an application for execution of a decree for default of appearance, neither party having appeared on the day fixed for hearing, will not operate as *res judicata* so as to bar the hearing of similar objections to a subsequent application to execute the same decree. **SHAFAT**

CIVIL PROCEDURE CODE, s. 13—
(continued.)

BEGAM *v.* HURMAT SULTAN. BEGAM AND ANOTHER.

[XV-15]

(81.)———.] A Court executing a decree had before it the question whether or not a sale in execution of that decree should be confirmed owing to the decree-holders, who were also auction purchasers, not having filed a receipt which they were ordered by the Court to file. The Court refused to confirm the auction sale owing to the absence of the receipt, but at the same time directed that the decree-holders should not have power further to execute their decree. Subsequently however the executing Court passed an order to the effect that, "the auction-sale which has been cancelled with be cancelled as before, and if the decree-holders apply again the property will again be put up." The decree-holders made a further application for sale; but to this it was objected by the judgment-debtor that the Court's previous order that the decree-holders could not further execute their decree operated as *res judicata*. Held, that the order thus relied on was superfluous and not warranted by any issue then before the Court, and did not operate as *res judicata* as to the right of the decree-holders to execute their decree. NATHU RAM AND ANOTHER *v.* MUHAMMAD ALI KHAN.

[XV-119]

(82.)———.] The plaintiff having obtained a decree for possession of certain land applied for execution by delivery of possession, whereupon a third party objected that he held a prior decree for possession of the same land and therefore the plaintiff's decree was incapable of execution. This objection was allowed and the plaintiff then sued for establishment of his right to possession of the land jointly with the objector, making the former judgment-debtor and the objector defendants to the suit:—held, on these facts, that s. 331 of the Code of Civil Procedure could not be applied to the disposal of the defendant's objection to execution, and this being so, s. 13 of the same Code did not make the plaintiff's claim for joint possession *res judicata*. *Buhal Singha Chowdhry v. Behari Lal* (1 B. L. R., A. C., 206) referred to. MAHABIR PRASAD AND OTHERS *v.* PARMA.

[XII-51]

(83.)———.] A sued for certain plots of land specified in the plaint. His suit was dismissed by the first Court but decreed by the appellate Courts. But both the appellate Courts omitted to enter in the decrees the numbers and specifications of the plots sued for. Consequently when the decree-holder applied for execution he was met by the plea that the decree as it stood could not be executed. The Court of first instance disallowed the objection but the lower appellate Court reversed that order and disallowed execu-

CIVIL PROCEDURE CODE, s. 13—
(continued.)

tion. The decree-holders therefore applied to the lower appellate Court to amend its decree and their application was granted. Then the decree-holders applied for the execution of the amended decree. The defendant's contention is that the application is barred by sec. 13 and they relied on *Mungal Prashad Dichit v. Grija Kant Lahiri* (J. L. R., 8 Calc., 519); *Rup Kuari v. Ram Kripal Kant Lahiri* (J. L. R., 18 Calc., 51) and *Rup Kuari v. Ram Kripal Shukul*, (J. L. R., 6 All., 269). Held that the rulings were not in point and the application was not barred. RAM SARAN AND ANOTHER *v.* PERSI DHAR RAI AND OTHERS.

[VII-284]

(84.)———.] The principle of *res judicata* is applicable to execution proceedings in the same manner as to suits. Hence where, upon an objection to an application for execution of a decree, an order was made under s. 244 of the Code of Civil Procedure directing that the villages affected by the decree should be sold in a certain order, and that order remained unappealed, thereby becoming final:—Held, that the same question could not be re-opened upon a subsequent application for execution of the same decree, but that execution must proceed upon the basis of the order referred to above. NAGESHAR PRASAD SINGH AND OTHERS *v.* SRI NIWAS PANDE AND OTHERS.

XI-33

(85.)———.] The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue, which, in that suit, or in the proceedings in the suit, had been previously determined. The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant respondent can not avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the *onus* of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. *Ram Kripal v. Rup Kuari* (J. L. R. 6 All., 269) referred to. BEHARI LAL AND ANOTHER *v.* MAJID ALI.

[XVII-29]

(86.)———. *Applicability of s. 13 to insolvency proceedings.*] An order rejecting an application under s. 351 of the C. P. Code for a declaration of insolvency, was passed, on the 14th April, 1888, on which date, under the first paragraph of s. 589 of the Code, an appeal from

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

such orders lay to the High Court. On the 1st July, 1888, the C. P. Code Amendment Act (VII of 1888) came into force, s. 56 of which repealed the first paragraph of s. 589 of the Code. In August, 1888, an appeal was presented to the High Court from the order of the 14th April. *Held*, applying the provisions of s. 6 of the General Clauses Act (I of 1868), that the insolvency proceedings out of which the appeal arose having commenced before Act VII of 1888 came into operation, the repeal of the first paragraph of s. 589 of the Code did not alter the form of appeal or take away the right of appeal from the orders specified in s. 588 (17) and that the appeal therefore lay to the High Court. Although the rule of *res judicata* may not be universally or necessarily applicable to orders made under Chapter XX of the Code, it would be incumbent on a person who had recently failed to satisfy a Court under s. 351 that he was entitled to be declared an insolvent, to show that circumstances had subsequently changed so materially as to justify a renewed application. The mere circumstance that the creditors had taken further proceedings in execution would not afford legitimate grounds for asking the Court to institute a new case between the same parties under the chapter. **ASHFAF HUSAIN v. KALIAN DAS.**

[IX-106]

(10) Miscellaneous Cases.

(87) s. 13.—*Fraud.*] A plaintiff, to meet a plea of *res judicata* raised by the defendants, pleaded that the previous decree relied upon by the defendants, which had been made on an award in the course of a suit in which the plaintiff, then a minor, had been represented by his mother as guardian appointed by the Court, had been obtained fraudulently and was not binding on him. *Held* that the specific fraud attributed must be alleged and proved, and that such fraud must be fraud on both sides, *i. e.*, on the part of the guardian and on the part of the present plaintiffs then opponents. Mere negligence on the part of the guardian in protecting the minor's interests would not be sufficient to prevent the decree being binding on the minor. **DAULAT SINGH AND ANOTHER v. RAGHUBIR SINGH.**

[XIV-141]

(88) ——— *Erroneous decision.*] Where a judicial decision pleaded as constituting *res judicata* in all other respects fulfils the requirements of s. 13 of the Code of Civil Procedure and no appeal has been preferred against it within limitation, it is immaterial whether such decision is or is not sound in law. **Parthasaradi Ayyangar v. Chinnakrishna Ayyangar (I. L. R. 5 Mad. 304)**, dissented from. **PHUNDO v. JANGI NATH AND OTHERS.**

[XIII-110]

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

(89) ——— *Cross suits—Failure to appeal in one.*] One *Mⁿ L* filed a suit to have a certain door opened. The defendants filed a cross suit to have the same door kept closed. *M L* was defeated in both suits. He appealed against both decrees and was again defeated in both appeals. He appealed a second time, but only against one decree, and the other decree before the hearing of the appeal became final. *Held* that under the circumstances *M L*'s appeal could not be maintained. **MANGLI LAL v. NARAIN DAS AND OTHERS.**

[XIII-190]

(90) ———.] One *K T* brought two suits, the one, to redeem a mortgage of a four-anna share in a village, against *A* and *M*, and the other for a declaration of his right to redeem a three-anna share out of the abovementioned four-anna share against *B* and *M*. The plaintiff obtained decrees in both suits. No appeal was preferred in the first suit. In the second suit an appeal was preferred by the defendants, but by the time that appeal came on for hearing the decree in the first suit had become final. Under these circumstances it was *held* that so far as the appellant *M* was concerned, he was precluded from questioning the title of the plaintiff which had been affirmed in the first suit. **KESHO TIWARI v. SARJU KUAR AND ANOTHER.**

[XIII-221]

(91) ——— *Disposal of one—Effect on the other.*] Where the plaintiff and the defendant prefer separate appeals from the same decree, and on the appeal first heard the decree is reversed and the cause remanded under s. 562 of the Code of Civil Procedure, the other appeal cannot be heard, the decree having disappeared. **JAWAHAR LAL v. MOHAN LAL AND ANOTHER.**

[X-68]

(92) ———.] The plaintiff and the defendant in a suit each appealed separately, and the defendant's appeal first came on for hearing, and an issue as to whether the plaintiff or the defendant had title to the land in dispute was decided on the facts by the appellate Court adversely to the defendant. Subsequently, the plaintiff's appeal, involving the same issue, came on for hearing before the same Court. *Held* that although s. 13 of the Code of Civil Procedure did not apply, still the principle of *res judicata* applied, and the finding on the former appeal barred the trial of the same issue in the latter. **Ram Kirpal v. Rupkuari (L. R., 11 A. 37; I. L. R., 6 All., 269)** referred to. **RAM LAL AND OTHERS. v. CHHAB NATH.**

[X-183]

CIVIL PROCEDURE CODE, s. 13.—
(continued.)

(93).—Same order on two *misls*—Appeal against one only.] An application by a decree-holder for execution of his decree, and objections by the judgment debtor being before the Court of a Subordinate Judge were registered separately and put up in separate *misls*. The Subordinate Judge recorded separate orders on each *mil*, in the one case allowing the judgment-debtor's objection, and in the other rejecting the decree-holder's application for execution. The decree-holder appealed against the order rejecting his application for execution, but not against the other order. Held that the appeal as instituted was not barred and could be heard. *Kesho Tiwari v. Sarju Kuar* (W. N. 1893, p. 221) and *Mangli Lal v. Narain Das* (W. N. 1893, p. 190) distinguished. *KAMTA PRASAD v. ZABARDAST KHAN*.

[XIV-88]

(94).—Finding not embodied in decree.] The decree in a suit gave the plaintiff an unrestricted right to the property claimed by him, but in the judgment on which that decree was based it was stated, the finding apparently not being a finding on any material issue in the suit, that the defendants were entitled to certain rights in respect of the property decreed to the plaintiff. No application was made to bring the decree into conformity with the judgment and the decree as it stood was affirmed on appeal. Held that the defendants, as plaintiffs in a subsequent suit between the same parties relating to the same property, could not plead the finding in their favor in the judgment as constituting *res judicata* in the face of the clear wording of the decree. *INDRAJIT PRASAD AND OTHERS v. RICHHA RAI*.

[XII-113]

(95).—[] *DB* and *S G* sued for ejectment of *M P* from a certain house claiming title thereto under a deed of gift from one *B K*, the mother of *B B*, who was alleged to be the widow of a separated Hindu to whom the house had belonged. Prior to this suit *M P* had brought a suit against *B K*, *DB* and *SG*, alleging that the house in question was the property of a joint Hindu family of which he was a member and praying for a declaration of his right to a one-sixth share therein. That suit was dismissed on the ground that the property was not joint, as asserted, but the Court of first instance recorded a finding that "the gift by a woman in respect of immoveable property even in the favour of the next heirs must be held to be invalid, a woman having no such authority." In the subsequent suit this finding was relied upon by the defendant as constituting *res judicata* in his favour. Held that the finding in question did not operate as *res judicata*. *MADHO PRASAD v. DARYAI BIBI AND ANOTHER*.

[XV-108]

CIVIL PROCEDURE CODE s. 13.—
(continued.)

(96).—Judgment after institution of second suit.] The rule of *res judicata* contained in s. 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an issue, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity of parties and other conditions of the Code being fulfilled) such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the latter litigation. *BAL KISHAN AND ANOTHER v. KISHAN LAL*.

[IX-42]

(97).—The whole pleading must be looked.] In considering whether a case comes within s. 13 it is necessary to look not only at the previous decree but to see what were the questions raised or what might or ought to have been raised. To do this it would be necessary to look at the pleadings and the judgment. An objection that the plaintiff discovers no cause of action can be taken at any stage of the suit (6 B. L. R. Appendix, p. 73.) *CHAMPA KUAR v. MINA MAL*.

[VII-1]

(98).—Judgment after subject matter ceases to exist—(Act X of 1877).] Held that judgment on merits in a suit the subject matters of which had ceased to exist at the date of its institution could not have the effect of *res judicata* on any of the points thus unnecessarily decided. *RADHA PRASAD SINGH v. ANNU PANDEY*.

[II-50]

s. 14.—Suit in British India on foreign judgment.] There can be no doubt that under s. 14 of the Code of Civil Procedure as amended by s. 5 of Act VII of 1888, the Courts of British India are competent to entertain suits on foreign judgments. *SETH SAMIR MAL AND OTHERS v. KALYAN MAL AND ANOTHER*.

[X-148]

(1). s. 15.—Over-valuation.] The plaintiffs in this suit were the widow, 6 sons, and daughters of one *A* deceased, and they claimed possession of certain houses and damages for the use of the same. A 7th son of *A* did not join nor was he joined by the plaintiffs either as plaintiff or defendant and the claim was valued at Rs. 1,080, (houses, Rs. 960 and damages Rs. 120.) The suit was decreed by the Munsif with the exception of damages for which no evidence was produced by the plaintiff. In appeal, by the defendant to the District Judge, it was contended

CIVIL PROCEDURE CODE, s. 15--
(continued.)

that the plaintiffs had included the 7th son's share in the claims and asked for damages simply to raise the value of the suit and thus to bring it within the jurisdiction of the Subordinate Judge. The District Judge accepted this contention and relying on *Bono Mally Naxon v. Campbell* (10 B. L. R., 193), held that the suit should have been brought in the Munsif's Court. *Held* (without overruling the Calcutta ruling) that the circumstances did not warrant the conclusion drawn by the District Judge. The appeal is therefore allowed. **ASHRAF ALI AND OTHERS v. MUHAMMAD HUSAIN AND OTHERS.**

[III-74]

(2).—*Concurrent jurisdiction of Munsif and Subordinate Judge.* *Per* PETHERAM, C.J., and BRODHURST, MAHMOOD AND DURHOIT, JJ. The object of ss. 19 and 20 of the Bengal Civil Court's Act, 1871, was to create in the District Judge, Subordinate Judge, and Munsif concurrent jurisdiction up to Rs. 1,000.

Per PETHERAM, C.J.—S. 15 of the Civil Procedure Code is a proviso to those sections. The word "shall" in that section is imperative on the suitor. The word is used for the purpose of protecting the Courts. The suitor shall be obliged to bring his suit in the Court of the lowest grade competent to try it. The object of the Legislature is that the Court of the higher grade shall not be overcrowded with suits. Whenever an act confers a benefit, the donee may exercise the same or not at his pleasure. The proviso is for the benefit of the Court of the higher grade, and it is not bound to take advantage of it. If it does not wish to try the suit, it may refuse to entertain it. If it wishes to retain the suit in its Court, it may do so; it is not bound to refuse to entertain it.

Per DURHOIT, J.—The words in s. 15 of the Civil Procedure Code, "shall be," are an instruction which the Court is bound to follow; and they are therefore a restraint upon jurisdiction. The effect, therefore, of the concurrent jurisdiction of Subordinate Judges and Munsifs is not to allow to a Subordinate Judge discretion as to accepting or not accepting for trial by himself suits cognizable by the inferior tribunal.

BRODHURST and MAHMOOD, JJ.—S. 15 of the Civil Procedure Code is a rule of procedure, not of jurisdiction, and whilst it lays down that a suit shall be instituted in the Court of the lowest grade, it does not oust the jurisdiction of the Courts of the higher grades. *Russick Chunder Mohunt v. Ram Lal Shaha*, (22 W. R. 301) and *Sufee-dollah Sircar v. Begum Bibi*, (25 W. R., 219,) followed.

Per OLDFIELD, J.—S. 15 of the Civil Procedure Code is a provision entirely of procedure as distinct from jurisdiction, and its effect on s. 19 of the Bengal Civil Courts Act, is that the jurisdiction of the District Judge and Subordinate Judge extends to all original suits cognizable by the Civil Court, subject in its exercise

CIVIL PROCEDURE CODE, s. 15--
(continued.)

to a certain procedure, namely, that the suits be instituted in the Court of lowest grade competent to try them.

Held, therefore, by Petheram, C.J., and Oldfield, Brodhurst, and Mahmood, JJ.—Where a Subordinate Judge had tried a suit which a Munsif, a Court of a lower grade, might have tried, that the Subordinate Judge had not acted without jurisdiction. The plaint in such suit had been in the first instance presented to the Munsif, who had returned it, to be presented to the Subordinate Judge.

Per DURHOIT, J.—The decree of the Subordinate Judge would not be liable to be reversed in appeal for want of jurisdiction, for jurisdiction was there, though it ought not to have been exercised. This view of the matter was consistent with the received canon of construction, that unless the Legislature uses negative words, or words showing an intention to treat the observance of a rule of procedure as essential, the rule will ordinarily be treated as a direction only. Under the circumstances, therefore, the District Judge had, in appeal, correctly refused to entertain the plea of defect in jurisdiction.

Per MAHMOOD, J.—The institution of a suit in a Court of higher grade than the Court which is competent to try it, is not a question either as to the jurisdiction or affecting the merits of the case. It is a question of the kind provided for by s. 578 of the Civil Procedure Code, and the irregularity is not one which affects, "the merits of the cases or the jurisdiction of the Court" within meaning of that section. The plea of want of jurisdiction can be entertained for the first time at any stage of a suit, provided there is on the record sufficient material to substantiate it. **NIDHI LAL v. MAZHAR HUSAIN AND ANOTHER.**

[V-1]

(1.) s. 16.—*Decree for sale—Jurisdiction.* *Held* that a decree upon a mortgage bond given by a Court having no jurisdiction over the mortgaged property must be regarded as simple money decree. **MAHABIR PRASAD AND ANOTHER v. JAGANNATH RAM.**

[VI-32]

(2).—*Malikana—Immoveable property.* A suit for *malikana* alleged to have been wrongfully appropriated by the defendant is not a suit relating to immoveable property so as to necessitate its being brought in the Court within the jurisdiction of which the immoveable property out of which the *malikana* arose is situated. **SRI LAL v. KISHAN LAL AND ANOTHER.**

[XI-165]

(1.) s. 17 (a).—*"Cause of action."* The expression "cause of action," as used in s. 17 of the Civil Procedure Code, does not mean whole cause of action, but includes *material part* of

CIVIL PROCEDURE CODE, s. 17 (a).—
(continued.)

the cause of action. In a suit for compensation for breach of a contract, the making of the contract is a material part of the cause of action. *Held*, therefore, where a contract was made at C and broken at A, that the Court at C had jurisdiction to try the suit for compensation for the breach of such contract. *Llewellyn v. Chunni Lal* (I. L. R., 4 All., 423) and *Gopi Krishna Gossami v. Nilkomul Banerji*, (13 B. L. R., 461) followed. *DeSouza v. Coles*, (3 Mad., H. C. Rep., 384) and *Jumoonah Pershad v. Zai-bunnissa*, (5 Calc., L. R., 268) dissented from. BISHUNATH AND ANOTHER v. ILAHI BAKHS.

[III-84]

See also

SALIMA BIBI AND OTHERS v. SHEIKH MUHAMMAD AND OTHERS.

[XVI-2]

(2).—*Suit to set aside forged will.*] This was a suit to have a will, purporting to have been executed by the plaintiff's deceased husband set aside as a forgery. Plaintiff lived at Azamgarh, defendant at Cawnpore. The will was alleged by the plaintiff to have been fabricated and registered by the defendant at Ghazipore. Plaintiff's husband also lived at Azamgarh. *Held* that the Azamgarh Court had no jurisdiction to try the suit as the cause of action arose at Ghazipore where the will was published. SHEODIAL MAL AND ANOTHER v. DURGA KUAR.

[III-128]

(3).—*Suit for dower.*] A suit for the recovery of a dower debt from the assets of a deceased Muhammadan being a suit on a contract is subject to the provisions as to jurisdiction contained in s. 17 of the Code of Civil Procedure, 1882. SHANKAR DIAL v. MUHAMMAD MUJTABA KHAN AND OTHERS.

[XVI-115]

(4).—*Breach of contract.*] C and L entered into an agreement at a place in the Saran district, in which the latter resided and carried on business, whereby C promised to sell and deliver to L at a place in the Saran district certain goods, and L promised to pay for such goods on delivery "by approved on Calcutta or Cawnpore (where C carried on business) payable thirty days after the receipt of the goods, or by Government notes." C delivered the goods according to his promise, but L did not pay for the same, and C therefore sued L for the price of the goods, suing him at Cawnpore. *Held* that the "cause of action" within the meaning of s. 17 of the Civil Procedure Code was L's breach of his promise to pay for the goods; that the parties intended that payment should be made at Cawnpore and the cause of action therefore arose there; and that therefore the suit had been properly instituted there. LEWHELLIN v. CHUNNI LAL.

[II-101]

CIVIL PROCEDURE CODE, — (continued.)

(5). s. 17 (b).—*Actually and voluntarily reside.*] One A R was Kotwal of Mirzapore and for the purposes of his duty in Mirzapore, had hired a house there in which he and his wife lived. His home or family residence, however, was in Bhadohi, a *parganah* within the Family Domains of the Maharaja of Benares. *Held* that for the purpose of s. 17 of the Code of Civil Procedure, A R must be taken to have and been "actually and voluntarily residing" in Mirzapore. *Fatima Begam v. Sakina Begam* (I. L. R., All. 51) and *Kashee Nath Kooer v. Deb Kristo Ramannj Doss* (16 W. R., 240) considered. ABDUL RAHMAN AND OTHERS v. AJUDHIA AND OTHERS.

[XII-115]

(6). s. 17, Expl. (II).—A suit was brought at Agra against a Railway Company whose principal office was at Bombay, but which had a Subordinate Office at Agra, for a refund of alleged overcharges of freight paid at Bombay on goods consigned from Agra. A railway receipt was given to the plaintiffs at the time of consignment stating the amount of freight payable at Bombay. *Held* with reference to s. 17, Explanation II, of the Civil Procedure Code, that the cause of action arose solely at Bombay and the Court at Agra had no jurisdiction to entertain the suit. AMOLAK RAM AND OTHERS v. THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY.

[VIII-59]

(1).—s. 19—*Property partly situated in Moradabad and partly in the Tarai.*] *Held* that the Courts of the Moradabad district had no jurisdiction to pass a decree in a suit for sale on a mortgage, or for sale of land, situated in the Tarai, to which at the time of the mortgage and of the suit thereon Regulation No. IV of 1876 applied, by reason merely of a portion of the property mortgaged being situate in the Moradabad district. RAM RATAN AND OTHERS v. LALTA PRASAD.

[XV-110]

(2).—*Property situate in different districts—jurisdiction.*] The plaintiff in this case as the heir of one B, claimed possession of certain property, situated partly in the Gorakhpore district, partly in Oudh, instituting the suit in the Court of the Subordinate Judge of Gorakhpore. All the properties are alleged by the plaintiff to have been originally in the possession of defendant No. 1, but that the property situate in Oudh was now in possession of defendant No. 2, who had obtained it from defendant No. 1, that part of the suit which related to the property situated at Gorakhpore was compromised and the only matter remaining in dispute was the property situated outside the jurisdiction of the Court. *Held* that the Court had no jurisdiction to try the suit. RAM RAJI v. DRUP NARAIN.

[V-125]

CIVIL PROCEDURE CODE, s. 19—
(continued.)

(3).—Where certain plaintiffs claimed possession of separate portions of land situated in two different districts on the same title against the same defendants alleging a dispossession on one day from part of the property claimed in district A and from the whole in district B and on another day from the rest of the property in district A; *Held* that the plaintiffs could bring one suit for recovery of the whole property in both districts and that such suit was properly brought in a Court in district A. *Katiya v. Ismail* (J. L. R., 12 *Mad.*, 380) referred to. *HAR CHANDAR SINGH AND OTHERS v. LAL BAHADUR SINGH AND ANOTHER.*

[XIV-119]

s. 20.—*Transfer—Convenience* [An application for transfer under s. 20 of the Code of Civil Procedure cannot be allowed where it is made solely on the ground of convenience and where no question arises as to whether or not justice is more likely to be done between the parties if the application is granted. *AMJAD ALI AND OTHERS v. HABIB-ULLAH AND OTHERS.*

[XIII-58]

s. 24.—*Power of High Court.* [S. 24 of the Civil Procedure Code does not empower a High Court to transfer a suit instituted within its own jurisdiction to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and, if necessary, to stay all further proceedings within its own jurisdiction. The defendants, in a suit instituted at Manipore, who resided and carried on business at Surat, applied under s. 24 of the Civil Procedure Code that the suit might be tried at Surat, on the ground that it would be tried with greater convenience to them at that place. *Held* that there being no balance in favour of either justice or convenience on the side of the Surat Court, the suit should proceed at Manipore. *TULA RAM AND ANOTHER v. HARJIWAN DAS AND OTHERS.*

[II-164]

(1). s. 25.—*Transfer—Proceeding in the winding up of company.* [There is nothing in Act VI of 1882 or the High Court's Act (24 and 25 *Vicc.* 104) or the Letters Patent, which prevents the High Court from calling for the record of the proceedings in the winding up of a company under the Company's Act, and transferring those proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25 of Act XIV of 1882. *IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.*

[VII-7]

(2).—*Transfer to District judge—His powers to transfer to Subordinate judge.* [When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for trial it is the duty of the District Judge to try the suit

CIVIL PROCEDURE CODE, s. 25—
(continued.)

himself and he is not competent to transfer the suit back to the Court of the Subordinate Judge. *FATIMA BIBI v. MUHAMMAD ABDUL MAJID.*

[XII-154]

(3).—*Transfer—Cure of jurisdiction.* [Held that a defect of jurisdiction arising out of the institution of a suit in the wrong Court was not cured by the transfer of the suit. *PACHONI AWASTHI v. ILAHI BAKSHI.*

[II-113]

(4).—*Consent of parties.* [A suit for the infringement of certain inventions, instead of being instituted in the Court having, by virtue of s. 22 of Act XV of 1859, jurisdiction to entertain it, was instituted in a Court subordinate to such Court not having such jurisdiction. The Court having jurisdiction to entertain such suit, at the joint request of the parties, transferred it for trial to itself under s. 25, of the Civil Procedure Code and tried it. *Held* that, inasmuch as the parties had assented to the transfer of the suit, and its transfer brought it into the right Court, the fact that the suit had been originally instituted in the wrong Court did not render the transfer illegal, and the Court having jurisdiction had properly tried the suit. *PETMAN v. BULL.*

[II-62]

(5).—*Transfer of Small Cause Court suit to Subordinate Judge—Appeal.* [This suit was instituted in the Court of a Subordinate Judge exercising Small Cause Court jurisdiction. The Subordinate Judge retired shortly after, and the District Judge directed his successor, who was not invested with Small Cause Court powers, to try the suit. This was done and the Subordinate Judge dismissed the suit. The District Judge entertained an appeal from his decree, and set aside his decision. *Held* that the order of transfer made by the District Judge must be taken to have been made under s. 25, C. P. C., and that consequently the Subordinate Judge who tried the case was a Small Cause Court, no appeal therefore lay to the District Judge. *DOST MUHAMMAD v. KAULESHAR RAI AND OTHERS.*

[III-49]

(6).—*Transfer of Small Cause Court suit to Munsif—Appeal.* [This suit was filed as a Small Cause Court suit in the Court of a Subordinate Judge having Small Cause Court powers. It was subsequently transferred by the District Judge under s. 25, C. P. C., to the Munsif to be tried as a Munsif's Court case. *Held* that it would remain throughout a Small Cause Court suit and would be subject to the incidents of such a suit. *MANGAL SEN v. RUP CHAND AND ANOTHER.*

[XI-86]

(7).—*Try the suit.* [Where the trial of a suit was commenced by a Subordinate Judge,

CIVIL PROCEDURE CODE, s. 25—
(continued.)

and then transferred by the District Judge to his own file under s. 25 of the Civil Procedure Code, and the latter did not re-take the evidence, but dealt with the case as it came to him from the Subordinate Judge, and dismissed the suit,—*held* that the District Judge had not tried the case within the meaning of s. 25 of the Code. *BANDHU NAIK v. LAKHI KUAR AND ANOTHER.*

[V-33]

(8)———*Appeal.*] This was an appeal from an order rejecting an application to transfer a suit with costs under s. 25, C. P. C. The ground of appeal impugned the order in so far as it related to costs. *Held* that there was no appeal from an order passed under s. 25, of the C. P. C. *AJODHIA PRASAD AND OTHERS v. RAMSARUP AND ANOTHER.*

[III-88]

(9)———*Revision.*] *Held* that an order under s. 25 of the Code of Civil Procedure transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under s. 622. *FARID AHMAD AND OTHERS v. DULARI BIBI.*

[IV-45]

(1) s. 26.—*Suit in Manager's name.*] The appellant, who as the eldest son of a joint undivided Hindu family, was the manager of a mercantile business of which his father was the sole owner, sued the respondents for money due in respect of his dealings with them in that capacity, instituting the suit in his own name. *Held* that the appellant was not competent to sue in his own name, having no personal right of suit, and such right could not be conferred upon him by his father's consent to the exercise thereof. *AJUDHIA PRASAD v. GAYA DIN AND ANOTHER.*

[I-23]

(2)———*Separate suits by the heirs of an obligee.*] *Held* by the Full Bench (Mahmood, J., dissenting) that, when, upon the death of the obligee of a money bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs can not maintain a separate suit for recovery of his share of the money due on the bond. *KANDHIYA LAL v. CHANDAR AND OTHERS.*

[V-34]

(3)———*Nonjoinder—Suit for possession of common land.*] The occupancy tenant of certain land made a gift of his interests in the land to the defendant *S.T.* The plaintiff, one of the *zemindars*, thereupon brought the present suit to set aside the gift and recover possession of the land. The plaintiff alleged that a portion of the land belonged to him exclusively, while the rest was the joint property of himself and other co-sharers in the village. *Held* that the suit was bad for misjoinder of causes of action and

CIVIL PROCEDURE CODE, s. 26—
(continued.)

nonjoinder of parties. *SHEO TAHAL DAS v. SYED HUSAIN.*

[VIII-156]

See also.

HIRA LAL v. BHAIKON KANDU AND OTHERS.

[III-155]

(2). s. 26—*Misjoinder of causes of action.*

See s. 31.

(1). s. 28.—*Nonjoinder—Suit in ejectment.*] A plaintiff suing for possession of immoveable property originally made defendants some only of several persons in joint possession, the others were not made defendants until after the period of limitation prescribed for such a suit had expired. *Held* that the suit would not fail as against all the defendants, but the plaintiff would be entitled to a decree for joint possession with such of the defendants as he had omitted to join as parties until after limitation had expired. *BEHARI LAL v. GIRDHARI LAL AND OTHERS.*

[XVII-36]

(2)———*Joint Hindu family.*] Certain members of a joint Hindu family sued other members of the same family for a declaration of their rights as members of the joint family in respect of a certain door-way and its adjacent rooms, which they alleged to be the property of the joint family, and with their use of which they alleged that the defendants had interfered. They omitted to join one member of the joint family to which both they and the defendants belonged. *Held*, that whether or not all members of the joint family were, under the Hindu Law, necessary parties to such a suit, the nonjoinder of one such member was not a fatal defect and the omitted member or his representatives could, and should, have been joined as a party by the Court if the Court was of opinion that his presence on the record was necessary to the proper decision of the case. *HARI BAKSHI AND OTHERS v. GULAB RAI AND OTHERS.*

[XI-175]

(3)———*Suit by reversioner.*] *X* a Hindu widow entered into possession of the property left by her husband *Y*. Thereupon *B*, *Y*'s brother, sued her for possession of that property. The suit was compromised under which *B* obtained possession. Then *A*, another brother of *Y*, brought this suit for possession of property by cancelment of the compromise against *B*. The lower appellate Court dismissed the suit on the ground that the plaintiff ought to have made *X* also a party to the suit. *Held* that it was no ground for dismissing the suit. *MANOHAR KANDU v. PAHLAD KANDU.*

[II-80]

HIRA LAL v. BHAIKON KANDU AND OTHERS.

[III-155]

CIVIL PROCEDURE CODE, s. 26—
(continued.)

(1). ———— *Suit under s. 539, C. P. C., Aliens.* In a suit under s. 539 of the Code of Civil Procedure for the removal of a trustee it is not necessary to make alieness from the trustee defendant parties to the suit. *Bishen Chand v. Sved Nadin* (L. R., 15 I. A. 1); *Chintaman Bajaji Dev v. Dhondo Ganesh Dev* (1 L. R., 15 Bom. 612) and *The Attorney General v. The Port Reeve and others of Alton* (33 L. J., [N. S.] Ch. 172) referred to. HUSENI BEGAM AND OTHERS v. THE COLLECTOR OF MORADABAD.

[XVII-210]

(5). ———— *Who may be joined—Parties to fraudulent-deed.* This suit for the cancellation of a bond as a forgery was decreed by both the lower Courts as against B A, the so called obligee of the bond, and the appellants who, the plaintiff alleged, were also "parties to the fraud." In second appeal it has been contended on behalf of the appellants that as their names were not included as obligees of the bond there was no cause of action against them. *Held* that the contention was unsound, as the appellants also are found to have been parties to the fraud, there is no reason why they should not have been impleaded as defendants and that the decree passed against them was justified. CHANEA AND OTHERS v. GANGA SINGH.

[VIII-209]

(6). ———— *Insolvent—Trustee.* The creditor of an insolvent, who had assigned all his property to trustees for the benefit of all his creditors generally, sued him for his debt, joining the trustees as defendants on the ground that they had refused to register his claim. The trustees had refused to register the claim on the ground that the plaintiff had not applied for its registration within the time notified by them, and that he would not consent to abide by the order which the High Court might make on an application by the trustees for its advice regarding the claims of creditors who, like the plaintiff, had applied for the registration of their claims after such time, but before the assets of the insolvent had been distributed. The deed of trust empowered the trustees to distribute the assets of the insolvent after a certain time among the creditors who had preferred their claim within that time, and declared that they should not be liable for such distribution to creditors who had not preferred their claim within that time; but it did not empower them to refuse to register claims made after that time but before distribution of the assets. *Held* that the trustees had been properly joined as defendants in such suit; that their refusal to register the plaintiff's claim gave him a cause of action against them; and that, inasmuch as the plaintiff had applied for the registration of his claim before the distribution of the assets, the trustees had improperly refused to register it. AJUDHIA NATH AND OTHERS v. ANANT DAS.

[I-73]

CIVIL PROCEDURE CODE, s. 26—
(continued.)

(7) s. 26.—*Misjoinder of causes of action.*

See s. 26, No. (3) and s. 31.

(1). s. 30.—*Temple—Suit for management of property dedicated.* The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendant obtained from the Revenue authorities mutation of names in the idol's favor, and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they (defendants) had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers thereat, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. *Held*, with reference to s. 30, Civil Procedure Code, that the plaintiff could not maintain the suit alone on his own behalf or on behalf of himself, and others against those defendants. RAGHUBAR DIAL AND OTHERS v. KESHO RAMANUJ DAS.

[VIII-570]

(2). ———— *Mosque—Suit to use.* Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance, and is competent to maintain a suit against any one who interferes with its exercise, irrespective of the provisions of ss. 30 and 539 of the Code of Civil Procedure. S. 30 of the Code of Civil Procedure applies only to cases in which many persons are jointly interested in obtaining relief, and not to cases in which an individual right has been violated. *Zafaryab Ali v. Bakhtawar Singh* (1 L. R., 5 All., 497) referred to. *Jan Ali v. Ram Nath Mundul* (1 L. R., 8 Cal., 32) dissented from. JAWAHRA AND OTHERS v. AKBAR HUSAIN.

[IV-324]

FAZLUL RAHMAN AND OTHERS v. MUHAMMAD YUSUF.

[V-219]

(3). ———— *Association—Suit in the name of secretary.* This suit for a declaration that certain property was *wakf*, appertaining to a *masjid* &c., was instituted by the Muhammadan Association of Meerut in the name of its secretary. *Held* that the association has "*per se*," no status in law to warrant its instituting a suit in its own name by its secretary. Had its members empowered one or more of their members to act for them in the manner provided in section 30 of

CIVIL PROCEDURE CODE, s. 30—
(continued.)

the Code of Civil Procedure, it may be that the Court would have accorded the permission therein mentioned. As it is, the Association has no "*locus standi*" to maintain a suit, it has been properly dismissed. *FIDA ALI, SECRETARY OF THE MUHAMMADAN ASSOCIATION OF MEERUT v. BAKHSI RAM AND OTHERS.*

[IV-76]

(4.)—*Suit by one co-sharer against trespasser for ejectment.*] A share-holder of an undivided piece of land sued three of his co-sharers, who, he alleged, had trespassed on the land by building thereon, for restoration of the land to its original condition. The Court of first instance tried and determined the suit as brought and framed. The lower appellate Court dismissed the suit on the ground that, there being many co-shares, the plaintiff could not alone sue, and under s. 30 of the Civil Procedure Code the suit was bad.

Per STUART, C. J., that the lower appellate Court was right in holding that s. 30 of the Civil Procedure Code applied to the case, but that it was not right in dismissing the suit, but should have remanded it for the procedure provided by that section. Also that the permission mentioned in s. 30 is express and not constructive.

Per BRODHURST, J., that s. 30 was not applicable to the case, that section contemplating a case, in which there are numerous parties, having the same interest in a suit, who are all before the Court, and are all anxious to have the matter in dispute disposed of, but, in order to save trouble and expense, are desirous that one or more of them shall sue or defend on behalf of all in the same interest.

Per STRAIGHT AND TYRRELL, JJ.—That s. 30 was not applicable to the case, the first part of that section implying that the plaintiff therein contemplated wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same. *HIRA LAL v. BHAIROON KANDU AND OTHERS.*

[III-155]

See also

SHEO TALAL DAS v. SYED HUSAIN.

[VII-156]

(1.) s. 31.—*Misjoinder of causes of action.*]

See s. 26, No. (3)

(2.)—[The plaintiff sued eleven persons jointly for a declaration of his proprietary title to certain trees. He stated in his plaint that he had previously applied in a Court of Revenue for entry of his name in respect of these same trees, and that, "his application was opposed by the defendants Nos. 1 and 2, who, asserting their own proprietary title denied the plaintiff's proprietary title." He further stated that the Court of

CIVIL PROCEDURE CODE, s. 31—
(continued.)

revenue had rejected his application and entered his name in respect of 36 only out of the 169 trees claimed. He went on to allege that he was in possession of all the trees in suit by virtue of his ownership and by right of his having planted them, and that the defendants had nothing to do with him, but were interfering with the trees on the strength of the above mentioned order of the Revenue Court. *Held* that the suit framed as above described fell within the provisions of s. 28 of the Code of Civil Procedure and that the Court should have given judgment against such one or other of the defendants as it found to be liable according to their respective liabilities, without amendment, or to have allowed the plaintiff to amend, but should not have dismissed the suit in toto. *BRIJ MOHAN PANDE v. CHURHU RAI AND OTHERS.*

[XV-23]

(3.)—*Suit for contribution.*] Where the owner of two villages, sold under a decree obtained upon a mortgage, the sales being confirmed on different dates, claims contribution proportionately against the owners of the other properties included in the mortgage, and does not claim from them all collectively one lump sum as contribution, he may join all the contributors in one suit, and is not bound to bring separate suits for the contribution against the separate owners. *Hira Chand v. Abdal (I. L. R., 1 All., 455)* distinguished; *Rujaput Rai v. Mahomed Ali Khan (N. W., H. C., Rep. 1873, p. 215)*; *Tavasi Telavar v. Palani Andi Telavar (3 Mad., H. C., Rep. 187)*; *Khema Dava v. Kumola Kant Bukhshee (10 W. R., 10)* and *Eglinton v. Keylash Nath Mazoomdar (W. R., 1864, p. 303)* referred to. He may also bring a single suit in respect of the two sales, and is not bound to bring a separate suit in respect of each sale. *IBN HASSAN AND ANOTHER v. RAMDAI AND OTHERS.*

[X-31]

(4.)—*Suit by several creditors to avoid gift by debtor.*] *Held* that several creditors, to each of whom separate debts were owing by the same debtor, could not sue jointly for the avoidance of a deed of gift executed by the debtor, which deed was alleged to have been made fraudulently with intent to defeat or delay the executants creditors, the cause of action of each separate creditor not being the same as that of the others. *RAJJO KUAR AND ANOTHER v. DEBI DAYAL AND OTHERS.*

[XVI-139]

(5.)—*Several plaintiffs—Same cause of action.*] Where certain plaintiffs claimed possession of separate portions of land situated in two different districts on the same title against the same defendants alleging a dispossession on one day from part of the property claimed in district A and from the whole in district B and on another day from the res

CIVIL PROCEDURE CODE, s. 31—
(continued.)

of the property in district A: *Held* that the plaintiffs could bring one suit for recovery of the whole property in both districts. **HAR CHANDER SINGH AND OTHERS v. LAL BAHADUR SINGH AND ANOTHER.**

[XIV-119]

(6.) —————.] B and two others severally promised by an agreement in writing to pay K and G Rs. 2-8 monthly by way of pension. K and G joined in suing B for Rs. 160 arrears of this allowance at the rate of Rs. 5 per mensem. The lower appellate Court held that the suit was bad for misjoinder, but entered into the merits of the case notwithstanding and dismissed the suit on the ground that the agreement was bad for want of consideration. *Held* (in revision) that the lower Court was right in holding that the suit was bad for misjoinder but it should have refrained from entering into the merits of the case which must be deemed to be superfluous. **KESHO DAS AND ANOTHER v. BANKATESH.**

[IV-46]

(7.) —————. *Suit against principal defendant and his aliases.* The plaintiffs-appellants sued the defendant K A (No. 1) and seven other persons for their share by inheritance of the estate of one A A deceased. They alleged that the defendant K A and one A had wrongfully taken possession of such estate on the death of A A; that on the death of A in November 1879, the defendant K A had remained in exclusive possession thereof, that in January 1880, the defendant K A had mortgaged a portion of such estate to defendant No. 2, giving him possession; that while in wrongful possession of such estate the defendant K A had sold a portion of it to the defendants Nos. 3 and 4; that in June 1878, defendant No. 5 obtained a decree against the defendant K A and A for possession and partition of a portion of such estate and in August 1879, in execution of that decree, he brought to sale another portion of such estate and purchased it himself; that in August 1879, a portion of such estate was put up for sale in execution of a decree as the property of the defendant K A and A and was purchased by defendant No. 7; that in June, 1879, the defendant K A sold a portion of such estate to defendant No. 8; and that in July 1878, A mortgaged a portion of such estate to defendant No. 6 who was in possession of such portion. *Held* that the causes of action were distinct. The matter of the various claims of the plaintiffs against the several defendants was not the "same" in the sense of s. 28, Civil Procedure Code; and it was clear that the plaintiff's cause of action against the several defendants were distinct with regard to s. 31. The suit was therefore rightly dismissed by the Court below for misjoinder of parties and of causes of actions. **ILAHI BEGAM AND ANOTHER v. KHURSHED ALI AND OTHERS.**

[I-172]

CIVIL PROCEDURE CODE, s. 31—
(continued.)

(8.) —————.] Defendant No. 1, the tenant of certain land at fixed rates, on the 12th November, 1877, sold his interest in the land to the plaintiff. At the time of the sale the land was in the actual possession of defendant No. 2, defendant No. 1's subtenant, against whom however defendant No. 1 had obtained an order for ejectment on the 25th June, preceding. On the 25th March, 1878, defendant No. 1 applied a second time for the ejectment of defendant No. 2, and while this matter was pending the plaintiff endeavoured to obtain possession of the land, but was resisted by defendant No. 2. He thereupon instituted a charge of criminal trespass against the latter. This criminal proceeding was pending when, on the 14th September, 1878, defendant No. 1 obtained a second order for defendant No. 2's ejectment. Under this order he obtained possession of the land, and also of the crop planted by defendant No. 2, which he sold to defendant No. 3 on the 22nd September, 1878. On the 25th of the same month the plaintiff's charge of criminal trespass against defendant No. 2 was dismissed, on the ground that defendant No. 1 was in possession, and the plaintiff had never obtained possession under his purchase. Defendant No. 1 subsequently let the land to defendant No. 4. The plaintiff, alleging that three causes of action had accrued to him, *viz.*, (i) on the 12th November, 1877, the date of the sale to him—(ii) on the 30th March, 1878, when defendant No. 1 applied a second time for the ejectment of defendant No. 2 and (iii) on the 22nd September, 1878, when defendant No. 1 took possession of the land—sued defendants Nos. 1, 2, 3 and 4 claiming (i) possession of the land as against them all; (ii) mesne profits by way of damages for the year 1285 *Fasli* (September, 1877—September, 1878) as against defendants Nos. 1 and 2; (iii) mesne profits by way of damages for 1286 *Fasli* (September, 1878—September, 1879) against defendants Nos. 1 and 3; and (iv) mesne profits by way of damages for 1287 *Fasli* (September, 1879—September, 1880) against defendants Nos. 1 and 4. *Held* by the Full Bench (Mahmood, J., dissenting) that the Court of first instance had properly rejected the plaint, the suit being open to the objection that different causes of action against different defendants separately had been joined, for which procedure no sanction was to be found in the Code of Civil Procedure. **NARSINGH DAS v. MANGAL DUBEY AND OTHERS.**

[II-202]

(9.) —————.] The judgment of the majority of the Full Bench in *Narsingh Das v. Mangal Dubey* (I. L. R., 5 All., 163) except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further. In suit for possession of immoveable property a

CIVIL PROCEDURE CODE, s. 31—
(continued.)

part of which had been usufructually mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendants maintained such title. *Held* that inasmuch as the title of defendant No. 2 was derived from defendant No. 1 and stood or fell with the failure or success of the plaintiff's claim against the latter there were not two causes of action but one, namely, the infringement of the plaintiff's right by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action. *INDAR KUAR v. GUR PRASAD AND ANOTHER.*

[VIII-283]

(10.) ———— *Suit by reversioner against alienees of the widow.* Where a plaintiff alleging himself to be entitled on the death of a Hindu widow to the possession of certain immoveable property, upon the death of such widow brought a joint suit against three sets of defendants, being persons to whom the widow in her life time had by separate alienations transferred separate portions of the property claimed. *Held* that such suit was bad for misjoinder of both parties and causes of action and that s. 578 of the Code of Civil Procedure could not be applied to cure the defect: but the plaintiff was allowed on terms to withdraw his suit as against two out of the three sets of defendants with liberty to bring a fresh suit on the same cause of action. *Vasudeva Shanbhaga v. Kuleadi Narnapai* (7 *Mad.*, H. C. Rep., 290); *Banee Krishun v. Koondun Lal* (2 *N.-W. P. H. C. Rep.*, 221); *Koondun Lal v. Rai Himmut Singh* (3 *N.-W. P. H. C. Rep.*, 86); *Narsingh Das v. Mangal Dubey* (1 *L. R.*, 5 *All.*, 163); *Kachar Bhoj Vajja v. Bai Rathore* (1 *L. R.*, 7 *Bom.*, 289); *Sudhendu Mohun Roy v. Durga Das* (1 *L. R.*, 14 *Calc.*, 435) and *Ram Narain Dui v. Anoda Prasad Joshi* (1 *L. R.*, 14 *Calc.*, 681) referred to. *GANESHI LAL AND ANOTHER v. KHAIRATI SINGH.*

[XIV-82]

(11.) ———— *Suit by claimants under s. 278—Hindu sons.* A decree-holder in execution of a decree against one G L attached a house as belonging to G L and his two sons forming a joint Hindu family. The sons objected that the house had previously been partitioned and was held by them and their father in separate shares, but their objection was disallowed. They then brought a joint suit for a declaration that their respective portions of the house were not liable to attachment in execution of a decree against their father. No objection was taken to the frame of that suit, and the Court of first instance gave the plaintiffs a decree on the finding that partition had in fact taken place prior to the suit in which the defendant, judgment-creditor, had obtained his decree. On appeal by the judgment creditor, the lower appellate Court dismissed the suit

CIVIL PROCEDURE CODE, s. 31—
(continued.)

entirely, on the ground of misjoinder of causes of action. The plaintiffs appealed to the High Court. *Held* on these facts that the plaintiffs should have been allowed to amend their plaint by striking out the name of one of them and that under the circumstances s. 578 of the Code of Civil Procedure would apply. *BEHARI LAL AND ANOTHER v. KODU RAM.*

[XIII-150]

(12.) ———— *Joint suit by heir and his assignee.* Where two plaintiffs joined in a suit for the recovery of immoveable property, the one claiming a title by inheritance and the other a title by assignment from the 1st plaintiff, *held* that the suit was bad for misjoinder of causes of action. *Salima Bibi v. Sheikh Muhammad* (W. N. 1896, p. 2) followed. *RAHIM BAKHS v. AMIRAN BIBI AND OTHERS.*

[XVI-33]

(13.) ———— *Cause of action.* The term "cause of action" as used in ss. 31 and 45 of the Code of Civil Procedure is there used in the same sense as it is used in English Law, *i. e.*, a cause of action means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. Where three plaintiffs brought a joint suit for the possession of immoveable property, in which two of them were claiming half the property under a title by inheritance, and the third was claiming the other half of the property in virtue of a sale thereof to him by the first two plaintiffs, *held* that the suit as framed was bad for misjoinder of causes of action and that the plaint should be returned that the plaintiffs might elect which of them should proceed with the suit. *Jagobundhoo Dutt v. Mrs. C. B. Maseyk* (W. R. 1864, p. 81); *Anund Chander Ghose v. Komul Narain Ghose* (2 *W. R.*, 219); *Prem Shook v. Bheekoo* (N.-W. P. H. C. Rep. 1868, p. 242); *Cooke v. Gill* (1 *L. R.*, 8 *C. P.*, 107); *Read v. Brown* (1 *L. R.*, 22 *Q. B. D.*, 128); *Smurthwaite v. Hannay* (1 *L. R.*, 1894, A. C. 494); *Musummat Chand Kowar v. Pariah Singh* (1 *L. R.*, 15, 1 *A.*, 156); *Murti v. Bhola Ram* (1 *L. R.*, 16 *All.*, 165); *Nusserwanji Merwanji Panday v. Gordon* (1 *L. R.*, 6 *Bom.*, 266); *Ramanuja v. Devanayaka* (1 *L. R.*, 8 *Mad.*, 361) and *Ram Sewak Singh v. Nakhed Singh* (1 *L. R.*, 4 *All.*, 261) referred to. *SALIMA BIBI AND OTHERS v. SHEIKH MUHAMMAD AND OTHERS.*

[XVI-2]

(14.) ———— *Suit for pre-emption in respect of distinct sales.* The sons of R and of K and of S possessed proprietary rights in two *mahals* of a certain *manuza*. P possessed proprietary rights in one of those *mahals*. In April, 1879, the sons of R sold their proprietary rights

CIVIL PROCEDURE CODE, s. 31—
(continued.)

in both *mahals* to *G*. In August, 1879, the sons of *K* sold their proprietary rights in both *mahals* to *G*. Later in the same month the sons of *S* sold their proprietary rights in both *mahals* to *N*. *G* sued *N* to enforce a right of pre-emption in respect of the sale to the latter, and obtained a decree. *P* then sued to enforce a right of pre-emption in respect of the three sales mentioned above, so far as they related to the *mahal* of which he was a co-sharer, joining as defendants *G* and *N* and the vendors to them. *G* alone objected in the Court of first instance to the frame of the suit. That Court overruled the objection and gave *P* a decree. The lower appellate Court reversed this decree on the ground of misjoinder. *Held* that in respect of *G* there was no misjoinder, but that in respect of the other defendants there was misjoinder of both causes of action and parties, inasmuch as, however, *G* alone objected to the frame of the suit, and the defect did not affect the merits of the case or the jurisdiction of the Court, the lower appellate Court ought not, regard being had to s. 578 of Act X of 1877, to have reversed the decree of the Court of first instance by reason of such defect. **KALIAN SINGH v. GURDIAL MAL.**

[I-171]

(15.)—[Two co-sharers of a village, holding separate shares, sold their shares separately to the same person, upon which a third co-sharer of the village sued them and the vendor jointly to enforce his right of pre-emption in respect of the sales. *Held* that the frame of the suit was bad by reason of misjoinder of defendants and causes of action, and the suit had been properly dismissed on that ground. **BIAGWATI PRASAD v. BINDESHRI AND OTHERS.**

[III-229]

(16.)—[This was a suit brought by one *H S* to enforce the right of pre-emption in respect of the sales of a two annas share in one village and the whole of another village. It appeared that the defendant *Z K* had sold the two annas share to the defendants, *K C*, *P* and *R*, by a deed dated the 30th June, 1881, and the whole village to the same persons by a separate deed bearing the same date. The purchasers defendants objected to the frame of the suit on the ground that distinct causes of action had been united in the same suit without the leave of the Court. The Court of first instance disallowed this contention, holding that as the parties were the same the causes of action might be united in the same suit. On appeal by the purchasers defendants, the lower appellate Court allowed the objection and dismissed the suit. The plaintiff appealed to the High Court. *Held* that having regard to the views expressed in *S. A. No. 581 of 1883*, and to the Full Bench ruling in *Narsingh Das v. Mangal Dubey* (1 L. R., 5 All., 163) as to the

CIVIL PROCEDURE CODE, s. 31—
(continued.)

construction to be placed upon s. 45, Civil Procedure Code, it is obvious that this appeal must fail. **HARBANS SINGH v. LACHMINA KUAR AND OTHERS.**

[III-230]

(17.)—[Where a *zemindari* share and the *sir* land held with it were sold to the same vendee by two separate deeds of sale it was *held* that a suit to pre-empt both the *zemindari* share and the *sir* land was not liable to be defeated on the ground of misjoinder of causes of action. **AMBIKA DAT v. RAM UDIT PANDE AND ANOTHER.**

[XV-76]

(18.)—[*Malicious prosecution—Time for objection—(Act X of 1877).*] This was a suit, by two persons, for compensation for malicious prosecution. The two plaintiffs had been prosecuted jointly for certain offences by the defendant. The suit was decreed by the Munsif but the lower appellate Court dismissed it on a ground taken for the first time in appeal, *viz.*, misjoinder of plaintiffs. *Held* that the objection was too late and should not have been entertained in contravention of s. 34, Civil Procedure Code. **BARI LAL AND ANOTHER v. LALLU.**

[II-113]

(1). s. 32.—[*New party—Leave of Court.*] Except in the case of a plaint, where the plaintiff names himself as plaintiff and the defendant as the party against whom he seeks a remedy no person can bring himself or any one else or to the record of a Court unless with the cognizance and by the leave of the Court. **SHIB SAIHAI AND OTHERS v. JAGAN NATH.**

[XII-139]

(2).—[*Power of Court to strike out party—Time.*] An order striking the name of a defendant off the record of a suit cannot be made under s. 32 of the Code of Civil Procedure at a period subsequent to the first hearing of the suit. **ABBASI BEGAM v. IMDADI JAN.**

[XV-156]

(3).—[*Power of Court to add parties—Time.*] *Held* that the powers conferred by s. 32, Civil Procedure Code in respect of the addition of parties were exercisable even after a suit had been reinstated on an application under s. 108 of the Code made by one of the defendants who had not been served with notice of the suit. **TIRAM SINGH AND OTHERS v. THAKUR KISHORE RAWANJI MAHARAJ THROUGH SHROGOPAL AND OTHERS.**

[XVIII-12]

(4).—[*Limitation.*] A Court cannot under the provisions of s. 32 of the Code of Civil Procedure, 1882, add as a party

CIVIL PROCEDURE CODE, s. 32—
(continued.)

to a suit a person against whom limitation in respect of such suit has already expired. *Ram-sebuk v. Ram Lall Koonduo* (I. L. R., 6 Calc. 815) and *Kalidas Kevaldas v. Nathu Bhagvan* (I. L. R., 7 Bom., 217), referred to. *The Oriental Bank Corporation v. Charriot* (I. L. R., 12 Calc., 642), discussed. *IMAM UD-DIN AND ANOTHER v. LILADHAR.*

[XII-104]

(5). ———— *Person having distinct title.* An order for sale was made in execution of a decree. A party claiming the property objected. His objection was overruled by the Court of first instance. He appealed to the High Court. The High Court held that the property ordered to be sold was not the property included in the mortgage on which the decree for sale was made and was not property which could be sold under that decree. In the meantime the sale had taken place. Thereupon the owner of the property which the High Court had held on appeal was not saleable, brought a suit and made the decree-holders and auction purchaser parties to it, and claimed as against them his property. *Held* that it was not competent to the Court acting under s. 32 of the Code of Civil Procedure to introduce into this suit as a defendant a person who claimed the property in suit by a title quite distinct from that under which any of the parties to the suit claimed. *KALIAN RAI AND ANOTHER v. RAM RATAN AND OTHERS.*

[XVI-72]

(6). ———— *Addition of party—Discretion of Court.* The appellant, a Muhammadan lady instituted two suits in the Munsif's Court. In one she sued to have a mortgage of a portion of her deceased father's estate given by her husband *WA* to one *BL* set aside. In the other she sued one of her brothers *AK* for her share under Mahomedan law in her father's estate. In both suits the plaintiff claimed by right of inheritance. The Munsif dismissed both suits holding that the plaintiff ought to have brought only one suit and not two and that in her suit against *AK* she ought to have made all her brothers in possession of her father's estate defendants. *Held* that the fault rested primarily with the Munsif who ought to have exercised the powers given him by s. 32, Civil Procedure Code by causing the plaint to be amended and bringing in *WA* and his mortgagee and the rest of the appellant's (brothers) on to the record in the suit against *AK*. Under these circumstances the cases must be remanded. *HAFIZUNNISSA v. WAJID ALI AND ANOTHER.*

[I-140]

HAFIZ-UN-NISSA v. ASADYAR KHAN.

[I-140]

(7). ———— *Held* that a rejection of a plaint after the first

CIVIL PROCEDURE CODE, s. 32—
(continued.)

hearing, under the provisions of s. 53, Civil Procedure Code, on the ground that the plaintiff had knowingly not joined as defendants certain persons whom he ought to have joined was illegal, the Court having a discretionary power under s. 32 of adding parties to a suit. *MUHAMMAD TALIB v. GHAFURULLAH AND OTHERS.*

[II-67]

(8). ———— *Plaintiff, the son of Hindu governed by the Mitakshara law, sued his father and elder brother for his share in the ancestral property. S P, Banker, who had lent money to the father on his bond and obtained a decree enforcing his lien on the property the subject-matter of the suit, applied to be made and was made a party to the suit. It was found that the debt to S P was contracted for the purpose of paying off a debt of the grandfather of the plaintiff, and this was admitted by the counsel for plaintiff. Held* that the plaintiff was responsible for the debt in common with the rest of the family, and that in hypothe-cating the joint property, the father acted as the representative of, and manager for, the joint family, and each member of it was bound by his acts and alienations. *Held* further that, under the circumstances, it was not only competent, but most convenient and proper, for the lower Court to admit S P as a defendant in the present suit. His presence before the Court was necessary in order to enable it effectually and completely to adjudicate upon all the questions. *SRIMAN NARAIN CHAND v. RAM SEWAK AND OTHERS.*

[I-36]

(9). ———— *Party admitted by first Court—Rejection by appellate Court.* A sued C and D to set aside a mortgage made by C to D, on the ground that the property belonged to him and not to the mortgagor. B, alleging that the property belonged to him, applied to be made a defendant under s. 32, Civil Procedure Code. The first Court granted the application without objection on the part of A and decided the question in favor of A. On appeal the lower appellate Court declined to decide the question between A and B. *Held* that the first Court having granted the application of B and the respondent A not having objected to the application, the lower appellate Court was bound to consider and decide the question. *RADHA PRASAD SINGH v. RAM BHAJAN AND OTHERS.*

[III-201]

(10). ———— *Power of appellate Court to add parties—Procedure.* When a Court hearing an appeal is of opinion that a person not a party to the suit and not entitled to be brought on the record in a representative capacity, should be a party to the record, its proper course is to remand the case to the Court of first instance and direct that Court to bring on the particular person as a defendant, or as a plaintiff if he

CIVIL PROCEDURE CODE. s. 32—
(continued.)

consents, give him time to file his statement and opportunity to produce his evidence and try the issues raised between him and the opposite side. *MIHIN LAL AND OTHERS v. IMTIAZ ALI AND OTHERS*

[XVI-91]

(11)———*Order refusing to make party—Revision.*] *Held* that an order under s. 32 refusing to make the applicant party was not open to revision by the High Court under s. 622, Civil Procedure Code, as an appeal would lie from the decree in the case, to the High Court. *GHUNRANI v. RAJ KUMAR AND ANOTHER.*

[II-55]

(12)———*Order striking out party—Revision.*] *Held* that an order by the appellate Court striking off the name of a defendant made a party under s. 32, Civil Procedure Code, was appealable and therefore not open to revision by the High Court under s. 622, Civil Procedure Code. *JATPRAGASH SINGH AND OTHERS v. HAR SHANKAR PRASAD AND ANOTHER.*

[II-53]

(13)———*Order adding a party—Revision.*] *A* claiming to be the adopted son of *B* sued *C* for a *malikana* allowance. *C* among other pleas questioned the legality of the adoption of *A*. Subsequently one *D* applied to be made a defendant under s. 32 of the Civil Procedure Code on the ground that he claimed the estate of *B* adversely to the plaintiff. The application was granted and on appeal the order was affirmed by the lower appellate Court. This is an application for the revision of that order. *Held* that no revision lay as there was no error of *jurisdiction*, and as there lay an appeal from the decree. *HAR NARAIN SINGH v. BAKHTAWAR SINGH.*

[V-259]

(14).———*Practice.*] Where an order adding a defendant under s. 32, Civil Procedure Code, was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh v. Chakardhari Singh (I. L. R., 15 All., 119)* referred to. *BANSI LAL AND OTHERS v. RAMJI LAL AND ANOTHER.*

[XVIII-75]

s. 34.—*Misjoinder—Time for rejection.*

See. s. 31 No. (18).

s. 37.—*Recognized agent—Sovereign.*] S. 432 of the Code of Civil Procedure was not intended to limit the scope of s. 37 of the Code, and does not prevent the institution of a suit by an independent prince in his own name and through a recognized agent other than one appointed under s. 432. *Beer Chunder Manikya v. Ishan Chunder Burdhan (I. L. R., 10*

CIVIL PROCEDURE CODE, s. 39—
(continued.)

Calc., 136) followed. *THE MAHARAJA OF BHURT-PUR v. KACHERU AND OTHERS.*

[XVII-135]

(1) s. 39.—*Appointment of pleader.*] Under the provisions of Act No. XIV of 1882, the appointment of a pleader to make or do any appearance, application or act in or to a Civil Court, must be in writing, and that writing must be executed by the party, or by a person acting on his behalf and acting under the authority of a general power of attorney or *Mukhtar-namah*, unless the person making the appointment is the "recognized agent" of the party within the definition of s. 37 of Act No. XIV of 1882. *BADRI PRASAD v. BHAGWATI DHAR AND OTHERS.*

[XIV-62]

(2)———.] This was a suit against the *O* and *R. R.* Mr. Jenkins, the Agent-in-chief of the company, executed a power of attorney in favor of one Mr. Sim and Mr. Sim under this authority appointed a pleader (Mr. Newton) to conduct the suit. The lower Court holding that the pleader not having been duly appointed passed an *ex-parte* decree against the defendants. *Held* that the pleader had been duly appointed. *Held* further that though no appeal lay from an *ex-parte* decree the appeal was entertainable in order to see whether the decree appealed against was in fact and law an *ex-parte* decree. *THE OUDH AND ROHL-KHAND RAILWAY CO. v. SHIB CHARAN.*

[VI-172]

(3)———.] Observations on the duties of pleaders with reference to the execution of *vakalatnamahs* in their favor. IN THE MATTER OF A PLEADER.

[XII-78]

(4)———.] Where certain appellants in a Civil case being illiterate caused their signatures to be put upon a *vakalat-namah* authorizing certain pleaders to file and conduct the appeal by the pen of their family priest and in their presence. *Held* that the *vakalatnamah* so signed was a valid document. *RAM TAILAL AND OTHERS v. SUMER MAL AND ANOTHER.*

[XIV-90]

(5).———*Fresh vakalatnama—Application for restoration of appeal.*] Where a *vakil* had been duly empowered by a *vakalatnama* drawn in the customary form to file and conduct an appeal in the High Court, and that appeal had been dismissed for default. *Held* that such *vakil* was competent without filing a fresh *vakalatnama* to present an application for the restoration of the said appeal to the list of pending appeals. *RAGHUNATH SINGH v. RAGHUBIR SAHAI.*

[XII-222]

CIVIL PROCEDURE CODE, s. 43—

(1). s. 43.—*Failure to implead certain persons—Knowledge.*] One *D* borrowed Rs 433 of *G* mortgaging his and his brother *K*'s estate. On the death of the brother the whole property came in possession of *D*, wife of *A*, in 1873. On the 14th February, 1873, *D* gave a mortgage bond of the same property to one *I S*, who on the 14th August, 1873, got a decree on the bond, bought the property at public auction in satisfaction of his claim. In the meantime one *U* having paid some Government revenue for *D* sued her for it and having obtained a money decree, dated 20th August, 1875, brought the property to sale and bought it himself for Rs. 80 on the 20th February, 1877. At last in 1882 *G* brought his suit impleading *I S* and *B S* the minor heirs of *D* and *K*. In this suit he got a decree. In the execution he was opposed by *U* successfully on the ground that he was no party to the decree of *G*. Hence the suit. One of the pleas taken in defence was that the suit was barred by s. 43, Civil Procedure Code, because the plaintiff was entitled to make his present claim against the defendants when he brought his suit in 1882, but he intentionally omitted this remedy. *Held* that as the plaintiff is not shown to have had any notice of the existence of the appellants or of their pretensions when he brought his suit in 1882, he is not obnoxious to the disability of s. 43, Civil Procedure Code. **BHUP SINGH AND ANOTHER v. GULAB RAI.**

[VI-269]

(2).———*Presentation of plaint.*] Where a plaintiff presented a plaint in a Court of Small Causes for *malikana* for three years, and the Judge, holding that the case was not cognizable by him returned the plaint for presentation to the proper Court, and where, a subsequent instalment of *malikana* having in the meantime become due the same plaint without any alteration was presented in the Munsif's Court. *Held* that the suit must be taken to have been commenced by the presentation of the plaint to the Court of Small Causes and not on its presentation in the Court of the Munsif, and the plaintiff was not barred by s. 43 of the Code of the Civil Procedure from bringing a suit for the sum which had accrued after the plaint was presented in the first Court but before its presentation in that of the Munsif. **MORSIN ALI v. IBRAHIM ALI.**

[X-243]

(3).———*Registration of suits.*] *Held* that where two suits are filed on the same day it must be presumed until the contrary is proved that they were presented and admitted in the order in which their numbers appear in the register of Civil suits prescribed by s. 58 of the Code of Civil Procedure. **Kaleshar Prasad v. Jagan Nath** (I. L. R., 1 All., 650); **Appasami v. Rama Sami** (I. L. R., 9 Mad., 279); and **Duncan Brothers & Co. v. Feetmull Greedharee Lall** (I. L. R., 19 Cal., 372) referred to. **Zahur Husain v. Muhammad Hasan**

CIVIL PROCEDURE CODE, s. 43—

(continued.)

(*W. N.*, 1888, p. 147) and **Muhammad Ibrahim Khan v. Habib-ul-lah Khan** (*W. N.*, 1886, p. 113) overruled. **MURTI v. BHOLA RAM AND ANOTHER.**

[XIV-65]

*Per contra.*1. **ZAHUR HUSAIN v. MUHAMMAD HASAN.**

[VIII-147]

(4).———*Splitting up cause of action—Property conveyed under one sale-deed.*] *R* purchased two houses under the same sale-deed. Four years afterwards, he sued for possession of one of the houses, alleging that he had been dispossessed by the ancestor of the defendant. Subsequently he sued the same defendant for possession of the other, alleging that, at the time when he instituted the former suit, he had already been dispossessed of the house now in question, and by the same person. *Held* that, although the plaintiff's title to both houses rested on the title acquired by him under one and the same sale-deed, yet the cause of action, *viz.* his ouster from the two houses on different occasions, gave rise to two separate causes of action, which he was not bound to join in the former suit, there being nothing in the Civil Procedure Code to compel him to do so. **Jardine Skinner & Co., v. Rance Shama Soondaree Debia**, (13 *W. R.*, 196) and **Ram Soondur Saha v. Delanney** (20 *W. R.*, 103) referred to. **RIYAT-UL-LAH v. NASIR KHAN.**

[IV-185]

(5).———*Change of parties.*] One *A*, the owner of a one-third share, died in 1874 leaving as heirs a husband *M A* and a son *H A*. Subsequently *H A* died leaving as heirs his father *M A* and a wife *H B*. In 1877 *H B* sold the whole of this one-third share to *G D* who obtained mutation of names under the sale-deed. In 1883 *M A* brought a suit for one-fourth share of the property sold claiming as the heir of his wife *A* and obtained a decree. In 1885 he brought the present suit for a three-sixteenth of the one-third share sold in 1877 claiming as heir of his son *H A*. The defendant *G D* pleaded that the present suit was barred by s. 43, Civil Procedure Code, *Held* that although the persons from whom the plaintiff derived his title died on two different dates, the real cause of action relied upon in each case was the taking possession of the one-third share by *G D* under the sale-deed of 1877. Thus the cause of action in the two actions was one and the same and the present suit was barred by s. 43. **GANGA DIN v. MAHMUD ALI.**

[VII-108]

(6).———*Property inherited from different persons.*] *J* had a right to share in a certain estate, as an heir to her father, and also as an heir to her brother. She transferred such right by sale to *H H* sued *S*, who had acquired the whole estate by purchase at sales

CIVIL PROCEDURE CODE, s. 43—
(continued.)

in execution of decrees against the other heirs of *J's* brother, for *J's* share as one of her brother's heirs in such estate, and obtained a decree. *H* then sued *S* for *J's* share as one of her father's heirs in such estate. *Held* that *H* was debarred from bringing the second suit by the provisions of s. 43 of Act X of 1877. **SHAF-KATUNNISSA v. SHIB SAHAI AND OTHERS.**

[I-174-211

(7).—[*Suits under s. 283, C. P. C.*] *A* sold some of his property to *B*, and some he mortgaged to the same person. Subsequently *C*, who had a bond in his favor, executed by *A's* father, brought a suit on the bond and got a decree against *A*. He then took out execution and attached both the properties sold as well as mortgaged to *B*. *B* objected but his objections were disallowed. He then brought a regular suit to have it declared that the property sold to him was not liable for *C's* decree and he obtained a decree. He then brought another suit to have it declared that the property mortgaged was also not liable. *Held* that the suit was not barred by s. 43, Civil Procedure Code. **MUHAMMAD IBRAHIM KHAN v. HABIBULLAH KHAN AND OTHERS.**

[VI-113

(8).—[*plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved. Read v. Brown (L. R., 22 Q. B. D., 128) referred to.*] The plaintiffs holding a simple money decree against two persons, *B* and *M*, attached in execution thereof (a) their judgment-debtors' mortgagee interest in a certain mortgage and (b) a house said to belong to their judgment-debtors. Against this attachment one *M* filed objections under s. 278 of the Code of Civil Procedure in consequence of which the property was released from attachment. The plaintiffs thereupon brought two suits under s. 283 of the Code of Civil Procedure, one in respect of the mortgagee interest and the other in respect of the house. *Held* by the Full Bench (Aikman, J. *dissentiente*) that the first essential of the plaintiffs' cause of action was the order made under s. 280 of the Code of Civil Procedure and that until that order was made they had no cause of action. The cause of action was the order under s. 280, which had been obtained by *M* and the right and title of the plaintiffs to bring the subjects of the attachment to sale in execution of their decree. The title or titles which the defendant might prove formed no part of the plaintiffs' cause of action, nor would the defendant's allegation of different titles in herself to different portions of the property split up the plaintiffs' cause of action into different and distinct causes of action.

CIVIL PROCEDURE CODE, s. 43—
(continued.)

Similarly the fact that the plaintiffs' judgment debtors held or were alleged to hold portions of the property under different titles would not split up the plaintiffs' cause of action into different causes of action. S. 43 of the Code of Civil Procedure has nothing to do with the evidence which may be necessary or may be produced to support or defend a cause of action or with the desire of a plaintiff to bring more suits than one, or with the devolution of title where the cause of action relates to land or other kind of property. In the above case consequently s. 43 of the Code barred the latter of the plaintiffs' two suits. **MURTI v. BHOLA RAM AND ANOTHER.**

[XIV-65

(9).—[*Possession of leased property—To set aside lease.*] *A*, a Hindu widow, gave a lease of certain land to *B*. Subsequently *C*, claiming as the heir of *A's* husband, sued *A* and *B* for possession of half the land leased to *B*. He got a decree and obtained possession. He then brought this suit for cancellation of the lease in respect of the moiety decreed to him and for mesne profits. *Held* that as *C* was aware of the lease when he brought the first suit but sought no relief in respect thereof, the present suit was barred by s. 43. **NANAK CHAIR AND OTHERS v. BAKHTAWAR SINGH.**

[III-198

(10).—[*Account book—Promissory note.*] In 1876 accounts were settled between *B* and *D*, and a balance of Rs. 800 was found to be due from *D* to *B*. *D* gave *B* an instrument whereby he agreed to pay the amount of such balance in four annual instalments of Rs. 200. *B* at the same time noted in his account book that such balance was "payable in four instalments of Rs. 200 yearly." In July 1879, *B* sued *D* upon such instrument for the balance of the first instalment. The Court trying this suit refused to receive such instrument in evidence on the ground that it was a promissory note and as such was improperly stamped. Thereupon *B* applied for and obtained permission to withdraw from the suit with liberty to bring a fresh one for the original debt. In October 1879, *B* again sued *D*, claiming the balance of the first and second instalments, basing his claim upon the note made by him in his account book. He obtained a decree in this suit for the amount claimed by him. In 1880 *B* again sued *D*, claiming the amount of the third instalment, again basing his claim upon such note. *Held* by Spinkie, J., that the suit last mentioned was barred by the provisions of s. 43 of Act X of 1877, inasmuch as *B* should in the second suit brought by him against *D* have claimed the balance of the money found due from *D* to him upon the accounts settled between them, instead of claiming the balance of the instalments due. *Held* by Oldfield, J., that such suit was not so barred, the causes of

CIVIL PROCEDURE CODE, s. 43—
(continued.)

action therein and in the former suit being different. *Held* by the Court that the agreement by *D* to pay the balance found due from him to *B* on accounts settled between them in instalments of Rs. 200 annually could not be proved by the note made by *B* in his account book, but could only be proved by the promissory note. *BANARSI DAS v. BHIKARI DAS*.

[I-47]

(11.) ———— *Specific performance—Earnest money.* *M R* contracted with *N M* and *H L* for the purchase of two houses from them and agreed to pay Rs. 500 as earnest money. Instead of paying the earnest money he made over halves of currency notes for Rs. 500, retaining the other halves himself. Subsequently *M R* brought a suit for specific performance of his contract; but his suit was dismissed, and the decree dismissing the suit was ultimately affirmed by the High Court. After this *M R* sued *N M* and *H L* for recovery of the half currency notes which he had made over to them. *Held* that the suit was not barred by either s. 13 or 43, Civil Procedure Code. *HINGAN LAL v. MANSA RAM*.

[XIV-157]

(12.) ———— *Redemption—Pre-emption.* *B S* and his two brothers jointly owned a certain estate in equal one-third shares. The three brothers joined in mortgaging such estate to certain person, who assigned their rights as mortgagees to *M. B S's* two brothers subsequently sold their shares of such estate to *M. B S* brought a suit against *M* to redeem his own share and obtained a decree. He subsequently brought the present suit against *M* to enforce his right of pre-emption in respect of the sale to the latter by his brothers of their shares. *Held* that the suit was not barred by s. 43. *BALGAR SINGH v. MINAT-ULLAH*.

[I-163]

(13.) ———— *Profits for different years.* In this suit a co-sharer sued the *lambardar* for the profits of his share in respect of the year 1285 *Fasli*. At the time profits were due to him in respect of the year 1287 also. *Held* that he could not subsequently sue for the profits of the year 1287. *CHEDU SINGH v. MAHTAB SINGH*.

[III-142]

(14.) ———— *Possession of trees—Fruits.* The plaintiffs sued the defendants for possession of the land upon which certain trees stood, and for such trees, stating that on the 19th June, 1879, the defendants had interfered with their possession of such trees, and had wrongfully taken the fruit thereof. The plaintiffs subsequently sued the defendants for the value of the fruit upon such trees, alleging that on the 19th June, 1879, the defendants had wrongfully taken such fruit. *Held* that, as

CIVIL PROCEDURE CODE, s. 43—
(continued.)

the cause of action, *i. e.* the taking of such fruit, was in both suits identical, and the plaintiffs not having claimed the value of such fruit as mesne profits in the first suit, the second suit was barred by the provisions of s. 43 of Act X of 1877. *DEBI DIAL SINGH AND OTHERS v. AJAIB SINGH AND OTHERS*.

[I-33]

(15.) ———— *Plaintiffs sued the defendants for damages on account of the alleged misappropriation by the defendants of the fruit of certain trees. The defendants in the course of that suit for the first time denied the plaintiffs' title to the trees. The plaintiffs' suit was dismissed, and they subsequently brought a second suit against the same defendants for recovery of possession of certain trees, including those to which the former suit related. Held* that s. 43 of the Code of Civil Procedure did not apply to such subsequent suit. *Chunder Narain Mojoomdar v. Prithanand Asrum* (12 W.R. 290) referred to. *HAR DAT RAI AND OTHERS v. RAM PAL RAI AND OTHERS*.

[XIV-61]

(16.) ———— *Principal—Interest.* A usufructuary mortgagee under a mortgage-deed executed in 1879, who did not obtain possession as provided in the mortgage sued the mortgagor to recover the unpaid interest then due and obtained a decree. In 1886 he brought another suit for recovery of the principal together with the residue of interest up to the date of suit. *Held* that this subsequent suit was barred by s. 43. *HIKMAT-ULLAH KHAN AND ANOTHER v. IMAM ALI AND OTHERS*.

[X-87]

(17.) ———— *Possession of land—Mesne profits.* According to the terms of a mortgage possession of the mortgaged property was to be delivered to the mortgagee, and he was to take the mesne profits. The mortgagor refused to deliver possession of the property, and the mortgagee sued him to enforce specific performance of the contract to deliver possession, and obtained a decree. At the time this suit was brought, the mortgagee had been kept out of possession of the property for two years, during which time the mortgagor had taken the mesne profits. The mortgagee subsequently sued the mortgagor to recover the mesne profits of the mortgaged property for those two years. *Held* that, as the mortgagee might in the former suit, in addition to seeking the specific performance of the mortgage-contract, have asked for such mesne profits by way of compensation for the breach of it, and as the claim for possession and mesne profits were in respect of the same cause of action, *viz.*, the breach of the contract to give possession, the second suit was barred by the provisions of s. 43 of Act X of 1877. *LALJI MAL AND ANOTHER v. HULASI AND ANOTHER*.

[I-41]

CIVIL PROCEDURE CODE, s. 43.—
(continued).

RANI MEWA KUAR *v.* BANARSI PRASAD.

[XV-121]

(18)———. The respondent, the auction purchaser of certain immoveable property, sued the appellant for possession of such property, and for future mesne profits, and obtained a decree. He subsequently brought the present suit against the appellant to recover mesne profits which had accrued at the time of the former suit. *Held* that the present suit was clearly barred by s. 43 of the Civil Procedure Code. (See also petition of Lalji Mal, W. N. 1881, p. 41). **MASIH-ULLAH KHAN *v.* CHIRANJI LAL.**

[I-58]

(19)———. This was a suit for mesne profits for the period of plaintiff's dispossession from his land. He had previously brought a suit for possession of the land in which he did not claim mesne profits. *Held* that the suit was barred by s. 43. **SURJ BALI *v.* G. J. WALLACE.**

[II-3]

(20)——— *Lease—Hypothecation*. The usufructuary mortgagee of a certain land gave a lease of it to the mortgagor, the latter hypothecating the land as security for the payment of the rent. Arrears of rent accruing, the mortgagee sued the mortgagor for the same in the Revenue Court and obtained a decree. Subsequently the mortgagee sued the mortgagor in the Civil Court to recover the amount of such decree by the sale of the land claiming under the hypothecation. *Held* that the second suit was not barred by the provisions of s. 43 of Act X of 1877. **BANDA HASSAN *v.* ABADI BEGAM.**

[II-47]

IMAMI BEGAM *v.* GOBIND PRASAD.

[II-46]

(21)———. In 1874, the plaintiff leased certain immoveable property to the defendant, and the latter executed a deed by which he covenanted to pay the annual rent and fulfil other conditions of the lease, and gave security in Rs. 3,000 by mortgage of landed property. In 1874, the plaintiff obtained decrees in the Revenue Court for arrears of rent, and the decrees were partially satisfied and then became barred by limitation. In 1884, the plaintiff brought a suit to recover the balance due by enforcement of the mortgage security against the purchasers of the mortgaged property. *Held* that the plaintiff had two separate rights of action, one on the contract to pay rent, and the other on the mortgage security; that he could only enforce the first by suit in the Revenue Court for arrears of rent, and the second by suit in the Civil Court; and consequently there could be no bar to the latter suit by reason of the suit instituted in the

CIVIL PROCEDURE CODE, s. 43.—
(continued.)

Revenue Court, with reference to s. 43 of the Civil Procedure Code. *Held* also that when the plaintiff obtained his decrees for rent the mortgage security did not merge in the judgment-debt, nor did he lose his remedy on it; that the two rights were distinct, and the right of action on the mortgage security was not lost because the execution of the decrees for rent was time-barred, the only effect of which was that the debt was not recoverable in execution, but the debt existed nevertheless so far as to enable the amount secured by mortgage to be recovered by suit in the Civil Court, so long as such suit was not barred by limitation. (*Enam Momtaz-ool-deen Mohamed *v.* Raj Coomar Dass*, (15 B. L. R., 408) referred to. *Held* also that the amount which the plaintiff could recover by enforcement of the mortgage security was limited to Rs. 3,000. **CHUNNI LAL *v.* BANASTAR SINGH.**

[VI-279]

(22)——— *Remedy against hypothecated and other property*. A brought a suit against B for the amount due on a certain bond by sale of the hypothecated property only and obtained a decree. In execution however he attached property other than that hypothecated. B objected successfully and thereupon A brought this suit to have it declared that all the property belonging to the executant of the bond was liable for the decree. *Held* that the suit was barred by s. 43. **GAINDA KUAR *v.* DIR CHAND.**

[II-160]

(23)——— *Ejectment Redemption*. A, an occupancy tenant, mortgaged his tenancy to B; subsequently A having fallen in arrears, C the zamindar got him ejected under s. 36 of the Rent Act, but the Revenue Courts declined to eject B who was in possession under the mortgage. C brought a suit for the cancellation of the mortgage but his claim was dismissed by the District Judge. As he preferred no appeal from this judgment it became final. A few years after C brought this suit for redemption of the mortgage. *Held* that the suit did lie, s. 13 or 43 not operating as a bar to this suit. **SHEO RAM *v.* KHADERAN LAL AND ANOTHER.**

[VII-283]

(24)——— *Obligor—Auction purchaser*. The obligee of a bond for the payment of money, in which certain property was mortgaged as collateral security, sued the obligor for the money due on such bond, claiming the enforcement of such mortgage. At the time the suit was brought such property was in the possession of a third person, who had purchased it at a sale in execution of a money-decree against the obligor of such bond. The obligee did not make the purchaser a defendant to the suit. He obtained a decree in the suit for the sale of such property. Being resisted in bringing

CIVIL PROCEDURE CODE, s. 43—
(continued.)

it to sale by the purchaser, he sued the purchaser to have it declared that such property was liable to be sold under his decree. *Held* that such second suit was not barred by the provisions of s. 43 of the Civil Procedure Code. **BAHRAICHI CHAUDHRI v. SURJU NAIK AND ANOTHER.**

[II-7]

(25.) ————— *Mortgage.*] Two persons each held a mortgage over the same property from the same mortgagor. The mortgages were both executed on the same day. The mortgagees each instituted a suit for sale on the same day and obtained decrees, in execution of which they had the mortgaged property put up for sale, and each purchased it at the sale under his decree respectively. Neither mortgagee made the other a party to the suit on his mortgage. The representative of one of the mortgagee decree-holders, S got possession of the mortgaged property and held it as against the other mortgagee decree-holder or his representatives. Thereupon the representatives of the other mortgagee brought their suit for possession of a moiety of the property or in the alternative for redemption of the other mortgage. *Held* that such suit was not barred either by the provisions of s. 43 of the Code of Civil Procedure or by reason of those of s. 85 of the Transfer of Property Act, 1882. **BALMAKUND AND ANOTHER v. MUSSAMMAT SANGARI AND ANOTHER.**

[XVII-94]

(26.) ————— *Mutation—Possession.*] On the death of one B, the name of his mistress was recorded in respect of an orchard. The plaintiff brought this suit to establish his right to the orchard and for voidance of the mutation order. It appeared that the plaintiff had formerly brought a suit upon the same allegations as those made in the present suit. The only difference between the two suits was that in the former he claimed simply for the voidance of the mutation order. The former suit had been dismissed on the ground that the appellant could not sue simply for the voidance of that order but should have also sued to establish his right to the orchard. *Held* that s. 43 of Act No. X of 1877 was clearly applicable to the present suit which had been rightly held barred. **MAYA v. MANTORIA.**

[I-93]

(27.) ————— *Declaration—Possession (Act VIII of 1859).*] In 1868 B made, it was alleged, a gift of a *zamindari* estate to K. In 1869 B died, and K's name was recorded in the revenue registers in the place of B's name in respect of the estate. In 1870 K died, and her daughter S applied to have her name recorded in the revenue registers in respect of the estate. M, the illegitimate son of B, objected, claiming to have his name recorded. His objection having been disallowed and S's name having been recorded, M in 1876. sued S for

CIVIL PROCEDURE CODE, s. 43—
(continued.)

declaration of his proprietary right to the estate, and on the 29th June, 1878, obtained such declaration. In January, 1880, M sold a moiety of the estate, and in December, 1880, S sold the entire estate. In February, 1881, M's transferees sued S and her transferee for possession of the moiety of the estate transferred to them by M. *Held* by the Full Bench (Stuart, C. J., dissenting) that such suit was not barred by the provisions of s. 7 of Act VIII of 1859, by reason that M had omitted to claim in the suit of 1876 possession of the estate. *Darbo v. Kesho Rai* (I. L. R., 2 All., 356) and *Kalidhann Chuttur Padhya v. Shiba Nath Chuttur Padhya*, (I. L. R., 8 Calc., 483) followed. *Held* also that the possession of S and her transferee could be considered adverse only from the date of the decree of 29th June, 1878, declaring M's proprietary title to the estate. *Radha Gobind Rai v. Inglis* (7 C. L. R., 364) referred to. *Held* by Stuart, C. J., that such suit was barred by the provisions of s. 7 of Act VIII of 1859, by reason of such omission. *Darbo v. Kesho Rai* (I. L. R., 2 All., 356) distinguished. The meaning of the term "relief" explained and the distinction between it and the term "cause of action" pointed out. **SARSATI AND ANOTHER v. KUNJ BEHARI LAL AND ANOTHER.**

[III-81]

(28.) —————.] Where a previous suit for a declaration of title to immoveable property has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit a subsequent suit on the same title for recovery of possession of the land is not barred under s. 43 of the Code of Civil Procedure. *Jibunti Nath Khan v. Shib Nath Chuckerbutty* (I. L. R., 8 Calc., 819) followed. **MOHAN LAL AND ANOTHER v. BILASO**

[XII-80]

(29.) ————— *Title deed—Award.*] The appellants were directed by an award to pay the respondent certain moneys and to deliver to him certain title-deeds. They failed to do either of these things, and in 1870 the respondent sued them for such moneys. He subsequently sued them for the delivery of such title deeds. *Held* that the second suit was barred by the provisions of s. 43 of Act X of 1877. **KAULESHAR RAI AND OTHERS v. KHUDI RAI.**

[I-72]

(30.) ————— *Registration—Possession.*] A brought a suit against B to have a lease which the latter had granted to him registered and got a decree. A subsequently brought this suit against B for possession of the fields leased to him. *Held* that the suit was not barred by s. 43. **NANAK CHAND AND ANOTHER v. NARENI AND ANOTHER.**

[III-6]

CIVIL PROCEDURE CODE, s. 43.—
(continued.)

(31). ———— *Suit under s. 295, Civil Procedure Code.* A suit under s. 295 of the Code of Civil Procedure to compel the defendant to refund moneys received by him which should have been paid to the plaintiff, was not cognizable by a Court of Small Causes under Act XI of 1865 (Mufassal Small Cause Courts Act); where the plaintiff in such a suit had previously brought a suit in which he sought to follow the property which had been sold under the defendant's decree. *Held* that the present suit was not barred by ss. 13 and 43 of the Code of Civil Procedure on the ground that the relief now sought might have been asked for in the former suit, nature of the suits and the causes of action being different. **DOST MOHAMED v. AJUDHIA PRASAD.**

[X-21]

(32). ———— *Alternative remedies.* P gave K R a mortgage for Rs. 500 on certain immovable property, the instrument of mortgage containing the following stipulation:—"I (mortgagor) shall pay the said amount with interest at 2 per cent *per mensem* within two years. I shall pay the interest every month and in the event of default the mortgagee shall be at liberty to realize the whole sum due to him, with the interest for two years, without waiting for the expiry of the term by instituting a suit or by making an application for foreclosure as an absolute owner. These two courses are open to the mortgagee, it is optional with him to pursue whichever he pleases." A default in payment of interest having occurred, the respondent, the mortgagee, applied for foreclosure, and after the usual proceedings the mortgage was declared foreclosed. The respondent then sued for possession of the property. This suit was held to be brought "prematurely," that is to say, before the expiry of the two years' term stipulated. The respondent thereupon brought the present suit against the appellant, claiming to recover the mortgage money by the sale of the mortgaged property. *Held* that the present suit was not barred by the provisions of s. 43 of Act X of 1877, because, at the time when the respondent brought his foreclosure suit he was not "a person then entitled" to the alternative remedy which he now seeks to enforce. **PEARI LAL v. KHIALI RAM.**

[I-100]

(33). ———— *Applicability of s. 43 to execution proceeding.* S. 43 of the Code of Civil Procedure is not applicable to proceedings in execution of decrees. Where a decree grants different reliefs, as for example possession of land and mesne profits, it is competent to the decree-holder to execute such decree by means of separate and successive applications in respect of each relief. So held by Edge, C. J., Tyrrell, Blair and Burkitt, JJ. **Ram Baksh Singh v. Madat Ali, N.-W. P. H. C. Rep., p. 95; and Radha Kishen Lal v. Radha Prasad Singh (I.**

CIVIL PROCEDURE CODE, s. 43.—
(continued.)

L. R., 18 Calc., 515) cited. **SADHO SARAN AND ANOTHER v. HUL PANDE.**

[XIII-57]

(31). ———— *Claims that could not be joined under s. 44.* A, B's lessee, sold a house together with the land on which it stood, where upon B, the zamindar, brought a suit in 1882 for cancellation of the sale of the land and for rent, and obtained a decree. In 1885 he brought his claim for zamindar's *hagq-i-chaharrum*, i.e., one-fourth of the price paid for the house by the vendee. *Held* that his suit was not barred by the provisions of s. 43, his cause of action not having accrued at the time of the first suit and also because he could not have joined looking to the provisions of s. 44 (a), his present claim with the former. **GIRDHARI DAS v. RAGHUNATH PRASAD AND ANOTHER.**

[VII-77]

(35). ———— *Penalty for insufficient stamping.* This was a suit to recover from the defendant the amount of stamp duty and penalty for insufficient stamping which the plaintiffs had paid in respect of an instrument. The plaintiffs had sued the defendant on the instrument and had been compelled to pay the duty and penalty. The defendant was the person bound by law to stamp the document. The lower Court dismissed the suit on the ground that the amount was a part of the costs of the former suit and should have been taken into account in that case. *Held* that the view was wrong. The suit was maintainable as it was not barred by s. 13 or 43. **C. P. C. GOPAL DAS AND OTHERS v. MASUD KHAN.**

[III-211]

(1. s 44 (a).—*Redemption—Compensation—Land taken for public purposes.*) In this suit for redemption of certain property usufructuarily mortgaged to the defendant plaintiffs also claimed certain sums received by the defendant as compensation for portions of the land mortgaged which had been taken for public purposes. *Held* that the latter part of the claim was barred by s. 44. **ABUL HASAN AND OTHERS v. CHIRANJI AND OTHERS.**

[I-41]

(2). ———— *Damages—Establishment of title.* There is nothing to prevent a claim for damages and a claim for establishment of title being joined with a claim for the relief provided by s. 9 of Act I of 1877. **RAM HAKRAM RAM v. SHEODHAR JOTI.**

[XIII-103]

(3). ———— *Leave to join—Cause of action.* This was a suit for possession and partition of a one-third share of certain immovable property and a one-third share of certain ornaments. On instituting the suit plaintiff asked for permission to join in the two claims under s. 44, Civil Procedure Code. The Subordinate Judge after observing that the plaintiff had failed to

CIVIL PROCEDURE CODE, s. 44 (a)—
(continued.)

state when his cause of action in respect of the immoveable property had accrued and that the date of cause of action in respect of the other claim was wrong, held, that although both claims had the same foundation yet as the claim for moveable property was against some of the defendants only, the claims could not be joined. He further observed that as the two claims separately were cognizable by the Munsif's Court, the plaint should be returned to be filed in a Court of competent jurisdiction. This order was upheld in appeal by the District Judge. *Held* in revision that the proceedings amounted to a "case" within the meaning of s. 622. *Held* further that the view expressed by the lower Court was wrong. The cause of action being single the lower Court should have returned the plaint to get the date of cause of action corrected under s. 53. **GANDHARP SINGH v. JASWANT SINGH AND OTHERS.**

[III-37]

(4.)—*Time for taking objection.* An objection under s. 44 of the Code of Civil Procedure as to misjoinder of causes of action should be taken in the Court of first instance. Where such an objection was raised for the first time in second appeal in the High Court the Court declined to entertain it. **MAULA AND ANOTHER v. GULZAR SINGH.**

[XIV-11]

(5.)—*Implied leave.* A objected to the attachment of certain immoveable property in execution of a decree held by B against one X on the ground that such property belonged to him. His objection was disallowed and he consequently brought the present suit against B for recovery of such property valued at Rs. 999 and Rs. 14, the costs incurred by him in prosecuting his objection to the attachment. The suit was instituted in the Subordinate Judge's Court. The Subordinate Judge gave him a decree for the property but dismissed the claim for damages. On appeal the District Judge dismissed the claim on the ground that the two claims could not be joined in a single suit under s. 44 without the permission of the Court and no permission was asked for or given. *Held* that the proceedings of the Subordinate Judge imply and indicate that the leave of the Court was given to the joinder. *Held* further that as the claim was for more than Rs. 1,000 and the claim for damages was not before the Judge in appeal the question of s. 44 was not before him. The appeal must be decreed. **JAGARNATH DAS v. PABARU SINGH AND ANOTHER.**

[II-207]

(6.)—*Defect of misjoinder.* *Held* that the defect of misjoinder under s. 44 is cured if the Court proceeds to the trial of the suit and does not reject the plaint or return it for amendment. **KISHNA RAM v. RAI RAKMINI SEWAK SINGH AND OTHERS.**

[VII-31]

CIVIL PROCEDURE CODE, s. 44 (a).—
(continued.)

(7.)—*Objection disallowed by First Court—Appellate Court.* *Held* that where a claim for moveable property had been joined with one for immoveable property without the leave of the Court, but the objection was overruled by the Court of first instance it, was not proper to interfere with the discretion of the lower Courts on that ground with reference to s. 578. **BULAKI AND ANOTHER v. MUL CHAND.**

[I-15]

(8.)—*Order refusing leave—Appeal.* A instituted a suit in the Subordinate Judge's Court for the recovery of a house together with some grain stored in the house. The Subordinate Judge returned the plaint as the suit was not properly framed under s. 44 (a). An application to join the two causes of action had been previously rejected. From this later order, A preferred an appeal. *Held* that no appeal would lie. The order returning the plaint was a decree and A could have preferred an appeal from that order. **BANDHAN SINGH v. SOLHU AND OTHERS**

[VI-46]

(9.)—*Power of appellate Court to grant leave.* The Court below dismissed this suit on the ground that the plaintiff had, without obtaining the leave of the Court, joined a claim to moveable property with a claim to immoveable property. As it was a case in which the issue as to moveable property would decide the claim as to immoveable property the High Court in first appeal gave plaintiff leave to join the causes of action and remanded the case under s. 562, Civil Procedure Code. **NAZIRAN BIBI v. ABDUS SAMAD AND OTHERS.**

[VII-266]

(10.) s. 44 (b).—*Personal capacity—Manager of temple.* It is not competent to a plaintiff to join in the same suit a claim for possession of land in his private capacity with a claim in his capacity of manager of a temple for an injunction restraining the defendant from blocking up certain drains. **KUNJBIHARI LAL v. CHUNNI LAL AND ANOTHER.**

[XII-111]

(11.) s. 44, (b).—*Assignee of dower and estate.* *Held* that a suit by the assignee of a Muhammadan widow for the recovery of part of the assignor's dower and of part of the estate and the assignor's late husband did not contravene the provisions of s. 44, rule (b) of the Code of Civil Procedure. *Ashabai v. Haji Tyeb Haji Rahimullah* (1. L. R., 6 Bom., 390) dissented from. **AHMAD-UD-DIN KHAN v. SIKANDAR BEGAM.**

[XVI-52]

s. 45.—*Misjoinder.*

See s. (31.)

CIVIL PROCEDURE CODE, s. 45—
(continued.)

(12).—*Suit for land and mesne profits—Court may order separation.* When a suit has been transferred by an order of the High Court from the Court of a Subordinate Judge to the Court of the District Judge for trial, it is the duty of the District Judge to try the suit himself, and he is not competent to transfer the suit back to the Court of the Subordinate Judge. In a suit on title in which the recovery of immoveable property and mesne profits are claimed the Court may, under s. 45 of the Code of Civil Procedure, order separate trials in respect of the claim for the recovery of the immoveable property and in respect of the claim for mesne profits. Where under s. 212 of the Code of Civil Procedure a Court in such suit passes a decree for the property and directs an inquiry into the amount of mesne profits the direction as to the inquiry into the amount of mesne profits need not necessarily be contained in the decree. *Puran Chand v. Roy Radha Kishun (I.L.R., 19 Calc., 132)* referred to. *FATIMA BIBI v. MUHAMMAD ABDUL MAJID.*

[XII-154]

(1). s. 50.—*Plaint filed—By major through next friend.* A suit was instituted on behalf of a person alleged to be a minor through her next friend. The plaintiff obtained a decree. The defendant appealed and on this appeal the alleged minor applied to be placed on the record in her own right as respondent stating that she had attained her majority since the institution of the suit. The affidavits, however, by which this application was supported, showed that she had been of full age at the time the plaint was filed. *Held* that the suit was dismissed. *Taqi Jan v. Obaid-ullah (I.L.R., 21 Calc., 866)* dissented from. *SHEO RANIA v. BHARAT SINGH*

[XVII-203]

(2).—*By official liquidator on behalf of Company.* *Held* that a plaint in a suit by a Bank in liquidation in which the plaintiff was described as "the Official Liquidator Himalaya Bank, Limited, in liquidation," and which was also subscribed and verified in the same terms, was not a valid plaint having regard to the terms of s. 144 of the Indian Companies' Act, 1882, and that the defect could not be cured by amendment. *In re Winterbottom (L.R., 18 Q.B.D., 446)* referred to. *GHULAM MUHAMMAD v. THE HIMALAYA BANK, LD.*

[XV-81]

See also

THE MUSSOORIE BANK, LIMITED v. BARLOW.

[VII-17]

(1). s. 51.—*Who should sign plaint.* Except in the case provided for by the last clause of s. 51 of the Code of Civil Procedure it is imperatively necessary that the plaintiff himself

CIVIL PROCEDURE CODE, s. 51—
(continued.)

should sign his plaint. Where the plaintiff is not shown to be, by reason of absence or any other good cause, unable to sign the plaint himself, a power of attorney authorising a pleader in general terms to sign plaints for him will not render a plaint signed by such pleader in accordance with such power of attorney a valid plaint according to law. *MAHABIR PRASAD v. SHAH WAHID ALAM.*

[XI-152]

(2).—*Held* that in very important cases such as where fraud, &c., is alleged to have been committed by the defendants, the defendants may require the plaintiff to subscribe and verify the plaint himself and not by a general attorney and the Court will compel the plaintiff to do so. *THE RAJA OF TOMKUM v. BRAIDWOOD AND OTHERS.*

[VII-137]

(1.) s. 52.—*Verification.* *Held* that a plaint verified in the following form:—"I, Musammam Ganno Bibi, plaintiff, affirm that the contents of the plaint are true to the extent of my knowledge and belief" was not properly verified according to law. *BALGOBIND DAS v. GANNO BIBI.*

[XVI-75]

(2).—*Held* that a plaint filed by three joint plaintiffs was verified by each in the form:—"The contents of the petition of plaint are true to the best of my knowledge and belief." *Held* that this form of verification though not free from ambiguity, was in substantial compliance with the provisions of s. 52 of the Code of Civil Procedure. *Balgobind Das v. Ganno Bibi (W.N. 1896, p. 75)* referred to. *RAJIB RAM AND OTHERS v. KATESAR NATH AND OTHERS.*

[XVI-102]

(3).—*In order to constitute a proper verification of a plaint within the meaning of s. 52 of the Code of Civil Procedure it is necessary for the person verifying, if all the facts are within his knowledge, to state distinctly that they are to his knowledge true; and if he has knowledge as to some and only information and belief as to others, to state to which he speaks from his knowledge and to which from his information and belief. A verification in the form:—"To the limit (or extent) of my knowledge the purport of this is true," is not such a verification as satisfies the requirements of s. 52 of the Code.* *GIRDHARI v. KANHAIYA LAL.*

[XII-235]

(1) s. 53.—*Return for amendment—Rejection.* The plaintiff in this suit claimed in a Civil Court among other reliefs a declaration of his right to certain land. The lower Court held

CIVIL PROCEDURE CODE, s. 53—
(continued)

that the plaintiff did not disclose a cause of action, as it was not alleged that the defendant had disputed the plaintiff's right, and directed that under s. 57, Act X of 1877, the plaintiff should be returned to the plaintiff to be presented to the Revenue Court with reference to the other reliefs claimed. *Held* that under the circumstances the plaintiff should have been rejected and not returned. **NAGAR MAL v. MACPHERSON.**

[I-66]

(2) ———— *Amendment—Time for—After limitation*] A Court is not precluded from returning a plaintiff for amendment because at the time it is returned for amendment the period of limitation for the suit may have expired. The plaintiff in a suit for pre-emption after filing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality. *Held* that the Court had power and ought to have allowed the plaintiff to be amended and that the amendment was not precluded by the fact that the limitation for the suit had expired. *Held* also that such misdescription would not render the suit liable to the objection that the plaintiff had sought to pre-empt only a part of the property sold. **BARKAT-UN-NISSA v. MUHAMMED ASAD ALI.**

[XV-80]

(3) ———— *First hearing.*] *Held* that an amendment of the plaintiff even after the first hearing, on grounds other than those mentioned in s. 53, clause (a), (b), ... (f) if allowed by the first Court could not be questioned in appeal. **BENI PRASAD v. SHAMBHU NATH.**

[V-167]

(4) ————] The plaintiff in this case was amended subsequent to the first hearing of the suit. The amendment was to alter the claim from one of maintenance of possession to one to recover possession. The lower appellate Court relying upon *Damodar Das v. Gokal Chand* (I. L. R., 7 All., 79) dismissed the suit. *Held* that the ruling was confined to amendments for any of the grounds mentioned in s. 53, C. P. C., that therefore it was not applicable to the present case. **RAM KISHAN SINGH AND OTHERS v. MOTI SINGH AND OTHERS.**

[VI-248]

(5) ————] *Held* (Oldfield, J. dissenting) that under section 53 of the Code of Civil Procedure a plaintiff can be rejected, returned for amendment, or amended by the Court of first instance only at or before the first hearing of the suit, and not after the first hearing thereof. *Madhe v. Dongre* (I. L. R., 5 Bom., p. 609) dissented from. *Soorj mukhi Koer's case* (I. L. R., 2 Calc., 272); *Burjore v. Bhagana* (I. L. R., 10 Calc., 557); (L. R., 11 I. A. 7) and *Eazul-un-nisa Begam v. Mulo* (I. L. R., 6 All., 250) distinguished by Mahmood, J.

CIVIL PROCEDURE CODE, s. 53—
(continued)

Per MAHMOOD J.—The plaintiff may, for causes other than those mentioned in s. 53 be amended by the Court after the first hearing. **DAMODAR DAS v. GOKUL CHAND AND OTHERS.**

[IV-303]

1. **BHAWANI KUAR AND ANOTHER v. NARAIN SINGH AND OTHERS.**

[VII-247]

(6) ———— *Settlement of issues.*] *Held* that the plaintiff could not be returned for amendment of the verification after art issues had been settled. *Girdhari v. Kanhaiyame Lal* (I. L. R., 15 All., 59) referred to. **BALATE GOBIND DAS v. GANNO BIBI.**

[XVI-71]

(7) ———— *Appeal.*] If the verification of a plaintiff is discovered to be defective at any time whilst the suit is before the Court of first instance the plaintiff may be amended by the Court. If such defect be discovered until the suit comes on appeal before an appellate Court, such Court may, if it thinks fit, return the plaintiff to the Court of first instance to be amended by it. But where the defect is such that it is covered by the provisions of s. 57, or of the Code of Civil Procedure there is no necessity for the appellate Court to take any steps to procure the amendment of the plaintiff. **RAJIT RAM AND OTHERS v. KATESAR NATH AND OTHERS.**

[XVI-102]

(8) ————] A suit relating to property alleged to belong to a temple cannot be brought in the name of the idol of the temple. Where such a suit was so brought the Court in second appeal allowed the plaintiff to be amended, on certain conditions, by substituting the name of the person alleged to be the manager of the temple. **THAKUR RAGHUNATHJI MAHARAJ v. SHAH LAL CHAND.**

[XVII-75]

(9) ———— *Scope of.*] The plaintiffs in this suit originally claimed a declaration of their right to a three-fourth share of a garden. Two or three days after the date fixed for the first hearing they caused their plaintiff to be amended by the addition of a prayer for possession. *Held* that he could do so. **SHEONARAIN SINGH v. NAGO AND OTHERS.**

[IV-26]

(10) ————] This suit originally brought for maintenance of possession over certain immovable property was subsequently, but before the settlement of issues, converted with the permission of the Court, into one for possession of the property, on the ground that the defendant had since after the institution, obtained possession of the pro-

CIVIL PROCEDURE CODE, s. 53—
 —(continued.)

party. The Court however subsequently refused to entertain the suit on the ground that the nature of the suit had been altered and the suit as originally brought was not maintainable as the plaintiff was out of possession. *Held* that the amendment did not alter the nature of the suit and the suit was entertainable. **SUNDAR LAL AND OTHERS v. BUNYAD ALI AND OTHERS.**

[II-129]

(11). —————.] The plaintiff-appellant based his claim of pre-emption broadly on the legal status he enjoyed under the *wajibulars*. The defendant pleaded that transfers in the village were governed by the Mohammadan Law. The plaintiff thereupon applied (at the first hearing) for permission to amend his plaint by explaining that the condition of the *wajibulars* was also the condition of the Mohammadan Law of pre-emption. The application was rejected by the Munsif under the mistaken notion that the amendment was contrary to s. 53, Civil Procedure Code. *Held* that the amendment should have been allowed and that the amendment proposed did not change the nature of the suit. **HABIBULLAH v. DHUMAN KHAN AND OTHERS.**

[VII-28]

(12). —————.] A suit was brought by the manager of the *M* Bank against the executrix of *B*, to recover a sum of money as due upon a bond executed by *B*, in favor of the Bank. The plaint described the defendant as "*Miss Sarah G. Barlow of Mussoorie*" and stated that she was executrix of the deceased *B*. It began thus:—"George Henry Webb, Manager of the abovenamed plaintiff's business, states as follows," and proceeded to state that the deceased was at the time of his death "indebted to the plaintiff" and to set forth the cause of action in detail. It was signed and verified thus:—"For the *M*. Bank limited, *G. H. Webb*, Manager." The Court of first instance returned the plaint for amendment under s. 53 of the Civil Procedure Code (i) because the defendant was not properly described (ii) because the plaint was set out as made by *George Henry Webb* as Manager and not as on the part of the Bank and (iii) because the suit should not have been brought in the form in which it was brought, but in the form referred to in s. 213 and No. 105 of sch. IV of the Code. *Held* that the first of these grounds failed because it was clear that the defendant was stated to be the executrix of the deceased, and the suit was brought against her in that capacity; that the second ground did not come within s. 53 of the Code, as it was clear that the circumstances set out in the plaint applied to the case of the plaintiff Bank and the plaint sufficiently fulfilled the requirements of the Code, that the facts which the plaintiff considers essential should be concisely and clearly set out and that the verification should be made by some one

CIVIL PROCEDURE CODE, s. 53—
 (continued.)

acquainted with these facts. *Held*, with reference to the third ground, that the plaintiff was at liberty to bring a suit for money against any person administering to or representing an estate, and if such suit should be found with reference to the facts in evidence not maintainable, it should be dismissed; but there was no authority for returning a plaint for amendment when it was found that the suit was not maintainable in the form in which it was brought, in order to amend it so as to convert the suit into one of a different character. **THE MUSSOORIE BANK LIMITED v. BARLOW.**

[VII-17]

(13). —————.]

See s. 50, No. (2).

(14). —————.] A Court has no power under s. 53 of the Code of Civil Procedure to amend or allow the would-be plaintiff to amend a plaint which, by reason of its having been signed by an unauthorized person, is *ab initio* invalid. **KATESAR NATH v. AGGYAN AND ANOTHER.**

[XIV-05]

(15). —————[Consent.] *Held* that the parties to an action may enlarge by consent or compromise the original claim. By consent of the parties and the leave of the Court an action may be amended to cover an increased claim. A suggestion was thrown out that a Court having made a mistake in law may properly in an application for review reconsider its order. **MOHIBULLAH v. IMAMI AND OTHERS.**

[VII-10]

(16). —————[Written on separate paper.] Though ordinarily speaking when a plaintiff is permitted to amend his plaint, such amendment should be made upon the face of the plaint already before the Court, yet an amendment, if not otherwise defective, will not be a bad amendment merely by reason of its being written on a separate sheet of paper. **KHAYALI RAM v. BHUP SINGH AND OTHERS.**

[XIII-225]

(17). —————[First hearing—Meaning of.] *Held* that where a date is fixed for framing issues and the issues are framed on that date, that date is to be regarded as the first hearing of the suit though the Judge who framed the issues has been removed and a new Judge takes up the case. *Jagann Das v. Narain Lal* (I. L. R., 7 All., 857) does not apply to such a case. **BIHAWANI KUAR AND ANOTHER v. NARAIN SINGH AND OTHERS.**

[VII-247]

(18). —————[Appeal.] No appeal lies from an order by a Court under s. 53 of the Civil

CIVIL PROCEDURE CODE, s. 53—
(continued).

Procedure Code directing an amendment of a plaint upon its file. *Rajendra Kishore Singh v. Rajah Prasad Singh* (I. L. R., 3 All., 854) followed. Unless a statute specifically gives a right of appeal from a particular decree or order, no such appeal is entertainable or can be preferred. *Minakshi v. Subramanya* (I. L. R., 11 Mad. 26); *Ajudhia Prasad v. Balmukand* (I. L. R., 8 All., 354) and *Fariduddin Ahmad v. Muhammad Nasarullah Khan* (ante p. 7) referred to. MUHAMMAD HUSAIN AND OTHERS v. BADRI PRASAD.

[IX-83]

(19). ————.] The plaintiff in this suit preferred a petition for amendment of the plaint. The defendant preferred objections to the amendment, and a day was fixed for the "admission or rejection of the petition of amendment, and the determination of the defendant's objections thereto." After hearing the parties the lower Court decided that the "petition of amendment" should be allowed, and rejected the defendant's objections. The defendant appealed to the High Court from the lower Court's order. *Held* that the plaint not having been "returned for amendment" within the meaning of s. 53 of Act X of 1877, but being amended by the lower Court itself, after hearing the parties, the lower Court's order was not appealable under s. 588 (6) of Act X of 1877. MAHARAJAH RADHA PRASAD SINGH v. MAHARAJAH RAJENDRO KISHORE SINGH.

[I-99]

(20). ————.] The Court of first instance made an order returning the plaint in a suit to be presented to the proper Court, on the ground that it was not competent to try such suit. On appeal from such order the appellate Court, holding that the Court of first instance was competent to try such suit, made an order "decreeing the appeal." It subsequently made an additional order directing that the case "should be returned for re-trial." On appeal to the High Court from such additional order *held* that the appeal would not lie, as it was in reality one from an order passed in appeal from an order returning a plaint, which under the last clause of s. 588 of Act X of 1877 was final, and not an appeal from an order remanding a case under s. 562, the character of the original order of the appellate Court not being altered by the passing of the additional order. KISHNA RAM v. NARSINGH SEWAK AND ANOTHER.

[I-101]

(1). s. 54.—*Insufficient stamp—Failure to make up deficiency—Dismissal—Appeal.*] The Court of first instance being of opinion that the plaint bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower appellate Court held that the court-

CIVIL PROCEDURE CODE, s. 54—
(continued.)

fee was sufficient, and remanded the case for trial on the merits. *Held* that s. 158 of the Civil Procedure Code was not applicable to the case, that the first Court's disposal of the suit must be treated as being under s. 54 and was therefore a decree within the meaning of s. 2, and appealable as such, and that such appeal was not prohibited by s. 12 of the Court Fees Act. *Ajoodhya Pershad v. Gunga Pershad* (I. L. R., 6 Cal., 249) and *Annamali Chetti v. Clote* (I. L. R., 4 Mad., 204) referred to. MUHAMMAD SADIK AND OTHERS v. MUHAMMAD JAN AND OTHERS.

[VIII-286]

(1). HIRA LAL v. WALI BHAGAT AND OTHERS.

[IX-124]

(2). SHEORAJ AND OTHERS v. DALJIT SINGH.

[IV-151]

(2). ————.] The plaintiff's claim was decreed by the first Court. The lower appellate Court finding the court-fees paid by the plaintiff to be deficient ordered the plaintiff to make up the deficiency within ten days and on his failing to comply with the order dismissed the claim and allowed the appeal. *Held* that the decision was unexceptionable and s. 578 had no application because an objection that a relief has been undervalued affects the jurisdiction of the Court. RAM PEARI v. BALGOBIND DAS AND ANOTHER.

[V-294]

(3). ————. *Limitation.*] When a Court fixes a time under cl. (a) or cl. (b) of s. 54 of the Code of Civil Procedure it must be a time within limitation. S. 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. JAINTI PRASAD v. BACHU SINGH AND OTHERS.

[XIII-29]

(4). ————. *Rejection of plaint—Time.*] S. 54 of the Civil Procedure Code may be applied at any stage of a suit. KISHORE SINGH v. SABDAL SINGH AND ANOTHER.

[IX-185]

(5). ————. *Suit barred by Act XII of 1881—Rejection of plaint.*] Where a plaint in a Civil Court alleges facts which, if true, would show that the dispute or matter involved in the suit was one to which s. 93 or s. 95 of Act No. XII of 1881 applied, the plaint should be rejected under cl. (c) of s. 54 of the Code of Civil Procedure or possibly in some cases returned under s. 57 of the same Code. TARAPAT OJHA AND OTHERS v. RAM RATAN KUAR AND OTHERS.

[XIII-164]

CIVIL PROCEDURE CODE, s. 54—
(continued.)

AMIR KHAN AND OTHERS v. JADU NATH DAS.

[II-57]

GANGA RAM v. BENI RAM AND OTHERS.

[IV-312]

SHAKUR KHAN AND ANOTHER v. GOUANI LAL.

[X-177]

ss. 54 and 55.—*Alteration of judgment—Court-fees.* A Judge after disposing of an appeal on the 1st March, 1883, again took it up, and on the 21st March, 1883, directed the appellant to pay additional court-fees on her memorandum of appeal. On the 2nd May, 1883, the appellant paid the additional court-fees under protest, and a decree was then prepared, bearing date the 1st March, 1883, but it referred to and carried into effect the subsequent order of the 21st March, and of 2nd May.

Per MAHMOOD, J., that as soon as the Judge had passed the decree of the 1st March, 1883, he ceased to have any power over it, and was not competent to introduce new matters not dealt with by the judgment, that the order of the 21st March, and the deposit of the 2nd May, whether right or wrong, were not proceedings to which effect could be given in the antecedent decree of the 1st March, 1883; and that the decree was *ultra vires* to that extent, and was therefore liable to correction in second appeal under s. 584 of the Civil Procedure Code. The powers conferred by ss. 54 (a) and (c) and 55 read with s. 582 of the Civil Procedure Code are intended to be exercised before disposal of the case and not after it has been finally decided. Oldfield, J.

Per contra

MAHADAI v. RAMKISHAN DAS.

[V-140]

ss. 53, 54 and 57.—*Non-suit.* Held that the Courts in India have no power to make a decree of non-suit. They must act either under s. 373 or under Chapter V, Civil Procedure Code. There is no third course open to them. BANWARI DAS v. MUHAMMAD MASHIAT AND OTHERS.

[VII-254]

(1). s. 57.—*Suit barred by Act XII of 1881—Rejection of plaint.*

See s. 54, No. (5.)

(2).—*Appeal.* A district Court transferred for trial a suit instituted in a Court subordinate to it to another Court subordinate to it. The Court in which the suit was instituted was not the one in which the suit should have been instituted and consequently the Court to which it was transferred made an order dismissing it, and directing the return of the plaint for presentation to the proper Court. Held that such order must be taken to have been

CIVIL PROCEDURE CODE, s. 57—
(continued.)

passed under s. 57 of the Civil Procedure Code, and was therefore appealable under s. 588 (6). PACHONI AWASTHI v. ILAHI BAKSHI.

[II-113]

s. 82. *Substituted service.* Held that before a Judge directs substituted service under s. 82 he should first satisfy himself that the defendant has been keeping out of the way for the purpose of avoiding the service. Before he could be satisfied he must be satisfied that the defendant is aware that the writ is out against him. A decree passed against the defendant on such substituted service without such satisfaction as is mentioned above must be set aside if the appeal is made by any one who is entitled to make it. Held further that a decree-holder or the defendant was so entitled. MORAN v. THE SIMLA BANK CORPORATION LIMITED.

[VI-35]

(1). s. 100.—*Appearance.**See* s. 102, Nos. (2) and (3).(2). s. 100. ———— *Ex-parte decree.*

The first hearing of a suit was fixed for the 12th December, 1883, on which day the defendant did not appear and the case was adjourned to the 18th December, and, as the defendant did not then appear a decree was passed in favour of the plaintiff. A *retractum* had been previously filed on the defendant's part, and he had also objected to an application filed by the plaintiff for attachment of the defendant's property before judgment. Held that these acts on the defendant's part did not constitute an "appearance" by him within the meaning of s. 100 of the Civil Procedure Code, which referred to an appearance in answer to a summons to appear and answer the claim on a day specified, issued under s. 64; that the decree was therefore *ex-parte* within the meaning of ss. 100 and 108. *Zain-ul-abdin Khan v. Ahmad Raza Khan*, (1 L. R., 2 All., 67) distinguished. *The Administrator-General of Bengal v. Dayaram Das*, (6 B. L. R., 688), *Bhimacharya v. Fakirappa*, (4 Bom. H. C. R., 206); and *Bibee Hulo v. Atwari*, (7 W. R., 81) referred to.

Per MAHMOOD, J.—That the Court on the 18th December seemed to have acted under s. 157 of the Civil Procedure Code, and, choosing the first of the alternative courses allowed by that section, acted under Chapter VII of the Code, and passed an *ex-parte* decree under the provisions of s. 100 of that Chapter. HIRA DAI v. HIRA LAL AND OTHERS.

[V-144]

RAMTAHAL RAM AND ANOTHER v. RAMSHAR RAM.

[VI-42]

(3). ————.] A Munsif, before whom a suit was pending, fixed by way of

CIVIL PROCEDURE CODE, s. 100—
(continued.)

adjournment a particular date for its disposal. Upon the date so fixed, it was necessary to take evidence upon issue of fact which had previously been settled. The plaintiff appeared on that day. The defendants did not appear, but there was in Court a pleader, who had been instructed by the two principal defendants at the outset and who had filed his *vakalatnama*. There was nothing to show that he had ever received any other instructions whatever either as to the facts of the case or the conduct of the defence, or that the defendants had done any thing beyond giving the pleader the instructions above referred to. Under these circumstances the plaintiffs gave their evidence and the Munsif decreed the claim. Held that, under the circumstances stated, the defendant's pleader must be taken not to have been in Court on the date fixed for the purpose of defending the suit on behalf of the defendants, inasmuch as, upon that part of the case, he had not been instructed; that it was therefore a fair inference that the defence did not appear and the case was disposed of under s. 157 of the Civil Procedure Code; and that, under these circumstances, the provisions of s. 108 were applicable and the decree was an *ex-parte* decision, which it was open to the Munsif to reconsider. *Hira Dai v. Hira Lal* (I. L. R., 7 All., 538) followed. **RAM TAHAL RAM AND ANOTHER v. RAMESHAR RAM.**

[VI-42]

(4). ————.] A summons was issued to a defendant in a civil suit. The serving officer, being unable to find either the defendant or any person empowered to accept service for him at the address given affixed a copy of the summons to the outer door of the defendant's house and returned the original to Court. On the day notified in the summons the case was called on, and upon its being called on a pleader presented himself in Court with a power of attorney, executed not by the defendant himself but by a third person on his behalf, and stated that the defendant had no notice of the time fixed for the hearing of the case and prayed for an adjournment to a date upon which a proper answer to the claim could be filed. The application was refused, but the case was adjourned to the day following. On that date no one appeared for the defendant and a decree was passed against him. Held that there was no appearance on behalf of the defendant within the meaning of s. 100 of the Code of Civil Procedure, and that the decree passed on the adjourned date was therefore an *ex-parte* decree. *Hira Dai v. Hira Lal* (I. L. R., 7 All., 538) and *Ram Tahal Ram v. Rameshar Ram* (I. L. R., 8 All., 140) referred to. *Fazal Ahmed v. Bahadur Singh* (Weekly Notes 1893, p. 25); *Ganga Das v. Inderman* (W. N. 1893, p. 208) and *Sahibzada Zainulabdin Khan v. Sahibzada Ahmad Raza Khan* (L. R.,

CIVIL PROCEDURE CODE, s. 100—
(continued.)

5 J. A., 233) distinguished. **CHAUDHRI RAJ KUMAR v. JUGAL KISHORE AND ANOTHER.**

[XVI-47]

(5). ————.] A party defendant retained a pleader to defend the suit against him, and the pleader filed a *vakalatnama* and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff. Held that this decree was a decree *ex-parte* within the meaning of s. 108, C. P. C. *Bhagwan Dai v. Hira* (I. L. R., 19 All., 355) and *Jonardan Dobe v. Ramdhone Singh* (I. L. R., 23 Calc., 738) referred to. *Sahibzada Zein-ul-abdin Khan v. Ahmad Raza Khan*, (L. R., 5 I. A., 233) distinguished. **SHANKAR DAT DUBE v. RADHA KRISHNA.**

[XVIII-17]

(6). ————.] A party to a suit cannot claim to have a decree against him set aside as an *ex-parte* decree when in fact an appearance was made by a pleader in his behalf on the day fixed for the hearing even though such pleader was for some reason unable to proceed with the suit. *Fazl Ahmad v. Bahadur Singh* (W. N. 1883, p. 25) followed. **GANGA DAS v. INDARMAN.**

[XIII-208]

(7). ————. *Ex-parte decree—Application to set aside—Appcal.*] Held that a defendant against whom a decree has been passed *ex-parte* and who has not adopted the remedy provided by s. 108, C. P. C., is not competent to prefer an appeal from such *ex-parte* decree. **LAL SINGH AND OTHERS v. KUNJAN AND OTHERS.**

[II-85]

(8). ————. *Appcal.*] Held that though no appeal lies from an *ex-parte* decree an appeal may be entertained in order to see whether the decree appealed against was in fact and law an *ex-parte* decree. **O. AND R. RAILWAY COMPANY v. SHIB CHARAN.**

[VI-172]

(1.) s. 102—Appearance.]

See s. 100, Nos. (2), (3), (4), (5) and (6).

(2). ————. *Dismissal for default.*] The plaintiff in this suit, a *pardanashin* lady, did not appear on the day fixed for the disposal of the case and her pleader was engaged in another suit. Her case was consequently dismissed for default. She made an application to the Munsif which was also dismissed, the Munsif holding that the dismissal was

CIVIL PROCEDURE CODE, s. 102 --
(continued.)

under s. 157 of the Code of Civil Procedure. Against that order the plaintiff appealed and the District Judge reversed that order and ordered the Munsif to restore the case to his file. In revision before this Court under s. 622 of the Code of Civil Procedure it is contended that the Judge exercised "a jurisdiction" not vested in him by law.....(s. 622 of the Code of Civil Procedure). *Held* that the suit must be treated to have been dismissed under s. 102 or 157 of the Code of Civil Procedure. In either case an appeal lay to the Judge. His act therefore cannot be said to come under s. 622 of the Civil Procedure Code. **SHEONANDAN v. JAMNA.**

[VII-65]

(3.)-----[.]. Where on the day fixed for the hearing of a suit the plaintiff's pleader appeared, but in consequence of none of the plaintiff's witnesses being present was unable to support the plaintiff's case and the suit was consequently dismissed. *Held* that this was not a dismissal for default of appearance and did not entitle the plaintiffs to apply under section 103 of the Code of Civil Procedure for a re-hearing. **Ram Chandra Pandurang Naik v. Madhav Purushottam Naik (I. L. R., 16 Bom., 23).** **FAZAL AHMAD AND ANOTHER v. BAHADUR SINGH AND OTHERS.**

[XIII-25]

(4.)-----[Dismissal for default—Appeal.] *Held* that an appeal lay from an order of dismissal for default under s. 102 of the Code of Civil Procedure. Plaintiff's remedy was not limited to that provided in s. 103 of the Code of Civil Procedure. **ABLAKH AND ANOTHER v. BHAGIRATHI.**

[VII-66]

SHEONANDAN v. JAMNA.

[VII-65]

(5.)-----[.]. A plaintiff who had been ordered, under s. 66, of the Civil Procedure Code, to appear in person in Court upon a day specified, failed to appear and under s. 107 read with s. 102 his suit was dismissed. He then applied to the Court, under s. 103 for an order to set the dismissal aside, but his application was rejected. He thereupon preferred an appeal from the decree dismissing the suit under the provisions of s. 540, C. P. C. *Held* that the plaintiff was not entitled to appeal from the decree dismissing the suit, and that his only remedy was by way of an appeal under s. 588 (8) of the Code from the order rejecting the application to set the dismissal aside. **Lal Singh v. Kunjan (I. L. R., 4 All., 587)** referred to. **KRISHNA RAM v. GOBIND PRASAD.**

[V-321]

CIVIL PROCEDURE CODE, s. 102
(continued.)

(6.)-----[Failure to produce evidence—Appeal.]

See s. 155, No. (1).

(7.)-----[Failure to pay commission fee.]

See s. 158, No. (2).

(1.) s. 103.—[Dismissal for default—Appeal.]

See s. 102, No. (4) and (5).

(2.)-----[Appearance—Dismissal for default.]

See s. 102, No. (3).

(3.)-----[.]. A suit was dismissed for default of prosecution on the ground that the plaintiff was not personally present nor had he produced his witnesses or his accounts. The pleader for the plaintiff was present and the judgment dismissing the suit did not show whether the defendant was present or not. *Held* that a fresh suit for the same relief was not barred by s. 103 of Act No. X of 1877 as the former suit had been improperly dismissed. **HIRA LAL v. BHAWANI AND OTHERS.**

[I-141]

(1.)-----[Revision.] On an application by the petitioner, purporting to be made under s. 103 of the Code of Civil Procedure for restoration of a case to the file of pending cases the Court found that the case in question had been dismissed under s. 158 of the Code, and on the ground that the order of dismissal was appealable and also on the merits rejected the application. The petitioner then applied to the High Court for revision of the order rejecting his application for restoration. *Held* that under the above circumstances an appeal lay from the order in question and therefore the application for revision was not entertainable. **KUADIM HUSAIN v. SHANKER LAL AND OTHERS.**

[XIII-44]

s. 107.—[Non-attendance in person—Dismissal for default.]

See s. 102, No. (5).

(1.) s. 108—[Appearance—Ex-parte decree.]

See s. 100, Nos. (2), (3), (4), (5) and (6).

(2.)-----[Ex-parte decree—Application to set aside—Appeal.]

See s. 100, No. (7).

See s. 157, No. (3).

(3.)-----[Order refusing application—Appeal.] *Held* that an order rejecting an appli-

CIVIL PROCEDURE CODE, s. 108—
(continued.)

cation to set aside an *ex-parte* decree is appealable under s. 588 (9) of the Code of Civil Procedure. *HIRA DAI v. HIRA LAL AND OTHERS.*

[V-144]

RAMTAHAL RAM AND ANOTHER v. RAMESHAR RAM.

[VI-42]

(4.)—*Order restoring application—Revision.* Held that no application would lie for revision of an order under s. 108, Civil Procedure Code, restoring a suit to the file of pending suits. *KALIAN AND ANOTHER v. BEGAM AND ANOTHER.*

[XVIII-73]

(5.)—*Costs—Discretion.* Where an order under s. 108 of the Code of Civil Procedure was granted to a defendant conditionally on his paying certain costs of the plaintiff by a date fixed in the order, and where on the date so fixed, such costs not having been paid, the Court rejected the defendant's application. Held that the Court was acting within the powers conferred on it by s. 108 of the Code of Civil Procedure and had exercised a sound discretion. *BHIKHARI DAS AND ANOTHER v. JAWAHIR LAL.*

[XII-216]

(1.) *s. 111—Set off—Suit for money—Suit for dissolution of partnership.* A suit for dissolution of partnership in which the claim was valued at Rs. 2,000 with a prayer that such balance as might be found due to the plaintiff upon taking the partnership accounts, might be paid to him, is a suit for money within the meaning of s. 111 of the Code of Civil Procedure and a plea of set off may be raised in such a suit, and if in consequence of such plea the Court of first instance decrees in favour of the defendant a sum above Rs. 5,000, then by reason of the provision in paragraph 2, s. 216 of the Code, an appeal from that decree will lie to the High Court and not to the District Court. *RAMJIWAN MAL AND ANOTHER v. CHAND MAL AND OTHERS.*

[VIII-258]

(2.)—*Balance of account.* The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions, one to the effect that the Government if it saw fit at the expiration of the lease to farm the bridge to any other contractor should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible he will be

CIVIL PROCEDURE CODE, s. 111—
(continued.)

entitled to compensation from Government for all losses." The lessee died before the expiration of the lease and the Magistrate of the district, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed to persons to assess the value of the stock which was ultimately fixed at Rs. 10,900. The Magistrate added a percentage, bringing the total amount up to Rs. 12,100; and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount and claiming the balance due in respect of the last two instalments under the contract. Held that the sum of Rs. 12,100 assessed in the manner above described could not strictly be regarded as a set off. The suit was one for balance of account and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favor. *THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MADARI LAL AND ANOTHER.*

[XI-85]

(3.)—*Same character.* The heirs to *M*, deceased, appointed *A*, one of the heirs, manager of *M*'s estate with a view to the payment of the debts due by the deceased. A creditor of the deceased sued his heirs to recover his debt, and obtained a decree, in execution of which the share of *Z*, one of the heirs, in *M*'s landed estate was sold. The sale proceeds exceeded *Z*'s share of such debt and she sued the other heirs for contribution in respect of the difference. The defendants claimed a set off in respect of *Z*'s share of the liabilities of *M*'s estate which had been satisfied by *A* as manager. Held that the set off claimed could not be entertained in such suit. *ABUL HASAN AND OTHERS v. ZOHRA JAN.*

[III-45]

(4.)—*Unliquidated damages—Jurisdiction.* *A* brought a suit against *B* in the Small Cause Court for Rs. 77 arrears of salary. *B* claimed a set off of Rs. 199 being moneys received by the plaintiffs on his behalf in the course of service. Held that the set off claimed, not being in the nature of unliquidated damages and not exceeding the pecuniary jurisdiction of the Court should have been adjudicated upon. *RAMZAN KHAN v. BIKHA MISR.*

[III-5]

(5.)—*Section not exhaustive—Equitable set off.* The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not up to contract. Held

CIVIL PROCEDURE CODE, s. 111—
(continued.)

that in such a suit the defendant might claim by way of set off compensation for the loss which he had incurred in the re-sale of that portion of the timber, the subject of the contract which the plaintiff had failed to take delivery of. S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set off. *Stephen Clark v. Ruthnavaloo Chetti* (2 *Mad. H. C. Rep.*, 296); *T. Kistnasamy Pillay v. The Municipal Commissioners for the Town of Madras* (4 *Mad. H. C. Rep.*, 120); *Kishore Chand Champa Lal v. Madhowji Visram* (1. L. R., 4 *Bom.*, 407); *Pragi Lal v. Maxwell* (1. L. R., 7 *All.*, 284); *Bhagbat Panda v. Bande Pandu* (1. L. R., 11 *Calc.*, 557) and *Chisholm v. Gopal Chandar Surma* (1. L. R., 16 *Calc.*, 711) referred to. *NIJAZ GUL KHAN v. DURGA PRASAD AND ANOTHER.*

[XII-115]

(6).———.] *Held* that although, taking the word "ascertained" to mean "liquidated," the claim of the defendants for damages would not come within the meaning of a set off under s. 111 of the Civil Procedure Code, that section was one regulating procedure and was not intended to take away any right of set off, whether legal or equitable, which parties would have had independently of its provisions; that the right of set off would be found to exist not only in cases of mutual debts and credits, but also where the cross demands arose out of one and the same transaction, or were so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross suit, and that as, in the present case, the claim sprang out of the same contract which the plaintiff sought to enforce, and could readily be determined in the same suit, it was equitable that it should be so determined. *Gauri Sahai v. Ram Sahai*, (N. W. P. H. C. Rep. 1875, p. 157); *Kistnasamy Pillay v. The Municipal Commissioners of Madras*, (4 *Mad. H. C. Rep.*, 120) and *Kishore Chand Champa Lal v. Madhowji Visram* (1. L. R., 4 *Bom.*, 407) followed.

Per OLDFIELD, J.—That the excess of the set off in favour of the defendants over and above the claim of the plaintiff might properly be decreed to them, and that the set off should be allowed, if at all, to its full extent, and not merely to the extent of defeating the claim.

Per DUTHOIT, J.—That although the set off might properly be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, the defendants could not, failing the provisions of s. 111 of the Civil Procedure Code, be allowed to recover a sum of money from the plaintiff, they having paid no court-fees on that account. *PRAGI LAL v. MAXWELL AND OTHERS.*

[V-40]

CIVIL PROCEDURE CODE,—(continued.)

(1). s. 136. — *Parde ladies.*] In this case the plaintiffs-appellants (*parde ladies*) were ordered by the lower Court to put in certain affidavits and on their not fully complying with the order their suit was dismissed under s. 136, Civil Procedure Code. *Held* that they ought to have been shown some leniency. *RABUAN BIBI AND ANOTHER v. SAJDAR HUSAIN KHAN AND OTHERS.*

[VI-89]

(2).———*Minor.*] In a suit in which the principal defendant was a minor under the guardianship of his step-mother, the plaintiff applied for the production by the minor of certain account books which had belonged to the minor's deceased uncle. On this application the Court issued a summons under s. 163 of the Code of Civil Procedure to the minor to appear and produce the books. Some were produced, and it was stated on behalf of the minor that if there were others and they could be found they also would be produced. The remaining books, if there were any, were not produced, and it was stated on behalf of the minor that they could not be traced. Ultimately, on the motion of the plaintiff, the Court took action under s. 136 of the Code and struck out the minor's defence to the suit. On the same day that the plaintiff applied to the Court to take action under s. 136 the minor himself appeared and made an application stating that his guardian was colluding with the plaintiff, and asking for the appointment of another guardian, also asking the Court to appoint a guardian *ad litem*. *Held* that under the above circumstances the Court was wrong in exercising the powers given by s. 136 of the Code. *KANTA PRASAD v. KANTA NATH.*

[XVI-156]

(3).———*Power to be sparingly used.*] The provisions of s. 136 of the Code of Civil Procedure ought not to be put in force except in extreme cases. Where the defendant had not complied with an order for discovery within the time limited by the Court's order in that behalf, but had subsequently been permitted to file a written statement and to produce documents which he relied on in support of his defence, which documents remained upon the record of the case for some six months before the plaintiffs applied under s. 136; and where, further, it appeared that the plaintiffs had been in no way prejudiced by the non-compliance of the defendant with the orders of the Court it was *held* that the Court had not properly exercised its discretion in applying s. 136 and striking out the defendant's defence. *Sham Kishore Mundie v. Shashi Bhosun Biswas* (1. L. R., 5 *Calc.*, 707), referred to. *SOBHA RAM v. SARDAR SINGH AND OTHERS.*

[XVII-140]

(1).———*Appeal.*] A defendant failing to comply with an order to answer interrogatories

CIVIL PROCEDURE CODE, s. 136 —
(continued.)

the Court under s. 136 of the Code of Civil Procedure struck out his defence and proceeding *ex-parte*, passed a decree against him. *Held* that the decree could not be treated, in respect of the remedy by appeal, as an *ex-parte* decree, and therefore, under the ruling in *Lal Singh v. Kunjan (I. L. R., 4 All., 387)* not appealable, but that an appeal would lie from the decree. *CHUNNI LAL v. CHHAMMAN LAL.*

[IV-313]

s. 137.—The provisions of s. 137 of the Code of Civil Procedure must be strictly complied with: and the High Court will not in second appeal send for the record of a previous suit merely because such record has been sent for and inspected by the lower Courts, where no such application as is provided for by s. 137 has been made to it. *HIRA SINGH v. RAM LAL AND OTHERS.*

[XIV-3]

ss. 142 and 142 A.—Tender in evidence. Where a document tendered in evidence in a Court of first instance was rejected as inadmissible but was nevertheless allowed to remain on the record of the case. *Held* that the mere fact of the document remaining on the record did not make it evidence in the appellate Court, but it must be tendered as evidence in the appellate Court and accepted thereby. *HAR GOBIND AND OTHERS v. NONI BAHU.*

[XII-42]

ss. 150 and 151.—Appeal. This was a suit for a declaration that the plaintiff was entitled to have two spouts flowing to the houses of the defendant. Plaintiff summoned a number of witnesses, but afterwards the parties under s. 150 and 151 of Civil Procedure Code, entered into an agreement that the Munsif after inspecting the spouts, may decide "according to justice", and that the decision of the Munsif should be binding upon the parties under s. 150. The Munsif inspected the spout and decided the suit against the plaintiff but without summoning any witness. *Held* that an appeal lay from the decree. A decree passed under s. 150 and 151 not being in any way distinguished from ordinary decrees. That the decision of the Munsif having been arrived at without any evidence was illegal and must be set aside. *SHUGAN CHAND v. JUDAYAL MAL.*

[VI-233]

(1.) s. 155.—Dismissal for failure to produce evidence—Remedy. On the 17th December, 1881, the plaintiffs in this suit informed the Court of first instance that they would produce witness in three days and the 20th December was accordingly fixed for the hearing of the suit. On the 20th December the Court dismissed the suit its order being as follows:—Whereas the plaintiff has not produced any evidence in support of his claim and does not conduct his suit

CIVIL PROCEDURE CODE, s. s. 155
(continued.)

properly I dismiss his claim with costs. On the 14th January, 1882, the plaintiffs applied to have the case restored to the file under ss. 97 and 99, Civil Procedure Code. The first Court allowed the application and gave the plaintiffs a decree which was upheld in appeal to the Court of first appeal. In second appeal it was *held* that the order of the Munsif, dated 20th December, was made under s. 155, Civil Procedure Code, and not under ss. 97 and 99, nor could it be regarded in the nature of a review of judgment. The plaintiff's only remedy therefore was by way of appeal under s. 540. In restoring the case, the Munsif acted *ultra vires* and the whole subsequent proceedings are consequently void. *PARTAB RAI v. RAM KISHAN AND OTHERS.*

[III-171]

(2.)—Sufficient cause—Review.] This was a suit in the Munsif's Court. The parties endeavoured to settle their differences by arbitration. One of the defendants told the plaintiff that he will inform the Court of what was going on. In consequence of this the plaintiff did not attend on the day fixed for the disposal of the suit nor was his pleader instructed to carry on the suit. The pleader therefore stated that the plaintiff had failed to produce his evidence. On this the Munsif dismissed the claim. The plaintiff then applied to the Munsif to review his judgment. The application was granted and the plaintiff obtained a decree. In appeal to the lower appellate Court it was held that the dismissal being under s. 155 no application for review lay; consequently the order of the Munsif admitting the application was *ultra vires*. *Held* that under s. 155 the Munsif was not entitled to dismiss the suit unless the plaintiff failed without *sufficient cause*, to produce his evidence. The defendant's saying what he did say is manifestly a *sufficient cause*. One of his remedies was to apply for a review and therefore the Munsif's accepting it was not *ultra vires*. *Held* further that a liberal and wide interpretation should be put on the words "for any sufficient reason" in s. 562, Civil Procedure Code. *KADIR BAKSH v. ABDUR RAHMAN AND OTHERS.*

[VII-105]

(1.) s. 156.—Adjournment—Sufficient cause.] In this case 27th June, 1881, was fixed for the hearing. On the 24th June, plaintiff applied to have certain witnesses summoned which was granted. The summons not having been served and the witnesses not attending he applied for an adjournment which was refused. *Held* that though it was a discretionary matter yet unless there is pressing necessity for proceeding with the case or the application for adjournment is obviously frivolous, it should not be rejected. *JHANDA SINGH v. DUNGAR MAL AND OTHERS.*

[II-127]

CIVIL PROCEDURE CODE, s. 156—
(continued.)

(2.)—*Talbana for summoning witnesses.* 1st July was fixed for hearing of this suit by the lower Court. The case was not called on on that day but on the next. In the meantime the plaintiff's witnesses had gone away. The plaintiff accordingly applied for an adjournment and for fresh summonses to issue to his witnesses. This application was granted on condition that he should deposit *talbana* at once. 9th was fixed for the hearing. Plaintiff deposited the *talbana* on the 8th. The case coming on the 9th, plaintiff applied for further time; the lower Court refused this application and dismissed the suit for want of evidence. *Held* that as it was not the fault of the plaintiff that his witnesses were not in attendance, for under the rule of this Court, no fee could properly be charged for serving summons for witnesses and a second time in consequence of an adjournment made otherwise than at the instance of the party, the lower Court's order was wrong and must be set aside. *SUNDUR v. SAMBHAL SINGH.*

[VI-220]

(3.)—*"Shall fix a day"*
—*Note by Munsarim.* *Held* that if a case is not heard on the day fixed for its hearing, another date, duly specified by an order to be recorded in, or in respect of the particular case should be fixed; and that a mere note by a munsarim or clerk in charge of certain appeals or records does not amount to a proper appointment of adjourned date for hearing of a case. *INTIAZ ALI v. SHAIKH BHOLA.*

[II-171]

(1.) s. 157.—*Appearance—Ex-parte decree.*

See s. 100, Nos. (2), (3) and (4).

(2.)—*Dismissal for default.*

See s. 102, No. (2.)

See s. 155, No. (1.)

(3.)—*Order setting aside ex-parte decree—Appeal.* No appeal will lie from an order made under s. 157 read with s. 108 of the Code of Civil Procedure setting aside a decree passed *ex-parte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned. *Jonardhan Dohy v. Ramdhone Singh (I. L. R., 23 Cal., 738)* referred to. *BHAGWAN DEI AND ANOTHER v. HIRA.*

[XVII-89]

(1.) s. 158—*Dismissal for failure to pay certain expenses—Remedy.* *Held* that the dismissal of a suit for failure to pay into Court expenses of commission to ascertain the value of the suit and to draw a map, ordered by the Court, was not a dismissal falling under Chapter VII of the Civil Procedure Code and therefore none of the remedies provided therein were applicable. That it was a decision which if

CIVIL PROCEDURE CODE, s. 158—
(continued.)

not challenged in appeal became final and would bar a fresh suit for the same relief. *RAM GHULAM SINGH AND OTHERS v. HARNANDAN.*

[V-168]

(2.)—*Dismissal for want of prosecution—Remedy.* The plaintiffs instituted their suit in the Court of the Munsif in February 1888. After several preliminary dates, the 26th of July was fixed for the framing of issues. On that date the 17th of August was fixed for the hearing. The plaintiffs however were not ready on the 17th of August to proceed with their case and time was allowed them till the 26th of September. On the last mentioned date the Munsif passed an order dismissing the plaintiffs' suit "for default of prosecution." Subsequently the Munsif cancelled this order and proceeded with the trial of the case and ultimately gave a decree in the plaintiffs' favor. *Held* that the order above referred to dismissing the plaintiffs' suit must be regarded as an order under Chapter VII of the Code of Civil Procedure and not as one passed under s. 158 of that Code. *LACHMAN SINGH AND OTHERS v. BHAJAN SINGH AND ANOTHER.*

[XIII-82]

(3.)—*Failure to produce evidence—Dismissal.* Two cases involving similar issues were ordered by an Officiating District Judge to be tried together, one of the cases being transferred from the file of the Subordinate Judge to that of the District Judge for that purpose. The District Judge's successor in office dissociated the two cases, and ultimately fixed the 6th February for the hearing of one of them and the 8th April, for the hearing of the other, apparently in ignorance of the order passed by his predecessor. On the 30th January, the plaintiff in the case which was fixed for the 6th February applied for the summoning of witnesses and for a postponement of the hearing. The District Judge granted the application for summonses but refused to postpone the hearing of the case. In consequence of this action the attendance of the necessary witnesses could not be procured in time, and, on the 6th February, the District Judge purporting to act under s. 158, Civil Procedure Code, dismissed the plaintiff's suit for default. The plaintiff then appealed to the High Court. *Held* that even if the order of the District Judge under s. 158 of the Code of Civil Procedure could be considered on a proper construction of that section, as a legal order; still the plaintiff might reasonably be taken to have been misled by the action of the Court, and, under the circumstances, the Court had not exercised a sound discretion in dismissing the plaintiff's suit. *DULHIN SONRAJ KUARI v. AUDHAN SINGH.*

[XI-112]

(4.)—*Applicability of section to execution proceedings.* An application for execution of

CIVIL PROCEDURE CODE, s. 158—
(continued.)

a decree by attachment of immovable property having been presented by a decree holder the Court executing the decree ordered that the costs of such attachment should be deposited by the decree-holder on or before a certain specified date. The costs of attachment were not deposited by the day named in the order above referred to and the Court thereupon passed the following order:—"This case came on for hearing to-day; as the decree-holder has not deposited the costs of attachment &c., therefore it is ordered that the case be struck off for default." *Held* that whether this second order was an order under s. 158 of the Code of Civil Procedure deciding the application for attachment, or whether its effect was merely to remove the application from the file of pending applications without deciding it, in either case no fresh application (being of a precisely similar nature) was entertainable, though in the latter case, possibly the former application might be renewed. **PHEKU v. PIRTHI PAL SINGH AND OTHERS.**

[XII-222]

(5).—[A decree-holder having attached certain immovable property of her judgment-debtor applied to have a specified portion of such property sold. The Court executing the decree ordered the decree-holder to pay certain fees for issue of notice to the opposite side for the purpose of an inquiry as to whether the property sought to be sold was or was not ancestral property, and directed that the case should be brought up again on a date named in the order. On that date the Court passed an order striking off the application for sale on the main, and practically the sole ground that the *talbana* required had not been paid but at the same time specifically maintaining the attachment. *Held* that such order could not be taken to have an effect similar to that of an order in a suit under s. 158 of the Code of Civil Procedure and to be a bar to any subsequent application of a similar nature. **WILAYAT HUSAIN v. SHAFAT BEGAM.**

[XIII-12]

(6).—[*Applicability of section to the proceedings of Collector.*] A Collector to whose Court a Civil Court's decree has been transferred for execution has no power to make an order which would by analogy have the effect of an order under s. 158 of the Code of Civil Procedure dismissing a suit and would finally determine all proceedings in execution of the decree. **BILAS KOER AND ANOTHER v. RAM SAHAI AND ANOTHER.**

[XIII-28]

(7).—[*Appearance—Dismissal for default.*]

See, s. 102, No. (3).

(8).—[*Dismissal for failure to produce evidence—Remedy.*]

See, s. 155, No. (1).

CIVIL PROCEDURE CODE,
(continued.)

(1) s. 159.—[*Application to summon witnesses—Discretion of Court.*] Where a person making an application to a Civil Court for witnesses to be summoned has negligently or with intention to delay the hearing postponed the making of his application for a summons until a time when it would be impossible to obtain the attendance of the witnesses at the hearing, the Court might properly refuse to adjourn the hearing but nevertheless it would be the duty of the Court to order the summons asked for to issue, as the Court is not given a discretion under s. 159 of the Code of Civil Procedure enabling it to refuse such an application. Where under circumstances similar to those indicated above an application to summon witnesses was refused and that refusal was made one of the grounds of appeal against the decree in the suit. *Held* that s. 578 of the Code of Civil Procedure would apply if the irregularity in refusing the application did not affect the merits of the case. If it did affect the merits of the case the ground of appeal would be a good one. **Krishna Churn Baisack v. Protab Chunder Surma (I. L. R., 7 Cal., 560) and Rai Kali v. Alorakh Pirbhai (I. L. R., 15 Bom., 86) approved. BHAGWAT DAS v. DEBI DIN AND ANOTHER.**

[XIV-45]

(2).—[*Material witness.*] Where an appellant pleads as a ground of appeal that the Court of first instance did not summon one of his witnesses it is incumbent on him to show that the witness whom he asked to have summoned could or would have given some evidence material to the appellant's case. **MAKHI v. BHOLA NATH AND ANOTHER.**

[XVI-120]

s. 174.—It is within the meaning of s. 174, Civil Procedure Code, a lawful excuse for the non-attendance of a witness in obedience to a summons that the person causing the summons to be issued has not paid or tendered the necessary expenses of such witness as specified in s. 160 of the Code. **TODAR MAL v. SAID MUHAMMED AND OTHERS.**

[XV-74]

(1) s. 191.—[*Power to deal with evidence taken by another Judge.*] A Subordinate Judge having taken all the evidence in a suit before him, adjourned the case to a future date for disposal. Upon the date fixed, a further adjournment was made. The Subordinate Judge at this stage of the proceeding, was removed and a new Subordinate Judge was appointed. *Held* that the trial, so far as it had gone before the first Subordinate Judge, was abortive, and, as a trial became a nullity. *Held* also that the duty of the second Subordinate Judge when the case was called on before him was to fix a date for the entire hearing and trial of the case before himself; that he might at the request of the pleaders, have fixed the same day upon

CIVIL PROCEDURE CODE, s. 191— (continued.)

which the case was called on, and proceeded to try it at once and that the trial should then have proceeded in the ordinary way except that the parties would be allowed under s. 191 of the Civil Procedure Code, to prove their allegations in a different manner. *Jagram Das v. Narain Lal* (I. L. R., 7 All. 857) referred to. *AFZAL-UN-NISSA BEGAM v. AL ALI*.

[V-322]

(2.) —————.] A Subordinate Judge, having taken all the evidence in a suit before him, and having completed the hearing of the suit except for the arguments of counsel on both sides, was removed, and the case came on for hearing before his successor. The new Subordinate Judge took up the case from the point at which it had been left by his predecessor, and proceeded to judgment and decree. *Held* that the only power given by the Civil Procedure Code in such cases is to allow the evidence taken at the first trial to be used as evidence at the second trial, and not to allow the two hearings to be linked together and virtually made one; that the Subordinate Judge should have fixed a day for the entire hearing of the suit before himself, and should first have heard the opening statement on behalf of the plaintiff, the evidence produced by both sides, and the arguments on behalf of both, and then finally decided the case which he had himself heard and tried; that he might, in accordance with the provisions of s. 191 of the Civil Procedure Code, have allowed the depositions which had been taken before his predecessor to be put in; and that, in neglecting to take this course, and in deciding the case upon materials which were never before him, his action was illegal, and the judgment and the decree were nullities. *JAGRAM DAS v. NARAIN LAL*.

[V-285]

(3.) —————.] The trial of a suit before a Subordinate Judge was completed except for argument and judgment, and a date was fixed for hearing argument. At this point a new Subordinate Judge was appointed, and he passed an order directing a further adjournment and fixing a particular date for disposal of the case. After some further adjournments, the Subordinate Judge delivered judgment having heard argument on both sides upon the evidence taken by his predecessor. The District Judge, having on appeal upheld the Subordinate Judge's decision, a second appeal was preferred to the High Court, and an objection was raised on the appellant's behalf that the proceedings taken before the Subordinate Judge were void, and he could not be said to have tried the case, inasmuch as no evidence was taken before him, and his judgment was based solely on evidence recorded by his predecessor. No objection of this kind was taken in either of the Courts below. *Held* by the Full

CIVIL PROCEDURE CODE, s. 191— (continued.)

Bench that with reference to the grounds of appeal, and under the circumstances of the case, the officer who passed the decree in the Court of first instance had jurisdiction to deal with and determine the suit in the mode in which he did. *Jagram Das v. Narain Lal* (I. L. R., 7 All., 857) and *Afzal-ul-nissa Begam v. Al Ali* (I. L. R., 7 All., 35) discussed.

Per STRAIGHT, OFFICIATING C.J., that as no objection was raised before the Subordinate Judge to his taking up and dealing with the case in the mode in which he did, but the evidence was discussed and criticised on both sides, there had been a waiver on the part of the appellant in reference to the action of the Subordinate Judge of which he now sought to complain.

Per OLDFIELD, J., that where a judge takes up a trial begun by another although the law prevents him to deal with the evidence taken by his predecessor as if he himself had taken it down, he must deal with it judicially, and try the cause as though it had come before him in the first instance, and there must be a hearing of the entire case before himself and in every case it has to be seen whether as a matter of fact, there has been a real trial and hearing of the entire case by the judge, and if the evidence previously taken was not judicially dealt with, counsel heard upon it and the entire case fully heard and tried, there has been no trial in the legal sense of the word, and the proceedings must be set aside. *Jagram Das v. Narain Lal* (I. L. R., 7 All., 857) and *Afzal-un-nissa Begam v. Al Ali* (I. L. R., 7 All., 35) followed.

Per MAHMOOD, J., that although it is true that, "a trial must be one, and must be held before one Court only," the identity of the Court is not altered by a new Judge being appointed to preside in such Court; that when a trial goes on for more than one day, each day constitutes a separate hearing, and that such hearings cannot be treated as a trial heard on the original date, that the Civil Procedure Code does authorize a Judge to take up a case which has been partly heard before his predecessor, and to continue it from the point at which his predecessor left off; that where the Judge who has partly heard a case dies or is removed, the trial, so far as it has gone before him, is neither abortive nor becomes nullity; that the new Judge is not required to fix a day for the entire hearing of the suit before himself, nor is there anything to prevent him from taking up a trial which has been partly heard by his predecessor, and to proceed with it as if it had been commenced before himself; that the Code does not recognise such procedure as amounting to separate trials, that the Judge who succeeds another after a trial which has partly proceeded before his predecessor is not bound to fix a new day for commencing the trial *de novo*, nor should the trial proceed before the new Judge as if the day were the first on which the

CIVIL PROCEDURE CODE, s. 191—
(continued.)

case had ever come on for hearing; that the evidence recorded by the preceding Judge, by the mere fact of being upon the record, is *ipso facto* evidence in the cause, and could, under s. 191 of the Code, be treated by the succeeding Judge "as if he himself had taken it down or caused it to be made;" that when the case comes on for hearing before the new Judge, there is no necessity for putting in the depositions of witnesses which, though taken by his predecessor, are already upon the record; that such depositions must be dealt with as materials of evidence before the new Judge; that a judgment and decree upon such evidence are neither illegal nor absolute nullities, there being no want of jurisdiction; that when such judgment and decree are passed, the Court of first appeal is prohibited by s. 564 of the Code to order a trial *de novo* but is bound by s. 565 of the Code to decide the appeal upon the evidence on the record; that where further issues are directed to be tried or additional evidence is to be taken the Court of appeal is bound to act according to the provisions of ss. 566, 568 and 569 of the Code, but can not order a new trial; that even when there has been an irregularity on the part of the first Court in receiving or rejecting evidence, the provisions of s. 578 of the Civil Procedure Code and s. 167 of the Evidence Act prohibit the reversal of a decree and the remand of a case for new trial, unless the irregularity affects the merits of the case or the jurisdiction of the Court. *Jagram Das v. Narain Lal* (I. L. R., 7 All., 857) and *Afzal-un-nissa Begam v. Al Ali* (I. L. R., 7 All., 35) dissented from.

Per TYRRELL, J., that in reference to the Full Bench the only matters which can legally be attended to are the cases referred, and it is not competent for the Full Bench to review or pronounce judicial opinions upon the Court's judgment in cases which have been finally decided and not made the subject of reference. *Jagram Das v. Narain Lal* (I. L. R., 7 All., 857) and *Afzal-un-nissa Begam v. Al Ali* (I. L. R., 7 All., 35) followed and explained. **JADU RAI AND ANOTHER v. KANIZAK HUSAIN AND OTHERS.**

[VI-195]

(4.) —————.] This case was tried by A (Munsif) before whom the entire evidence was taken, but judgment was delivered by B (Additional Munsif). *Held* that there has been no legal trial of the case. That the plea could be taken in second appeal. **RAGHUBIR RAI AND OTHERS v. THAKUR RAI AND OTHERS.**

[VII-13]

1. s. 202. *Alteration of judgment—Court fees.*

See ss. 54 and 55.

(2.) —————.] Where a decree is in fact in accordance with the judg-

CIVIL PROCEDURE CODE, s. 202—
(continued.)

ment on which it is based, such decree, however erroneous it may be, cannot be altered on an application under s. 206 of the Code of Civil Procedure to bring the decree into accordance with the judgment. **LAKHO BIBI v. SALAMAT ALI.**

[XVIII-59]

(1). **GANGA SAHAI v. CHEDA LAL.**

[I-57]

(2). **TEJ SINGH AND ANOTHER v. DIP CHAND AND OTHERS.**

[II-72]

(3.) —————.] The respondent claimed possession of a grove containing 21 mango trees and Rs. 40, the value of mangoes appropriated by the appellants. On the 21st July, 1880, the lower appellate Court gave him a decree for Rs. 14, value of fruits appropriated. On the 14th August, 1880, the lower appellate Court added a postscript to its judgment of the 21st July in these terms:—"My attention has been drawn to the fact that I have not given a decree for the land: this is an oversight: I find in my first judgment that the plaintiff is entitled to the land, which of course carries the trees on it with it: I therefore amend my order and give plaintiff appellant a decree for the land and trees, as well as for the value of the fruit." *Held* that it was not competent for the lower appellate Court to make the addition to its judgment contained in the order of the 14th August. **HARJAS AND OTHERS v. SHIB DAYAL.**

[I-95]

s. 203.—*Small Cause Court judgment.*] S. 203 of the Code of Civil Procedure does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given. Where a judgment in a Small Cause Court suit stated merely that the suit was dismissed for reasons given in the Judge's decision in another suit, and the judgment in the suit so referred to was in the following words:—"Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered that the claim is decreed with costs." *Held* that this was in fact no judgment at all, and the case must be remanded for re-trial on the merits under the analogy of s. 562 of the Code of Civil Procedure read with s. 647 *ib.* **MALIK RAHMAT v. SHIVA PRASAD AND OTHERS.**

[XI-172]

(1) s. 206. *Amendment of judgment.*

See s. 202, No. (2.)

CIVIL PROCEDURE CODE, s. 206 -
(continued.)

(2.) ----- *Amendment of decree—To bring it into conformity with judgment.* The judgment in an appeal adjudged interest to be paid for the period prior to the institution of the suit only. The decree contained an order for payment of interest from the date of the suit onwards. *Held* that no variance with the judgment within the meaning of s. 206 of the Civil Procedure Code, was involved in the additional order contained in the decree. **KOLAI RAM v. PALI RAM.**

[V-214]

(3.) ----- *Costs.* A suit was adjusted by the defendant filing a confession of judgment in which he agreed to pay the "money claimed, with interest, and costs of the Court, with interest, as much as might be entered in the decree." The judgment of the Court trying the suit merely recited the claim and, "in accordance with the confession of judgment," ordered the defendant to pay the plaintiff the money claimed, with interest during the pendency of the suit on the principal and on the "whole" till the day of realization, and in addition that the defendant should pay his own costs. The decree of the Court did not specify the costs. The plaintiff applied to the Court, under s. 206, to amend the decree, on the ground that the judgment awarded him costs. The Court refused the application. *Held* in revision by the High Court that the decree was at variance with the judgment and should be amended. *In re* PETITION OF GAYA PRASAD.

[I-17]

(4.) ----- *Dismissal of appeal.* A District Judge, by an order passed under s. 206 of the Civil Procedure Code, altered a decree passed by his predecessor in the terms, "I dismiss the appeal," to read "I accept the appeal," on the ground that his predecessor had obviously meant to say that he accepted the appeal, and that the decree as it stood failed to give effect to the judgment. *Held* by the Full Bench that an order passed under s. 206, Civil Procedure Code constituted an adjudication separate from that concluded by a decree under the Code passed after the parties had been heard and evidence taken, and that the order in the present case was therefore a separate adjudication, and was not appealable under s. 588. Also that, in saying that by "dismiss," his predecessor had meant "decree," the Judge had altered the decree in a manner not warranted by the terms of s. 206, that he had therefore exercised his jurisdiction "illegally and with material irregularity," within the meaning of s. 622, Civil Procedure Code, and that the High Court was consequently competent to reverse his order. The judgment of Oldfield, J., (I. L. R., 7 All., 412) reversed, and that of Mahmood, J., (I. L. R., 7 All., 412) affirmed. **SURFA AND OTHERS v. GANGA AND OTHERS**

[V-256]

CIVIL PROCEDURE CODE, s. 206 -
(continued.)

(5.) ----- *Costs.* An order as to costs, contained in a decree for pre-emption directed that the pleader's fees should be calculated with reference to the value of the claim as set forth in the plaint. Subsequently the Court, professing to act under s. 206 of the Civil Procedure Code passed an order directing the amendment of the decree, by calculating the pleader's fees upon the actual value of the property. *Held* by the Full Bench that the alteration of the decree was improper, and was not an amendment of the kind authorized by s. 206 of the Civil Procedure Code. The judgment of Oldfield, J., (I. L. R., 7 All., p. 277) reversed, and that of Mahmood, J., (I. L. R., 7 All., p. 278) affirmed. **RAGHUNATH DAS v. RAJ KUMAR.**

[V-256]

(6.) ----- *Costs.* *Held* that where no costs were awarded by the decree the remedy was by an application under s. 206 for an amendment of the decree. **TULSHI PRASAD v. MATTRA MAL AND ANOTHER.**

[V-325]

(7.) ----- *Substitution of names.* Where after decree passed in second appeal by the High Court an application purporting to be under s. 206 of the Code of Civil Procedure, was made for the purpose of having the names of certain alleged legal representatives substituted for the name of the successful appellant who had died pending the appeal in the High Court, the Court declined to make the amendment asked for. **KHUSHI RAM AND ANOTHER v. NIHAL AND ANOTHER.**

[XV-237]

(8.) ----- *Delay.* An application to amend a decree passed by the first Court on the 21st September, 1878, and confirmed on appeal to the High Court on the 16th August, 1880, was made to the Court which passed the decree on the 22nd November, 1880, on the ground that it was not in accordance with the judgment. That Court refused to amend the decree. Thereupon the petitioner applied to the High Court for revision. It was contended on behalf of the opposite party that the application was not entitled to favorable notice in consequence of the time that had elapsed since the date of the decree. *Held* that the petitioner was not chargeable with any laches; and as the Court below had, in this case, acted in the exercise of its jurisdiction illegally and with irregularity its order must be set aside and it should be ordered to amend the decree. **BALMUKAND v. SHROJATAN LAI AND OTHERS.**

[II-60]

(9.) ----- *Notice.* The Court in a suit upon a bond gave the plaintiff a decree, making a deduction from the amount claimed of a sum covered by a receipt produced by the defendant as evidence of part-payment

CIVIL PROCEDURE CODE, s. 206—
(continued.)

and admitted to be genuine by the plaintiff. The decree was for a total amount of Rs. 1,282. Subsequently, on application by the decree-holder, and without giving notice to the judgment-debtor, the Court which passed the decree purporting to act under s. 206 of the Civil Procedure Code, altered the decree, and made it for a sum of Rs. 1,460. The decree-holder took out execution, and the judgment-debtor objected that the decree was for Rs. 1,282 and had been improperly altered. The Court executing the decree disallowed the objection, on the ground that it was not such as could be entertained in the execution department. *Held* that the decree as it originally stood was in accordance with the judgment, and the Court had no power to alter it as it did, and the proceeding was further irregular, in that no notice was given to the opposite party, as required by s. 206 of the Code. *Held* also that when a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed and therefore not capable of execution, and that the judgment-debtor in this case could raise the question whether the decree, which was altered behind his back, was a valid decree and fit to be executed. **ABDUL HAYAT KHAN v. CHUNIA KUAR.**

[VI-127]

(10). ———— *Decree to be amended.* The effect of s. 579 of the Civil Procedure Code is to cause the decree of the appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree, and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the appellate Court and not the superseded decree of the first Court, though the latter may if necessary be referred to for the purpose of executing the appellate decree. The only Court which has jurisdiction to amend the appellate decree is the Court of appeal. So held by the Full Bench, Mahmood J., dissenting. *Shohrat Singh v. Bridgman* (I. L. R., 4 All., 376) explained and followed. **MUHAMMAD SULAIMAN KHAN AND OTHERS v. FATIMA.**

[IX-107]

Per contra

RAM SARAN AND ANOTHER v. PERSIDHAR RAI AND OTHERS.

[VII-284]

(11). ———— *Revision.* The plaintiff claimed proprietary possession of a house and courtyard. The Munsif decreed his claim in general terms, but without specific mention of the courtyard, and the District Judge affirmed the Munsif's decree in appeal. The plaintiff applied for execution, but an objection

CIVIL PROCEDURE CODE, s. 206—
(continued.)

was taken as to his right to execution in respect of the courtyard. The plaintiff then applied to the Munsif and to the District Judge under s. 206 of the Code of Civil Procedure, and in both cases his application was granted. The defendants then applied to the High Court for revision of the order of the District Judge under s. 206. *Held*, that the order of the District Judge under s. 206 might have been superfluous, as the decree, though badly drawn, was for the plaintiff's claim; but there was nothing in that order which would afford any ground for revision. **MOHAMMAD ABBAS v. MASHUQ ALI AND OTHERS.**

[XI-35]

(12). ———— *Appeal—Revision.* *Held* that an order passed under s. 206 amending a decree is not merely a part of the original decree but a separate adjudication and such an order is not appealable under s. 588, Civil Procedure Code. Such an order therefore can be revised by the High Court under s. 622, Civil Procedure Code. The judgment of Oldfield, J., (I. L. R., 7 All., 277) reversed and that of Mahmood, J., (I. L. R., 7 All., 278) affirmed. **RAGHUNATH DAS v. RAJ KUMAR.**

[V-256]

SURTA AND OTHERS v. GANGA AND OTHERS.

[V-256]

(13). ———— *Review of judgment.* *Held* that where a decree-holder applied under s. 623 of the Code of Civil Procedure for review of judgment, instead of under s. 206 to have his decree brought into conformity with the judgment, this was no reason for disturbing the order which he obtained and which he was in fact entitled to although the application should strictly speaking have been made under s. 206. **GHULAM MOHI-UD-DIN KHAN AND ANOTHER v. DHANNO AND ANOTHER.**

[XIII-123]

ss. 206 and 210.—Amendment—Alteration. The plaintiffs sued for recovery of a certain sum of money and interest up to the date of suit and for interest during the suit and subsequent to decree until satisfaction thereof. The Court in its judgment awarded the plaintiffs a specified sum of money and ordered that the rest of the plaintiff's claim should stand dismissed. Subsequently the Court amended its decree by adding a decretal order for the payment to the plaintiffs by the defendant of interest during the pendency of the suit and after decree until the satisfaction of the debt. *Held* that it was illegal for the Court to decree the claim for interest by way of amendment of its decree and that the order so amending the decree was open to revision. **HASAN SHAH v. SHEO PRASAD AND ANOTHER.**

[XIII-44]

CIVIL PROCEDURE CODE, (continued.)

(1). s. 210.—*Instalment decree.*] *A* sued *B* for Rs. 10,275 and got a decree with costs and interest at 6 per cent. but the amount was made payable by the decree in ten equal half-yearly instalments as *B* was "in an embarrassed condition." *Held* that as the decree injuriously affected plaintiff's interest it must be set aside and the amount made payable in a lump sum with interest at 6 per cent. *BISHEN CHAND v. JANG BAHADUR AND ANOTHER.*

[II-102]

(2). —————. The parties to a decree for money, dated the 14th July, 1871, entered into a compromise whereby, in lieu of a portion of the decretal money, the decree-holder was placed in possession of certain property, and the remainder of the decretal money was to be paid by fixed annual instalments and in case of default in the payment of any instalment it was agreed that the entire amount should become immediately realizable by execution of the decree. On the 11th December, 1882, the decree-holder alleging default in payment of the instalments applied for execution of the compromise. *Held* that such an agreement could not be treated as an instalment decree and as such capable of execution. *Debi Rai v. Gokul Prasad* (1. L. R., 5 All., 585) followed. *RAMLAKHAN RAI AND OTHERS v. BAKHTAUR RAI.*

[IV-207]

(3). ————— *Default—Waiver.*] A decree was made for payment of the decretal amount by monthly instalments running over a period of 12 years and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883, a default was made, and in 1884, the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887 he made another application for execution, in which he relied on the same default. *Held* that the default, if it was one, had been waived by the decree-holder and that such waiver was a good defence to the present application. *Mumford v. Peal* (1. L. R., 2 All., 857) and *Asmutullah Dalal v. Kally Churn Mitter* (1. L. R., 7 Calc., 56) distinguished. *BUDDHU LAL v. REKKHAB DAS.*

[IX-186]

(4). ————— *Consent of parties—Surety.*] A judgment-debtor, whose property was about to be sold, appeared before the officer appointed to conduct the sale and applied for its postponement, producing a surety and a bond in which such surety promised to pay the amount of the decree within one year, if the judgment-debtor did not do so. Such officer thereupon applied to the District Judge to postpone the sale, stating that such surety was willing to pay the amount of the decree by instal-

**CIVIL PROCEDURE CODE, s. 210—
(continued.)**

ments within one year, and forwarding such bond. The District Judge ordered the sale to be postponed and the papers to be sent to the Munsif who had made the decree and ordered the sale of the property. The Munsif made no order regarding the security, but merely made an order that the amount of the decree should be paid by instalments within one year, the judgment-debtor did not pay the amount of the decree within the time fixed, and the decree-holder therefore applied for execution of the decree against such surety. *Held* that, inasmuch as the decree-holder had not been a party to the proceedings of the sale officer or of the District Judge, and as the parties had not appeared before the Munsif and as such surety had not agreed to pay the amount of the decree by instalments, the provisions of sec. 210 of Act No. X of 1877 were not applicable and such surety had not become a party to the decree as altered by the Munsif; that such surety had not made himself a party to the decree by promising to pay its amount within one year and that therefore his liability was not one which could be enforced in execution of the decree under s. 253 of Act X of 1877. *CHANDAN KUAR v. TIRKHA RAM.*

[I-78]

(1) s. 214.—*Defective decree—Construction.*] Where in a suit for pre-emption the decree while decreeing the plaintiff's right to pre-emption upon payment of the pre-emptive price within one month from the date of the decree, omitted to state what would be the effect on the plaintiff's suit of non-payment within the prescribed period. *Held* that the form of such decree necessarily implied that if the pre-emptive price was not paid within the period limited by the decree or within such extended time as might afterwards be allowed, the plaintiff's suit must stand dismissed. *Kadir Singh v. Jaisri Singh* (1. L. R., 13 All., 376) referred to, *Bandhu Bhagat v. Shah Muhammad Taqi* (W. N. 1892. p. 40) dissented from. *JAI KISHN v. BHOLA NATH AND ANOTHER.*

[XII-106]

(2). ————— *Rival pre-emptors—Form of decree.*] *K* and *R*, two co-sharers of a village, instituted separate suits in which each claimed to enforce the right of pre-emption, based on the *wajib-ul-arz* in respect of the same sale of a share in the village to a stranger. The Court of first instance made the plaintiff in one suit a defendant in the other. The suits were tried together, and *R* being held to have a better right under the terms of the *wajib-ul-arz* than *K*, his suit was decreed, contingent upon payment by him of the purchase-money within one month from the date of the decree. *K*'s suit was dismissed absolutely. *Held* that decrees in cases where two rival pre-emptors of the same degree seek to enforce pre-emption, as each necessarily must do, in respect of the whole property conveyed by one transfer, are

CIVIL PROCEDURE CODE, s. 214—

(continued.)

defective if they dismiss the suit for any proportion of the property without providing for the contingency of the rival pre-emptor decree-holder omitting to enforce his decree in respect of the share decreed to him. *A fortiori*, where the rival decree-holders possess different degrees of pre-emption, the decree, in at least one of the rival suits, must be essentially defective if no provision is made for the contingency of the superior pre-emptor never enforcing his right. The question what should be the form of the decree in such cases can be dealt with only by exercising the vast and flexible jurisdiction possessed by the Courts of Equity in adapting their decrees to the exigencies of each case, so as to grant the actual relief required by the parties. *Held* applying the principles of Equity to the present case, that the Court of first instance acted right in adding the name of each rival pre-emptor as party defendant in the suit of the other, and in decreeing the claim of the superior pre-emptor, but that the decree in *K's* suit was defective and inequitable, inasmuch as it dismissed the suit *in toto* disallowing his pre-emptive claim wholly irrespective of the contingency of *R's* omission to enforce the pre-emption decreed to him by depositing the purchase money within time. As *K* admittedly had pre-emptive right as against the vendee, his suit should have been decreed against the latter in the terms of s. 214 of the Code of Civil Procedure; subject, however, to the condition that the decree should not take effect, so far as the enforcement of pre-emption was concerned in the event of *R's* enforcing the superior pre-emptive right decreed to him. *KASHI NATH v. MUKTA PRASAD AND OTHERS.*

[IV-119]

(3). — *Payment of purchase money less costs—Compliance.* The decree in a suit to enforce a right of pre-emption directed in accordance with the provisions of s. 214 of the Code of Civil Procedure, that the plaintiff should obtain possession of the property and recover costs of the suit from the defendants (vendor and vendee) on payment of the purchase-money within a fixed time, but that on default of such payment the suit should stand dismissed. The plaintiff deposited within time the purchase-money with the exception of a sum less than the amount of costs awarded to him. He subsequently applied for delivery of possession of the property in execution of the decree and for the recovery of the costs awarded to him deducting from such costs the unpaid portion of the purchase money. *Held*, applying, by analogy, of s. 221 and 247 of the Code of Civil Procedure, the equitable doctrine of set off, that the plaintiff was entitled, when depositing the purchase-money under the decree to deduct therefrom the sum of the decree awarded to him as costs, and that therefore the decree did not become null and void by reason that he had not deposited the full amount of the purchase money within

CIVIL PROCEDURE CODE, s. 214—

(continued.)

time. *Degumburee Dabee v. Eshan Chunder Sen* (9 W. R., 230); *Jugo Mohun Bukshee v. Soorendro Nath Roy Chowdhury* (13 W. R., 106) and *Brij Nath Dass v. Juggamath Dass* (1 L. R., 4 Calc., 742) referred to. *ISHRI v. GOPAL SARAN AND ANOTHER.*

[IV-125]

(4). — [A Court of first instance decreed a suit for pre-emption conditionally on the pre-emptor paying into Court Rs. 125 within a specified period, and also awarded the pre-emptor Rs. 39-9-0 as costs. Within the specified period the pre-emptor paid into Court the Rs. 125 and subsequently executed his decree for costs by drawing out therefrom the Rs. 39-9-0. After this the decree was modified on appeal, the appellate Court increasing the Rs. 125 payable as the condition of pre-emption to Rs. 200 and reversing the first Court's order as to costs. Within the period specified in the appellate Court's decree, the pre-emptor paid into Court the further sum of Rs. 75. Subsequently the vendee defendant applied to the Court under s. 583 of the Civil Procedure Code to have the property in suit restored to him contending that the pre-emptor had failed to pay the full Rs. 200 within the prescribed period. *Held* by Straight, J. (affirming the judgment of Mahmood, J.) that this contention must fail; that the payment of the Rs. 125 due under the first Court's decree could not be said to have been reduced by the pre-emptor subsequently executing against the amount so paid the order of that Court in his favour for costs, and that the subsequent payment of Rs. 75 within the period prescribed by the appellate Court satisfied the requirements of that Court's decree, subject to the judgment-debtor's right to recover the costs realized in execution of the first Court's decree. *Held* by Tyrrell, J., *contra* that although the pre-emptor had once made a payment which for a few days was a compliance with the first Court's decree such compliance became immaterial when that decree was modified on appeal, and as he had never had in any Court a credit for Rs. 200 as required by the appellate decree which was the true decree in the case, he had failed to fulfil the condition essential to pre-emption, and the defendant's application should be allowed. *BALMUKAND v. PANCHAM.*

[VIII-74]

(5). — *Payment of purchase money less interest—Compliance* In this case *A* obtained a decree conditional on payment of Rs. 109-4-9 and interest at 1 per cent per mensem within a month from the date of the decree. *A* deposited Rs. 109-4-9 within the time, but failed to deposit the interest then due. *Held* that the failure to deposit the very small sum of interest was a pure and *bonâ fide* mistake which does not render the deposit other than a substantial com-

CIVIL PROCEDURE CODE, s. 214—
(continued.)

pliance with the decree. *SUNDAR LAL v. RAM CHARAN.*

[IV-180]

(6).—*Payment within time.* On the 17th March, 1884, one *K B* obtained a decree for pre-emption which provided that the purchase-money should be paid within one month from the date of the decree. It did not contain any provision in accordance with the last portion of s. 214, Civil Procedure Code, to the effect that if the amount were not paid within the time prescribed the suit would stand dismissed. Both parties appealed from the decree the plaintiff as to the amount of the purchase-money the vendee as to the existence of the pre-emptive right. Both the appeals were however dismissed on the 15th January, 1885. The purchase-money was deposited in Court on the 16th February, 1885, (14th and 15th being close holidays.) *Held* that the period of one month within which the deposit should have been made should be regarded as beginning from the date of the decision of the first Court and not that of the appellate Court. The deposit was therefore clearly beyond time. *Sheo Prosad Lal v. Thakur Roy (N.W. P. H. C. Rep., 1868, p. 254)* and *Sukh Evaz v. Mokuna Bibi (I. L. R., 1 All., 132)* followed. *Hingan Khan v. Ganga Prosad (I. L. R., 1 All., 293)* and *Parshadi Lal v. Ramdial (I. L. R., 2 All. 744)* referred to. *CHHIDDA v. IMDAD HUSAIN AND OTHERS.*

[VIII-4]

(7).—*_____* In a suit for pre-emption, the decree of the Court of first instance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the appellate Court. *Held* that the decree of the appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the appellate Court's decree, and that payment by the decree-holder within one month from the date was in time. *Shohrat Singh v. Bridgman (I. L. R., 4 All., 376)*; *Luchmun Persad Singh v. Kishen Persad Singh (I. L. R., 8 Calc. 218)*; *Gobardhan Das v. Gopal Ram (I. L. R., 7 All. 366)*; *Noor Ali Choudhury v. Koni Meah (I. L. R., 13 Calc., 13)* and *Daulat v. Bhukandas Manekchand (I. L. R., 11 Bom., 172)* referred to. *RUP CHAND AND OTHERS v. SHAMSH-UL-JEHAN.*

[IX-127]

(8).—*_____* In a suit for pre-emption, the decree of the lower appellate Court increased the amount

CIVIL PROCEDURE CODE, s. 214—
(continued.)

payable by the plaintiff pre-emptor and was conditional upon payment of the increased amount before the 20th February, 1887. The plaintiff appealed to the High Court, but the appeal was dismissed, and the increased amount was not paid before the 20th February, 1887. No fresh period for payment was expressly allowed by the decree of the High Court. *Held* that it must be inferred that the High Court did not disturb the decree of the lower appellate Court as to the date by which payment was to be made by the pre-emptor and that payment not having been made before that date the suit stood dismissed. *Rup Chand v. Shamsul Jehun (I. L. R., 11 All., 346)* distinguished. *JAIRAM SINGH v. SRI KISHEN.*

[X-92]

(9).—*_____* A decree for pre-emption was conditional upon the plaintiff paying the amount of the purchase-money within two months, but omitted to declare expressly that in default of such payment the suit would stand dismissed. Pending an appeal by the defendant vendee the period allowed by the decree expired without the plaintiff having paid the purchase-money and the lower appellate Court, having first rejected an application by the plaintiff for extension of time, struck off the appeal on the ground that the money not having been paid the plaintiff's decree had fallen to the ground. *Held* that the Court was right in so doing; that the plaintiff had no right to appeal from a decree striking off the defendant's appeal, and that he could not in an appeal from such decree ask the High Court to extend the time for payment of the purchase-money. *MULU SINGH v. RAHIM KUAR.*

[VIII-22]

(10).—*_____* A decree was given in favor of the plaintiff in a suit for pre-emption. The plaintiff paid in a portion only of the pre-emptive price within the time limited by the decree. The defendant appealed. Long after the time prescribed for payment by the original decree had expired, the defendant's appeal was dismissed, but the time for payment was not extended by the appellate Court's decree. The plaintiff then, after the lapse of a period from the appellate decree in excess of that which had been given him for payment by the decree of the first Court, paid in the balance of the pre-emptive price which was accepted by the Court. On appeal by the defendant it was *held* that the order of the Court allowing the payment was without jurisdiction, the decree having, on the expiration of the time limited without payment by the plaintiff, become a decree in favor of the defendant. *JAGGAR NATH PANDE v. JOKHU TEWAJI.*

[XVI-43]

CIVIL PROCEDURE CODE, s. 214—
(continued.)

(11).—*Payment in Court—Realization by creditor.* The holder of a decree for pre-emption paid the decreed pre-emptive price into Court. A creditor of the decree-holder applied for attachment of the money so paid in, and ultimately was allowed by the Court to withdraw a portion of it. After the decree for pre-emption had been confirmed in appeal, the pre-emptor applied for possession of the pre-empted property. *Held* that the decree-holder was entitled to obtain possession, and that it was not competent to the Court to pay out to any one but the person entitled to it under the decree for pre-emption any portion of the pre-emptive price, so long as the decree for pre-emption was not modified or reversed in appeal. **ABDUS SALAM AND OTHERS v. WILAYAT ALI KHAN.**

[XVII-31]

s. 215.—*Jurisdiction.* *Held* that a suit for dissolution of a partnership, taking the accounts of the firm and a declaration of the plaintiff's right to a certain share in the debts due to the firm was not an application of the nature mentioned in s. 265 of Act IX of 1872, but a suit of the nature mentioned in s. 215, Civil Procedure Code, and was therefore not cognizable in the district Court but in the Court of the Munsif. **KALLAN DAS v. GANGA SAHAI.**

[III-100]

s. 216.—*Appeal.*

See s. 111, No. (1).

(1). s. 220.—*Error of Court.* *Held* (by Mahmood J.,) that it could not be said that the error of a Court of justice which leads a party to initiate proceedings against another is sufficient to exonerate the losing party from paying the costs incurred by the opposite party. **HASNI BEGAM v. THE COLLECTOR OF MUZAFFERNAGAR AND OTHERS.**

[VI-245]

(2).—*Costs not actually incurred.* *Held* that a Judge cannot allow costs which have not been incurred actually in the suit. **ABDUL SHAKUR KHAN v. ATA ULLAH AND OTHERS.**

[VII-227]

Execution of decree.

(1).—*Power of Court executing decree—To go behind its terms.* *Held* that when no costs were awarded by the decree (though it be a mistake) the Court executing the decree could not award costs. **TULSHI PRASAD v. MATTRA MAL AND ANOTHER.**

[V-325]

(2).—*Competence of Court executing decree.* The Court executing a decree is not competent to inquire whether the decree is or is not capable of execution in the sense of s. 266 of the Civil Procedure Code, or in any way to touch or interfere with the decree or to go behind

CIVIL PROCEDURE CODE, (continued.)
its terms but must accept and enforce it as it stands. **TOTA RAM AND OTHERS v. DWARKA PRASAD.**

[VIII-69]

(3).—*Execution of decree.* The holders of a decree, made in 1866, against K and certain other persons jointly, applied to recover mesne profits in execution thereof. K paid the decree-holders the mesne profits claimed and then sued his co-judgment-debtors for contribution, and in 1878 obtained a decree against them. Subsequently the holders of the decree of 1866 again applied to recover mesne profits in execution thereof, and in the proceedings which followed it was decided that mesne profits were not recoverable under the decree. After this K's representatives applied for execution of the decree of 1878. The lower Courts refused to execute the decree on the ground that, as under the decree of 1866 on which the decree of 1878 was based, mesne profits were not recoverable, it would not be equitable to allow a decree for contribution passed on a contrary supposition to be executed. *Held* that the lower Courts were not competent to go behind the decree of 1878, but must deal with it as it stood. **RAMPHAL RAI AND OTHERS v. RAMBARAN RAI.**

[II-151]

(4).—*Enforcement of decree.* The Court executing a decree for enforcement of hypothecation is not competent to entertain an objection that the property ordered by the decree to be sold is not legally transferable. **BISHESHAR RAI v. SUKHDEO RAI AND OTHERS.**

[VIII-41]

(5).—*Jurisdiction.* It is competent to the Court charged with the execution of a decree to consider the question as to whether the Court which passed the decree had jurisdiction to pass it unless the decree itself precludes that question. **Muhammad Sulaiman Khan v. Fatima (I. L. R., 11 All., 314); Haji Musa, Haji Ahmed v. Purmanand Nursey (I. L. R., 15 Bom., 216)** referred to. **IMDAD ALI v. JAGAN LAL AND ANOTHER.**

[XV-109]

(6).—*What decrees to be executed.* *Held* that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts as such may not be referred to and applied by the Court executing such decree. **SHOHRAT SINGH v. BRIDGMAN.**

[II-68]

MUHAMMAD ALTAF ALI AND ANOTHER v. BHOLA NATH.

[II-126]

BHAWANI GHULAM AND ANOTHER v. DEORAJ KUARI.

[IV-183]

CIVIL PROCEDURE CODE,—(continued.)

(7). —————
Where the appellate Court has modified the decree of the Court below the decree of the appellate Court supersedes entirely that of the lower Court, and is the only decree which can be executed. *Shohrat Singh v. Bridgman* (I. L. R., 4 All., 376); *Gobardhan Das v. Gopal Ram* (I. L. R., 7 All., 366) and *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (I. L. R., 11 All., 267) referred to. NOURANG RAI v. LATIF CHAUDHRI AND OTHERS.

[XI-148]

(8). —————
The effect of the decision of the Full Bench in *Shohrat Singh v. Bridgman* (I. L. R., 4 All., 376) is nothing more than that the last decree is to be regarded as the decree to be executed, whether it reverses, modifies or confirms; but when it affirms and adopts the mandatory part of the first Court's decree, that decree may be, and should be referred to, and the mandatory part of it so affirmed should be executed as though it were the decree of the appellate Court. *Kristo Kinkur Roy v. Rajah Burradacaunt Roy* (14 Moo, I. A. 465) referred to. Where the first Court of appeal affirmed the decree of the Court of first instance, and the High Court affirmed the decree of the lower appellate Court and dismissed the appeal, and the decree-holder made an application of which the object clearly was to have execution taken under the decree of the appellate Court, by carrying out the mandatory part of the decree of the Court of first instance, held that the objection that the decree-holder did not in his application expressly ask the Court to execute the decree of last instance, was under the circumstances a mere technical objection, and there was no reason why the execution asked for should not be allowed. GOBARDHAN DAS v. GOPAL RAM AND OTHERS.

[V-57]

(9). —————*Vague decree.* This was a suit for possession of a certain grove. The defendants denied the title of the plaintiff and pleaded limitation. The lower appellate Court gave a decree in the following words. "Save the compact group of eleven mango trees which the defendants may select all the rest of the trees on No. 1955 belong to the plaintiff." Held that the decision was bad for uncertainty. MUHAMMAD WAZIR v. HANUMAN DAS AND OTHERS.

[V-286]

(10). —————
Where the judgment of an appellate Court directed that a certain sum over and above what had been decreed to him in the Court of first instance should be decreed to the appellant, but the decree of the appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based and to the decree of the Court of first instance. Held

CIVIL PROCEDURE CODE,—(continued.)

that though the decree as thus drawn was informal, yet as the amount due to the decree-holder was ascertainable from the record, and the decree was thus practically capable of execution, as a matter of equity execution should be granted to the decree-holder. JAWAHIR MAL v. KISTUR CHAND AND ANOTHER.

[XI-119]

(11). —————*Decree-holder purchases subject to appeal.* A decree-holder who purchases at an auction sale under his decree purchases subject to the result of an appeal. *Zainul-Abdin v. Muhammad Asghar Ali Khan* (I. L. R., 10 All., 166) and *Sadasivayyar v. Muttu Sabapathi Chetti* (I. L. R. 5 Mad 106), referred to. SAID-UN-NISSA v. MANGU LAL AND OTHERS.

[XVII-28]

(12). —————*Sale set aside—Fresh application for execution.* A obtained a decree against one X on the 18th September, 1879, on a bond dated 8th October, 1876, in which a house was hypothecated. On the 21st November, 1879, the house was put up for sale in execution of a simple money decree held by one T against X and was purchased by B. On the 26th February, 1880, the house was again put up to sale in execution of A's decree and one C purchased it. The sale proceeds were distributed between A and one Z it being held that T's decree was a mere money decree and possession of the house was given to C by dispossessing B (the former purchaser). B however applied to the Court and he was restored to the possession of the house, the Court holding that A's decree was a simple money decree. C then applied for a refund of the purchase money which was due by A and Z. A then applied for an amendment of his decree which was done and the decree was made to declare a lien on the house. He now applied to execute his amended decree by enforcement of the lien. Held that there was nothing in the law to prevent him from doing so. GUJAR KUAR v. BEHARI LAL.

[III-57]

(13). —————*Joint liability of judgment-debtors.* B, K and D jointly mortgaged their village G to S and M as a collateral security for a sum of money jointly borrowed by them. On the 6th December, 1877, the debt not having been paid the mortgagees obtained a decree by enforcement of lien. The decree was passed jointly against the three mortgagors and the property. On the 15th August, 1883, and 29th August, 1883, K and D respectively executed two mortgage-deeds for Rs. 22,000 each mortgaging his one-third share in the village X. Out of the consideration for these mortgages Rs. 1,000 and 6,000 were paid by each brother on account of the decree. The present application was made by the decree-holders to realise the whole of the balance due to them against B alone. The lower Court held

CIVIL PROCEDURE CODE,—(continued.)

that it would be unfair and inequitable to allow them to do so. *Held* that the lower Court was wrong. The decree being joint and several the decree-holder can realize the debt from any defendant. **SANT LAL AND OTHERS v. BAKH-TAWAR SINGH.**

[V-327]

(14).—*Decree against hypothecated property—Execution against person.* A decree upon a hypothecation bond, which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor though an order for costs contained therein may be executed. **PRAN KUAR v. DURGA PRASAD.**

[VIII-21]

(1). **S. 223.—Failure to certify execution &c.—Effect.** Where the Court to which a decree has been sent for execution under the provisions of s. 223 of the Code of Civil Procedure fails to send to the Court which passed the decree notice of execution or of the cause of failure of execution as required by the said section such failure will not in any way affect the rights of the parties under the decree. **FAIZ-ULLAH KHAN v. AMIN-UD-DIN KHAN AND ANOTHER.**

[XII-71]

(2).—*Transfer of execution—Second application for execution.* *Held* that where a decree for money was transferred by the Subordinate Judge of Ghazipur to the Subordinate Judge of Azamgarh a second application for execution should be made to the Subordinate Judge at Azamgarh. **GAJADHAR v. HANUMAN AND OTHERS.**

[VI-31]

s. 224.—Fresh certificate. A decree made by the Munsif of Moradabad was sent for execution to the Munsif of Meerut. It was executed and partly satisfied and then the execution case was struck off on the 25th April 1879. The decree-holder subsequently applied to the Meerut Munsif for further execution of the decree. The records relating to the execution were still in the Munsif's Court and execution had not been certified to the Moradabad Munsif. *Held* that no fresh certificate was necessary and the application should have been entertained. **RANGILI v. RAIYAT HUSAIN.**

[III-247]

See **ABDA BEGAM v. MUZAFFAR HUSAIN KHAN.**

[XVII-218]

s. 228.—Power of Court executing transmitted decree. The powers which the foreign Court has, under s. 228 of the Civil Procedure Code, are confined to the execution of the decree, and the Court cannot question the propriety or correctness of the order directing execution, nor can it, with reference to s. 239 of the

CIVIL PROCEDURE CODE, s. 228—(continued.)

Code, stay execution except temporarily. *Held*, therefore, where the drawers of a *hundi* against whom the endorsee from the payee had obtained a decree on the *hundi*, objected in the Court, to which the decree had been transmitted for execution that execution should not be allowed because the payee had paid the amount of the *hundi* to the decree-holder, after the decree had been passed, and such Court refused to entertain the objection that the order of the lower appellate Court directing that the parties should be allowed to produce evidence in regard to the alleged payment, and that, should the Court of first instance find that the decree-holder had received satisfaction to the full amount of the decree, the judgment debtors should be absolved from all liability under the decree, could not be maintained. **RAM LAL v. RADHEY LAL AND ANOTHER.**

[V-21]

(2).—*Execution of decree.* The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court had been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution. *J. G. Bagram v. J. P. Wise* (1, B. L. R., F. B., 91.) followed. **ABDA BEGAM v. MUZAFFAR HUSAIN KHAN.**

[XVII-218]

See **RANGILI v. RAIYAT HUSAIN.**

[III-247]

(1). **s. 230. Due diligence—(Act X of 1877.)** A who held a decree against B applied for its execution on the 6th December, 1877. It was struck off "for default of prosecution" on the 18th January, 1878. On the 5th December, 1878, he again applied for execution of the decree. It was rejected on the 12th December, 1878, with reference to s. 230, Civil Procedure Code, as they stood before they were amended by Act XII of 1879, on the ground that he had not used due diligence in respect of the first application. On the 4th May, 1881, A again applied for execution. *Held* that it was time-barred. **KIRAT v. PAHLAD AND ANOTHER.**

[II-97]

CIVIL PROCEDURE CODE, s. 230—
(continued.)

(2.)—“This section”—“Law in force”—*Act X of 1877, Act XIV of 1882.*] The holder of a decree applied for execution under s. 230 of Act X of 1877, and the application was granted. Within three years after the passing of Act XIV of 1882, by which Act X of 1877 was repealed, he applied, for the first time, under s. 230 of the former Act, for execution of the decree. At the time this application was made more than twelve years had elapsed from the date of the decree. *Held* by Straight, Brodhurst, and Tyrell, JJ., that the application might be granted, it being the first made under s. 230 of Act XIV of 1882 and the first made after the expiration of twelve years from the date of the decree, and not being barred by the last paragraph of s. 230 of that Act read in conjunction with the 3rd paragraph of s. 230 of Act X of 1877, the “law in force” mentioned in the last paragraph of s. 230 of Act XIV of 1882 referring to the law of limitation in force at the time the Act was passed, and not to the third paragraph of s. 230 of Act X of 1877. *Held* by Stuart, C. J. and Oldfield, J., that the application should not be granted, the effect of the last paragraph of s. 230 of Act XIV of 1882 being to bar any proceedings to enforce a decree under that Act which would have been barred under s. 230 of Act X of 1877, if taken thereunder, on the ground that the period of twelve years had elapsed from the dates specified in that section. *MUSHARAF BEGAM v. GHALIB ALI. (Obsolete.)*

[IV-22]

JOKHU RAM AND OTHERS v. RAMDIN AND ANOTHER.

[VI-162]

RAMADHAR v. RAMDAYAL.

[VI-168]

(3.)—[] Where an application was made under s. 230 of the Code of Civil Procedure, 1877, as amended by Act XII of 1879, for execution of a decree more than twelve years old and the application was granted. *Held* that a subsequent application for execution of the decree, under s. 230 of the Code of Civil Procedure, 1882, should have been refused, since the decree had been once allowed the benefit of the three years grace under the last paragraph of s. 230 of the Code of 1877, and then became dead or unexecutable. *Held* that there is nothing in the Code of 1882 to justify the conclusion that it was intended to revive decrees which had become dead before it became law, and that here the decree-holder's right having already become dead before the enactment of the present Code, the passing of that Code could not bring that right into existence again. *Musharraf Begam v. Ghalib Ali (I. L. R., 6 All., 189)* distinguished. *BHAWANI DAS AND ANOTHER v. DAULAT RAM AND OTHERS. (Obsolete.)*

[IV-134]

GENDA v. RAM PRASAD AND ANOTHER.

[IV-333]

CIVIL PROCEDURE CODE, s. 230—
(continued.)

(1).—*Application barred before Act XIV of 1882 came into force.*] *Held* that the proviso to s. 230 of the Civil Procedure Code applies only to applications which were barred at the date the Code came into force and not to those which had sometime to run on the date but became subsequently barred. To these latter therefore the three years extension was not applicable. *TUFAIL AHMAD v. SADHO SARAN SINGH AND OTHERS. (Obsolete.)*

[V-193]

(5).—“Passing of the Act.”] *Held* that the words “passing of the Act” mean the day on which the Act received the assent of the Governor-General and not the day on which it came into force. *RADHA KISHUN v. BUDHA SINGH. (Obsolete.)*

[II-2]

JUGAL KISHORE v. ZAMANIA BEGAM.

[I-58]

NATHU SINGH AND ANOTHER v. BHOPAT RAM.

[I-74]

TULSHI RAM AND OTHERS v. CHOTEY LAL.*

[I-113]

(6).—*Decree for payment of money—Decree for sale.*] *Held* that s. 230 of the Code of Civil Procedure did not apply to a decree which purported to be made under s. 88 of Act No. IV of 1882, but which in addition to the relief provided for by that section, granted also the relief provided for by s. 90 of the said Act. *JOGUL KISHORE v. CHEDA LAL AND OTHERS.*

[XIII-184]

(7).—[] A decree for sale of hypothecated property made in a suit upon a mortgage bond is not a “decree for the payment of money” within the meaning of s. 230 of Act No. XIV of 1882. *Fateh Chand v. Muhammad Bakhsh (Weekly Notes, 1894, p. 74)* distinguished. *RAM CHARAN BHAGAT v. SHEO BARAT RAI AND ANOTHER.*

[XIV-142]

(8).—*Decree for mesne profits and costs—Act X of 1877.*] A was the holder of a decree for possession of immoveable property and for the payment of mesne profits and costs, dated the 6th February, 1864. She made an application to enforce it in respect of the payment of mesne profits and costs on the 29th November, 1877. She made a similar application on the 17th January, 1881. *Held* that the last application was barred by s. 230, Civil Procedure Code. *RAHSI v. SHEOBALAK TEWARI AND ANOTHER.*

[II-111]

CIVIL PROCEDURE CODE, s. 230—
(continued.)

(9).—“*Application to execute a decree.*”] The term “application to execute a decree” in the third paragraph of s. 230 of the Code of Civil Procedure means any application to execute a decree. It is not confined to the last application preceding the expiry of the period of twelve years from either of the points of time mentioned in cl. (a) or cl. (b) of the same paragraph of the section above mentioned. *Paraga Kuar v. Bhagwan Din* (I. L. R., 8 All., 301) distinguished. *Ramadhar v. Ram Dayal* (I. L. R., 8 All., 536) referred to. *TILESHAR RAI AND OTHERS v. PARBATI AND OTHERS*.

[XIII-93]

(10).—“*Subsequent application.*”—*Application to revive one previously made.*] The decree-holder applied for execution on the 6th February, 1882, but on the application of the judgment-debtor the Court postponed the execution in order to enable the judgment-debtor to raise money. On 7th April, 1883, the money not having been paid they again applied for postponement of the execution. This was refused and on the 7th July, 1883, the decree-holder made his present application. *Held* that this application was linked to that of 6th February, 1882, and therefore not liable to the bar attaching to a subsequent application in the sense of para. (3) of s. 230 of the Civil Procedure Code. *BHAGWANTI PRASAD v. THE COLLECTOR OF BASTI*.

[V-269]

(11).—] The appellant is the holder of a decree dated 26th June 1873. He made an application for execution on the 10th March, 1884, asking that the decree be sent for execution to the district Court of Aligarh with a certificate of non-satisfaction. The application was granted under s. 224, Civil Procedure Code. The appellant then filed an application which is now the subject of appeal, to the Subordinate Judge of Aligarh. This application was made on the 27th November, 1885 (*i. e.* after 12 years.) *Held* that the application was not a fresh one but only one seeking to give effect to the application of the 10th March, 1884, and was therefore within time. *RAM SAILAI v. NANNI*.

[VI-187]

(12).—] An application made in May, 1883, for execution of a decree passed in July 1871, was struck off the file without any order either granting or refusing it. In September 1883, another application for execution was granted by the Court, but on a petition *ad misericordiam* by the judgment-debtor who promised to pay the judgment-debt, the Court, with the decree-holder's consent allowed a delay of two months. In January 1885, the debt remaining unpaid, the decree-holder again applied for execution. *Held* that the application not being a second application for execution made since the expiration of

CIVIL PROCEDURE CODE, s. 230—
(continued.)

twelve years from the date of the decree but only an application by way of revivor of the application of September, 1883, which had been suspended was not barred by s. 230 of the Civil Procedure Code. *Held* also that the application of September, 1883, could not be considered bad in law because the previous application of May, 1883, had received no judicial treatment at the hands of the Court executing the decree. *Surju Prasad v. Sita Ram* (I. L. R., 10 All., 71) referred to. *MUHAMMAD ISMAIL v. SUKH RAM*.

[VIII-295]

(13).—] A decree-holder obtained a decree for money on the 30th of July, 1877. Application was made in May, 1878, under the terms of s. 230 of the Code of Civil Procedure for execution of this decree by sale of three houses belonging to the judgment-debtor. Under that application two out of the three houses were sold. The sale of the third house was postponed on the application of a party. On the 15th of December, 1878, the application of May, 1878, was “struck off”; on the 11th of November, 1889, the decree-holder applied in terms to revive the application of May, 1878, and to bring to sale the remaining house. *Held* that s. 230 of the Code of Civil Procedure applied to the circumstances as above set forth and was a bar to the further execution of the decree. *THE DELHI AND LONDON BANK, LIMITED v. MAJOR B. L. REILLY*.

[XIII-124]

(14).—] *R N* and others obtained a simple money decree against *R S* and another on the 24th of February, 1881. On the 2nd of May 1892, previous applications for execution having been unsuccessful, the decree-holders made an application for execution in consequence of which certain property of the judgment-debtors was attached. That application was subsequently struck off by the Court, the attachment being maintained. On the 7th March, 1893 a further application for execution was made. *Held* that whether the application of the 7th of March, 1893, was or was not merely a continuation of the former application of the 2nd of May, 1892, execution of the decree was barred by the rule prescribed by s. 230 of the Code of Civil Procedure. *Held* also that an order on an application for execution striking off the application but maintaining attachment effected in pursuance thereof was an order not warranted by law. *RAM NEWAZ AND OTHERS v. RAM CHARAN AND ANOTHER*.

[XV-155]

(15).—] The “subsequent application to execute the same decree” mentioned in s. 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by s. 235 of the Code. Hence where an application

CIVIL PROCEDURE CODE, s. 230 —
(continued.)

for execution in accordance with s. 235 of the Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application; the right of the decree-holder to obtain execution will not necessarily be defeated if, by a reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under s. 235 above referred to, cannot be obtained within the period limited by s. 230. Further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under s. 235 and would not be obnoxious to the bar of s. 230. *The Delhi and London Bank, Limited v. Reilly* (W. N. 1893, p. 124) overruled. **RAHIM ALI KHAN AND OTHERS v. PHUL CHAND.**

[XVI-142]

(16).—*Application to wrong Court—“Granted.”—(Act X of 1877).* On the 18th November, 1879, within three years from the passing of Act X of 1877, A who held a decree against B dated 16th July, 1860, applied under s. 230 of that Act for its execution. But the application was made to the wrong Court, to the Munsif of Ghazipur instead of Ballia. He was consequently referred to the latter Court, to which he applied on the 15th May, 1880. Held that the proceedings taken before the Munsif of Ghazipur were good and valid for the purposes of limitation and as that application was not granted the 3rd para of s. 230, Civil Procedure Code, did not apply. **MAHARAJA RADHA PRASAD SINGH v. INDRAS KUAR.**

[II-91]

(17).—*“Granted.”* Under s. 230 of the Civil Procedure Code, after a decree is twelve years old, there is a prohibition against its being executed more than once, i.e., an application for execution should not be granted if a previous application has been allowed under the provisions of that section. The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not, “granting” an application within the meaning of s. 230 of the Code, and ss. 245, 248 and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March, 1877, various amounts were paid on account of the decree. In that month an application was made for execution

CIVIL PROCEDURE CODE, s. 230 —
(continued.)

of the decree the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March, 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this the application for execution was struck off on the 5th March, 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again on the 31st March, 1883, the decree-holder applied once more for execution of the decree. Held that neither the previous application of the 9th March, 1881, nor that of the 5th March, 1883, could properly be said to have been “granted” within the meaning of s. 230 of the Civil Procedure Code, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed. **PARAGA KUAR v. BHAGWAN DIN AND ANOTHER.**

[VI-97]

(18). s. 230 (b).—*Instalment decree* In 1868 a decree was obtained for Rs. 1,100 which provided that the amount should be paid in instalments, the first instalment being Rs. 200, to be paid at the end of the first year, and that the other instalments should be Rs. 100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas *per cent. per mensem*. In 1877, the decree-holder applied for execution of the decree asserting that Rs. 600 had been paid up to that time by five instalments, one of Rs. 200, and four of Rs. 100 each, and that default had been made in payment of the fifth instalment of Rs. 100, and he asked to recover the whole amount due on the decree. No order was passed on this application and eventually the case was struck off. In 1880, the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment-debtor but eventually the case was struck off. In 1883, the decree-holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch

CIVIL PROCEDURE CODE, s. 230 (b)—
(continued.)

as 10 instalments had been paid, and even if they had been paid, they could not be recognized, not having been certified. *Held* that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time, and might take out execution. **KANJI MAL v. KANHIA LAL.**

[V-60]

(19).—*Arrangement to pay by instalments—Not carried out by order under s. 210.* A decree was passed against defendant in the year 1859. In execution of the decree in 1878 an arrangement was made whereby the decree-holder allowed the judgment-debtors to pay the decree by instalments and on this arrangement being certified the Court released the property of the judgment-debtor then under attachment but it was not carried out by an order, under s. 210, Civil Procedure Code. Decree-holder contended that inasmuch as the Court sanctioned the arrangement by releasing the attached property it should be taken to have made the order required under s. 210 and therefore execution of the decree was not barred under s. 230 of the Code. *Held* that the decree was barred as more than 12 years had elapsed from the passing of the decree. **RADHEY LAL v. NATHU AND OTHERS.**

[II-5]

(20).—*_____.* The respondents, the holders of a decree against the appellants dated the 18th November, 1868, of which they had obtained execution under s. 230, Civil Procedure Code, made the present application for execution after the expiry of 12 years from the date of the decree. It appeared that in 1879, in the course of execution proceedings the parties had entered into a compromise whereby the decree was to be paid by instalments and the decree-holder was empowered to realize the amount when default was made in payment of an instalment. This arrangement was notified to the Court which regarding the decree as fully satisfied made an order striking off the execution proceedings. *Held* that the application was barred by s. 230 for the order of the Court did not fall within s. 230 (b). **SAHODRA KUAR AND OTHERS v. MANOHAR DAS AND OTHERS.**

[III-147]

(21).—*Certain date.* The parties to a decree presented a petition to the Court executing the decree stating that it had been agreed between them that the amount of the decree should be paid by ten monthly instalments of Rs. 500 each. The Court made an order directing that such petition should be filed. *Held* that this order did not amount to one directing payment of money to be made at a certain date,

CIVIL PROCEDURE CODE, s. 230 (b)—
(continued.)

which would give a fresh period of limitation under s. 230 (b) of the Code of Civil Procedure. **BALCHAND AND ANOTHER v. RAGHUNATH DAS AND ANOTHER.**

[I-168]

(1.) s. 231. *Decrees to which section applies.* The provisions of s. 231 of the Code of Civil Procedure are not applicable to the case of joint decree-holders the execution of whose decree is conditional on their joint performance of a particular act. **FARZAND AND ANOTHER v. ABDULLAH.**

[III-211]

(2).—*"Whole decree."* A joint decree cannot be executed by one of the several joint holders in respect only of his share of the decree. **Ram Autar v. Ajudhia Singh (I. L. R., 1 All., 231); The Collector of Shahjahanpur v. Surjan Singh (I. L. R., 4 All., 72) and Haro Sanker Sandayal v. Tarak Chandra Bhuttacharjee (3 B. L. R., 114) followed.** **BANARSI DAS AND OTHERS v. MAHARANI KUAR AND ANOTHER.**

[II-140]

(3).—*Transferee.* *Held* that the transferee of a joint decree though it had been transferred to him by one only of the two decree-holders was entitled to execute the whole decree for the benefit of both the decree-holders. **RUP SINGH v. DEOKINANDAN.**

[III-262]

(4).—*Partial satisfaction.* B and H were the joint holders of a decree for money. B applied for execution of the decree in respect of a moiety alleging that the other moiety had been paid to H. The judgment-debtor objected to the application on the ground that the whole of the decretal amount had been paid to H who had certified it. The lower appellate Court rejected the application on the ground that B could not apply for the execution of his part of the joint decree. *Held* that there was no objection to execution proceeding but the only question will have to be decided whether the whole amount had been paid as alleged by the judgment-debtor or not. **BANSIDHAR v. KISHEN LAL.**

[III-262]

(5).—*_____.* *Held* that when one of three joint decree-holders gives a *bharpai* without the consent of the other two, these latter are entitled to execute the decree to the extent of their own shares. **BHAIRON PRASAD AND ANOTHER v. BRIJ MOHAN.**

[VI-55]

(6).—*Against portion of property.* A together with five others obtained a decree for joint possession of a house. A week

CIVIL PROCEDURE CODE, s. 231—
(continued.)

within the limitation of three years *A* applied to execute the decree in the joint interest of all the decree-holders by putting them in possession of half the house alleging that the other half had been sold by some of the co-decree-holders to strangers who colluding with the judgment-debtors would not join in the application. Subsequently with the permission of the Court he amended his application so as to include the whole house. The judgment-debtor objected to the execution on the ground that the application was illegal as the decree could not be executed except as a whole. *Held* that s. 231, Civil Procedure Code, prohibited the breaking up of a single joint decree into two or more decrees in favour of different persons, but does not prohibit the execution of such a decree against a part only of the property decreed. Again on proof of such collusion he was even entitled to execute the decree even to the extent of his own share. **KUDHAI v. SHEO DAYAL AND ANOTHER.**

[VI-125]

(7). ————— *Judgment-debtor acquiring right of decree-holder.* When by operation of law one of several joint judgment-debtors acquires the position of decree-holder in respect of the whole judgment-debt, the effect is to extinguish the liability of the other judgment-debtors and the decree cannot be executed against them. But when one of them so acquires only a partial interest in the decree the effect is not to extinguish the entire judgment-debt, but so much only of it as such judgment-debtor has so acquired. *Wise v. Abdool Ali*, (7 W. R., 136); *Pogose v. Fakur-ood-deen Mahomed Ahsan*, (25 W. R., 343); *Degumburee Dabee v. Soroop Chunder Hazrah* (9 W. R., 230) and *Khoshalee v. Nund Lal* (N. W. P., H. C. Rep., 1874, p. 1) referred to. *Held*, therefore, where one of several joint decree-holders applied for execution in respect of his own share only, and the joint judgment-debtors under the decree had inherited the right therein of one of the joint decree-holders that the application was contrary to law; that so much of the judgment-debt as had devolved upon such persons had been extinguished; and that application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt. **Brojeswari Chowdharanee v. Tripoora Soonderce Debi** (3 C. L. R., 513) and **Dibee Budhun v. Hafezah**, (4 C. L. R., 70) followed. **BANARSI DAS AND OTHERS v. MAHARANI KUAR AND ANOTHER.**

[II-140]

(8). —————
Where in appeal the suit of a plaintiff against two defendants was dismissed with costs in favor of the defendants jointly, and where subsequently one of the joint decree-holders died and his rights under the decree devolved upon the judgment-debtor. *Held* that it was competent to the surviving decree-holder to exe-

CIVIL PROCEDURE CODE, s. 231—
(continued.)

cute the decree for half the cost against the judgment-debtor. **Banarsi Das v. Maharani Kuar** (1. L. R., 5 All., 27) referred to. **SIRTAJ KUAR v. NARENDARA BAHADUR PAL.**

[XIV-15]

(1). s. 232.—*Transferee—Hindu son.* *Held* that in the absence of any proper assignment of the decree a son is not competent in the lifetime of his father to apply for the execution of a decree obtained by his father. **ANTAJI v. DURGA PRASAD.**

[IV-39]

(2). ————— *Attachment.* If at the date of the assignment of a decree the judgment-debtor's property is already under attachment in execution of such decree, it is not necessary for the assignee of the decree to apply for a fresh attachment. When either the decree-holder or his assignee applies to have attachment under the decree of property which has been previously attached under the decree it lies upon the decree-holder or the assignee of the decree as the case may be, if the question is raised, to show that the second application was unnecessary by reason of the first attachment being still subsisting. Failing such evidence a Court may presume that the prior attachment had ceased before the application for a second attachment was made. **Puddomone Dossee v. Muthoora Nath Chowdhry** (12 B. L. R., 411), referred to. **HAFIZ SULEMAN v. SHEIKH ABDULLAH.**

[XIV-13]

(3) s. 232 (a).—*Defective registration—Notice.* The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently *M* transferred the decree to other persons and the co-transferees applied under s. 232 of the Civil Procedure Code, to have their names substituted for those of the original decree-holders. The judgment-debtor opposed the application on the ground that *M*'s name had not been substituted for the names of the original decree-holders who had transferred to him and that the transfers to *M* were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate, in accordance with s. 28 of the Registration Act (III of 1877). It appeared that no notice had been issued to *M* under s. 232 of the Civil Procedure Code, that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below. *Held* that matter involved questions arising between the parties to the decree or their representatives within the meaning of s. 244 (c) of the Code, and that the order allowing the application was therefore a decree within the definition of s.

CIVIL PROCEDURE CODE, s. 232 (a)—
(continued.)

2, and was appealable as such. *Held* that, even assuming that the judgment-debtor had a *locus standi* to raise the objection that notice had not been issued to the applicant's transferor, he had no passable interest in the question, and could not be prejudiced by the passing of the order; that it was not necessary to cite the representatives of the transferor; and that the order not being one upon which execution of the decree could issue, but merely for a transfer of names, the objection that the transferor had not been cited under s. 232 was not a substantial one. *Held* that the objection in reference to s. 28 of the Registration Act, could only properly be raised between the transferor and the transferee, and not by the judgment-debtor, and moreover had no force. *Held* that it could not be said that where a decree has been assigned by one assignor to another, the substitution of his name on the record in lieu of that of the original decree-holder was a condition precedent to the assignor's passing title under the assignment. *GULZARI LAL v. DAYA RAM AND ANOTHER.*

[VI-287]

(4.) s. 232 (b). *Extinguishment of decree.*

See s. 231, Nos. (7) and (8).

(5.) —————.]
Where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer the decree does not become incapable of execution, but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property. The rule of law against breaking up the integrity of a mortgage security is a rule aiming at the protection of the mortgagee, and is applicable to cases where the mortgagee himself has acquired the ownership of a portion of the mortgaged property. *KUDHAI v. SHEO DAYAL AND OTHERS.*

[VIII-231]

(6.) ———— *Appeal.*] In execution of a decree by persons claiming to be the legal representatives of the deceased decree-holder the Court passed an order in the following terms:—That the sale be adjourned, the Collector be required to strike off the execution case if within the term to be fixed by him none of the persons applying for execution filed a certificate to recover the debt. *Held* that the order was not a decree. *CHAMPA LAL v. MAHESH SITLA BAKSH SINGH.*

[VIII-82]

(7) ———— *Order falling under s. 244, C. P.*

See s. 244, Nos. (28), (29), (30), (31).

CIVIL PROCEDURE CODE,—(continued).

(1) s. 234.—*Legal representative—Joint Hindu family.*] An application was made under s. 234 of the Civil Procedure Code for execution of a decree by attachment of certain moveable property in the hands of the legal representatives of the deceased judgment-debtor who was a Hindu. The representatives objected that the property had always been their own, and had not come to them from the deceased. There was no specific evidence on this point, and there was no evidence that the objectors and deceased were not members of a joint Hindu family. *Held* that the property must be presumed to have belonged to the deceased as a member of a joint Hindu family, and the decree-holder was not bound to prove that each piece of such property had belonged to him; that it was for the objectors to show that they were no longer liable to execution by reason of having duly administered the estate and that assets were no longer available for satisfaction of the decree; and that, this not having been shown, execution against the property had been rightly allowed. *DURGA PRASAD AND ANOTHER v. CHOKHE LAL.*

[VIII-49]

(2) ———— *Application for substitution—Attachment—Sale.*] In execution proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the life-time of the judgment-debtor his proper course is that marked out by s. 234 of Act No. XIV of 1882, but if the property has been attached during the life-time of the judgment-debtor, it then comes into the hands of the law and the attachment does not abate on the death of judgment-debtor and for the purpose of proceeding against, and if necessary selling that property it is not necessary to implead any one as a legal representative. *ABDUL RAHMAN v. SHANKAR DAT DUBE.*

[XV-35]

(3) ————]. S. 234 C. P. C. applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life time and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. *SHEO PRASAD v. HIRA LAL.*

[X-103]

(4) ———— *Failure to apply for substitution—Sale.*] On a bond dated in July 1873, A obtained a decree dated in December 1877, enforcing a mortgage of two houses. On the 11th February, 1878, A took out execution and caused the houses to be attached on the 13th February, 1878. The case was struck off in September

CIVIL PROCEDURE CODE, s. 234—
(continued.)

1879, maintaining the attachment. On the 5th December, 1879, *B* also obtained a decree on a bond, dated the 3rd October, 1877, mortgaging the same houses. (*A* had obtained his decree in the Munsif's Court and *B* in that of the Subordinate Judge of Agra). *B* took out execution on 2nd February 1880, had the houses attached on the 16th, February, 1880, and they were sold on the 29th March, 1880, and bought by *B*. After this *A* applied to execute his decree on 5th August, 1880, in the Munsif's Court by the sale of the houses which were accordingly sold on the 18th September, 1880, and the sale confirmed on the 19th November, 1880. *A* was himself the purchaser *A* having been obstructed in obtaining possession has brought this suit. Defendant pleaded that the execution sale on which the plaintiff relies is void on the ground that the judgment-debtor had died before the sale took place though after the order for sale was made and no persons were brought on the record as his legal representatives. *Held* that the objection has no force and the suit must be decreed. **THE UNCOVENANTED SERVICE BANK v. AJUDHIA NATH AND OTHERS.**

[IV-67]

(5)———*Questions to be decided by Court executing decree.*] In the case of an application under s. 234 of C. P. C. to execute a decree against a person alleged to be a representative of a deceased judgment-debtor it is for the Court which passed the decree to decide whether the person against whom execution is sought is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. **SETH SHAPURJI NANA BHAI v. SHANKAR DAT DUBE.**

[XV-74]

(6.) s. 239—*Power of Court executing transmitted decree.*]

See s. 228, No. (1).

(1.) s. 243.—*Appeal.*] An appeal lies from an order under s. 243 of the C. P. Code staying execution of a decree pending a suit between the decree-holder and the judgment-debtor. The words "such Court" in s. 243 do not limit the exercise of the powers conferred by that section to decrees passed by the Court in which the suit is pending; but, with reference to ss. 235 (d), 581, and 583 that Court is competent to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal. **KASSA MAL v. GOPI.**

[VIII-51]

(2.)———*Stay of execution.*] There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Code of Civil

CIVIL PROCEDURE CODE, s. 243—
(continued.)

Procedure have no reference to a case in which execution has already been carried out and the decree-holder placed in possession of the property decreed to him. **GHAZIDEEN v. FAQIR BAKSH.**

[IV-226]

s. 244.

(1). Questions for Court executing decree.

(2). Questions arising between parties to the suit.

(3). Representative.

(4). Relating to execution, discharge, &c.

(1). Questions for Court executing decree.

(1.) s. 244.—*Questions that should have been raised in the suit.*] Where a person on his own application was added as a party respondent to an appeal, and on the case in appeal being remanded under s. 562, Civil Procedure Code, for re-trial on the merits, practically took no steps whatever to defend the suit. *Held* that he could not afterwards plead, by way of objection to execution of the decree, matters which ought to have formed part of his defence to the suit had he chosen to defend it. **Ram Kirpal v. Rup Kuari (I. L. R., 6 All., 269)** referred to. **KISHAN SAIHAI v. ALLADAD KHAN AND ANOTHER.**

[XI-221]

(2.)———

The plaintiff in a suit to enforce a right of pre-emption obtained a decree to the effect mentioned in s. 214, Civil Procedure Code, on payment by him of the purchase-money into Court. The defendants objected in the execution department to such payment on the ground that it had not been made within time. The Court which made the decree disallowed the objection. The defendants appealed from the order disallowing the objection. They had previously appealed from the decree. The appellate Court heard both appeals together and holding that the purchase-money had not been paid into Court within time reversed the decree and allowed the objection. The plaintiff preferred a second appeal to the High Court from the appellate Court's decree which was admitted. He also preferred an appeal from the appellate order allowing the objection, but this appeal was rejected as being beyond time, and such order became final. *Held* that, inasmuch as the question whether the plaintiff had paid the purchase-money into Court within time was not one relating to the execution of the decree within

CIVIL PROCEDURE CODE, s. 244—
(continued.)

the meaning of s. 244 of the Civil Procedure Code. but was one which should be decided in the suit itself, and therefore the proceedings in the execution department touching that question were ill-founded, such order was not a bar to the hearing of the second appeal preferred by the plaintiff. **MUHAMMAD ALI AND OTHERS v. DEBIDIN RAI.**

[II-94]

(2). Questions arising between parties to the suit.

(3).—Between co-defendants.] Held that s. 244, Civil Procedure Code, was not applicable to cases where the question was between two judgment-debtors *inter se* and not between the parties arrayed against each other as decree-holders on the one part and judgment-debtors or their representatives on the other. **RAYNOR v. THE MUSSOORIE BANK, LIMITED.**

[V-204]

RAM GOPAL v. KHALI RAM.

[IV-159]

(4).—The plaintiffs in a suit for money obtained a decree against all the defendants, except *P* and among them *K*. On appeal the Court of first appeal gave them a decree against *P*. In execution of this decree they attached and were paid, as belonging to *P*, certain money deposited in the Government Treasury in *K*'s name. On appeal by *P*, the Court of second appeal reversed this decree, and restored the decree of the first Court dismissing the suit as regards *P*. *P* thereupon applied in execution of his decree for a refund of the money. The plaintiffs objected on the ground that the money belonged to *K*. Held that the Court executing *P*'s decree was not competent to decide the question whether the money belonged to *P* or to *K*, such question not being one between *P* and them only, but involving and raising a question of title between him and *K* as to their conflicting claims, "*inter se*" to the money. **PUSAI v. MAHADEO PRASAD AND ANOTHER.**

[III-173]

(5).—S. 244 of the Code of Civil Procedure does not apply to a suit brought by one of two joint judgment-debtors who has been compelled to satisfy the decree in full against the other joint judgment-debtor for contribution. **RAM SARAN PANDE v. JANKI PANDE.**

[XV-240]

(6).—Person originally party but exempted afterwards.] Held that persons who had originally been made parties to a suit,

CIVIL PROCEDURE CODE, s. 244—
(continued.)

but had been expressly exempted from the operation of the decree, were not "parties to the suit" within the meaning of s. 244 of the Civil Procedure Code with regard to objections taken by them in respect of the attachment of their property by the decree-holder; but that such objections must be considered to be objections under s. 278 of the Code. **Jangi Nath v. Phundo (I. L. R., All., 74)** referred to. **MUKARRAB HUSAIN AND ANOTHER v. HUMMUT-UN-NISSA.**

[XV-153]

MASIHULLAH v. KIFAYATI.

[XIII-67]

(7).—Collector applying under s. 411, Civil Procedure Code.] Held that a Collector applying on behalf of Government under s. 411, Civil Procedure Code, for recovery of court-fees by attachment of a sum of money payable under a decree to a plaintiff suing in a *forma pauperis* might be deemed to have been a party to the suit in which the decree was passed within the meaning of s. 244 (c), Civil Procedure Code, and that an appeal would therefore lie from an order granting such application. **JANKI v. THE COLLECTOR OF ALLAHABAD.**

[VI-300]

(8).—Surety under s. 253, Civil Procedure Code.] Held that a surety under s. 253, Civil Procedure Code, puts himself into the position of a defendant in the cause and is considered for the purposes of the suit a party to it so that an appeal against him is maintainable though he was not made a defendant in the first Court. **Bans Bahadur Singh v. Mugha Begam (I. L. R., 2 All., 604)** followed. **MAKHAN LAL v. MUHAMMAD YAHIA.**

[VIII-13]

BALDEO DUBE v. MUHA

[VI-38]

(9).—Surety under s. 336, Civil Procedure Code.] One *B M* became surety under s. 336 of the Code of Civil Procedure on behalf of one *G R*, a judgment-debtor, to the effect that *G R* would appear before the Court when called on and would within one month file an application to be declared an insolvent. *G R* did so apply, but on the surety's asking the Court to declare him discharged of his liability the Court refused to do so. Held that the order refusing to discharge him was not appealable, was therefore open to revision under s. 622 of the Code. **Koylash Chandra Shaha v. Christophoridi (I. L. R., 15 C., p. 171)** referred to. **BANNA MAL v. JAMNA DAS AND OTHERS.**

[XIII-68]

CIVIL PROCEDURE CODE, s. 244—
(continued.)

(10). ———— *Different characters.* *Held* that where a decree is passed against a person in one capacity (partner in a firm) and he objects to an attachment under the decree in another (the house attached is his personal property) which is disallowed, no appeal lies from such order as the order would fall under s. 281 and not under s. 244, Civil Procedure Code. **ABDUL RAHMAN v. MUHAMADYAR.**

[II-1

NATH MAL DAS AND OTHERS v. TAJAMMUL HUSAIN.

[IV-218

(11). ———— *]* In a suit upon a hypothecation bond a third party was made defendant as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond and for enforcement of the mortgage. In execution of the decree the debt not being satisfied by sale of the mortgaged property, the decree-holder caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree. *Held* that as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 283 and was not barred by s. 244. **Kameshwar Pershad v. Run Bahadur Singh (I. L. R. 12 Calc., 458)** referred to. **Mulmantri v. Ashfaq Ahmad (I. L. R., 9 All., 605)** and **Nimha Harishet v. Sitaram Paraji (I. L. R. 9 Bom., 458)** distinguished. **JANGI NATH AND OTHERS v. PHUNDO AND ANOTHER.**

[VIII-275

(12). ———— *Judgment-debtor setting up justitii.* *Where* certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right. *Held* that the matter in dispute was one between the parties to the suit in which the

CIVIL PROCEDURE CODE, s. 244—
(continued)

decree was passed, and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Civil Procedure Code, and was therefore to be determined in the execution department and not by regular suit. **Chowdry Wahed Ali v. Musammal Fumace (11 B. L. R., p. 155); Shankar Dial v. Amir Haidar (I. L. R., 2 All., 752)** and **Nath Mal Das v. Tajammul Husain (I. L. R., 7 All., p. 36)** referred to.

Per MAHMOOD, J.:—That the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends, is whether the judgment-debtor, in raising objection to execution of decree against any property, pleads what may analogically be called a *justitii*, or a right which although he represents it, belongs to a title totally separate from that which he personally holds in such property. **Kanai Lal Khan v. Sashi Bhushan Biswas (I. L. R., 6 Cal., 777)** dissented from. **RAM GULAM AND OTHERS v. HAZARO KOER AND ANOTHER.**

[V-132

(13). ———— *]*. *A* obtained a decree against *B, C, D,* and *E* in different sums to be paid by them severally (and not jointly). *A* in execution of her decree attached a certain sum of money as the property of her judgment-debtors. *C* claimed the whole of this money as his own while *D* and *E* claimed three-fourths of this as theirs. They therefore applied (each separately) that a sum equal to the amount of the decree standing against them should only be attached. Their application was rejected on the finding that their shares in the sum were equal. *C* appealed. *Held* that his claim was under s. 278 and the order made upon it was an order under s. 283 and final as such from which no appeal lay. **NASIB-UN-NISSA AND ANOTHER v. NIAZ-UN-NISSA AND OTHERS.**

[VI-39

(3) Representative.

(14). ———— *One D* obtained a decree against *S*. Subsequently *D* brought the present suit against *G* (*S*'s brother) for the sale of certain property in his (*G*'s) possession alleged by the plaintiff *D* to be the property of his judgment-debtor *S*. *Held* that the suit was not maintainable, the proper course for the plaintiff being to proceed against the property by way of execution. **DAMMAR SINGH v. GAYADAT AND ANOTHER.**

[VII-183

(15). ———— *Justitii.* *The* decree-holder under a decree for enforcement of lien against the zamindari rights and interests of *K*, applied for execution by attachment and sale of certain shares, one of which was recorded in the *khowat* in the name of *K*, and two others in the

CIVIL PROCEDURE CODE, s. 244—

(continued.)

name of *B*, his brother's widow. The shares having been attached, the judgment-debtor died, and *J*, his brother, and *L*, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of *J* and *L* as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this *B* objected under s. 281 of the C. P. C., claiming to be the owner of the shares in question. Before the hearing of her objection she died, and *L* applied to have his name brought upon the record in her place for the purpose of supporting the objection. An order having been passed disallowing the objections which had been filed by *B*, *L* appealed to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal, on the ground that as the first Court's order related to *L*'s claim, as the heir of *B*, to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281, C. P. C., and as conclusive, subject to *L*'s bringing a suit to establish his right. On the other side, it was contended that *L* being the representative of the deceased judgment-debtor *K*, the first Court's order must be regarded as passed under s. 244 of the Code, and the appeal would therefore lie. *Held* that the preliminary objection must prevail, and the first Court's order must be regarded as passed under s. 281 and not under s. 244 of the Code, inasmuch as *L*'s claim which was rejected by it was nothing more than to come in as *B*'s representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and this character was wholly distinct from that he filed as the legal representative of his deceased father. Because *L* happened, for the purpose of the execution proceedings, to be his father's legal representative, and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution proceedings. *Wahed Ali v. Jumae* (11 B. L. R. 149); *Ram Ghulam v. Hazaru Kuar* (I. L. R. 7 All., 547); *Sita Ram v. Bhagwan Das* (I. L. R. 7 All., 733); *Shankar Dial v. Amir Haidar* (I. L. R. 2 All., 752); *Nath Mal Das v. Tajammul Husain* (I. L. R. 7 All., 36) and *Kanai Lal Khan v. Sashi Bhuson Biswas* (I. L. R., 6 Calc., 777) referred to. *BAHORI LAL v. GAURI SAHAI*.

[VI-228]

(16). —————

The heirs of the deceased obligor of a bond were sued thereon, on the ground that they were in possession of the property of the deceased, and

CIVIL PROCEDURE CODE, s. 244—

(continued.)

a decree was made in this suit for the recovery of the amount claimed, "from the property of the deceased." In execution of this decree, the plaintiff caused certain property to be attached as belonging to the deceased. The defendants objected to the attachment, on the ground that the property belonged to them. The Court executing the decree, proceeded to investigate this objection, and finding that the property did not belong to the defendants, but to the deceased, disallowed it. *Held*, that the proceedings upon such objections were taken under s. 281 of the Civil Procedure Code, and the order disallowing it was therefore not appealable. *AWADH KUARI v. RAKTU TIWARI AND OTHERS*.

[III-230]

Per contra.

SETH CHAND MAL AND ANOTHER v. DURGA DEI AND OTHERS.

[X-137]

SANWAL DAS v. BISMILLAH BEGAM.

[XVII-115]

(17). —————

Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such capable of being taken in execution, are questions which under s. 244 (c) of the Code of Civil Procedure, must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the positions of legal representatives added to the suit before, and those added after, the decree. Under the last paragraph of s. 234 the Court executing the decree may try and determine the question whether property in the legal representatives' hands formed part of the deceased judgment-debtor's estate, and find this fact for the purpose of bringing the property to sale in execution, and giving the auction purchaser a good title under the sale; and the Court's order is subject to appeal under s. 244 but not to a separate suit under s. 283. Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor, he can not set up a *Justertii*, so as to come in under s. 278 and the following sections of Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially by reason of his being the representative of the judgment-debtor, but as a trustee or executor of some one else. In that case either party may have the question of *Justertii* determined in a separate suit. So *held* by the Full Bench Tyrrell J. dissenting. *Held* by Tyrrell J., *contra*, that where the legal

CIVIL PROCEDURE CODE, s. 244—
(continued.)

representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relatively to the execution, discharge, or satisfaction of the decree, but in his personal character independent of the suit and decree, and prefers a claim under s. 278 on the ground that the decree has no operation against certain property attached, for reasons personal to the objector and antagonistic to all the parties and their representatives as such, the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings. Observations by Straight, J., as to the necessity of conducting the proceedings in execution of decree with the same care, and, as far as practicable, in accordance with the same procedure as that adopted in regular suits. *Rajrup Singh v. Ramgolam Rai* (I. L. R. 16 C. 1) approved. *Abdul Rahman v. Muhammadyar* (I. L. R. 4 All., 190) and *Awadh Kuari v. Raktu Tiwari* (I. L. R. 6 All., 109) overruled. *Bahori Lal v. Gauri Sahai* (I. L. R. 8 All., 626) distinguished. **SETH CHAND MAL AND ANOTHER v. DURGA DEI AND OTHERS.**

[X-137]

ISHRI DAT v. MAHABIR PRASAD.

[X-183]

(18). ————.] Two heirs of a Muhammadan woman took possession on her death of certain immoveable property left by her to the exclusion of the third heir, their sister. They mortgaged that property. The mortgagee brought a suit and obtained a decree for sale. After decree one of the mortgagors died and his sister was brought upon the record as his representative and the property was sold, and subsequently the sister brought a suit against the auction purchaser for recovery of her share in the mortgaged property. *Held* that s. 244 of the Code of Civil Procedure did not apply and that the suit was maintainable. *Deefholts v. Peters* (I. L. R. 14 Calc., 631) and *Seth Chand Mal v. Durga Dei* (I. L. R. 12 All., 313) referred to. **SANWAL DAS v. BISMILLAH BEGAM.**

[XVII-115]

(19). ————. Auction purchaser.] A purchaser at auction sale of the property of a judgment-debtor is not that judgment-debtor's representative within the meaning of s. 244 of the Code of Civil Procedure. *Gour Sundar Lahiri v. Hem Chunder Chowdhury* (I. L. R. 16 C. 355) and *Vishva Nath Chardn Naik v. Subraya Shivappa Shetti* (I. L. R. 15 Bom., 290) followed. **BADRI PRASAD v. SARJU PRASAD AND ANOTHER.**

[XIV-59]

CIVIL PROCEDURE CODE, s. 244—
(continued.)

(20). ————.] A decree enforcing a first mortgage of certain property not being satisfied, the property was sold in execution of a decree of a later date enforcing a second mortgage of the property.

Per. STUART, C. J., that the decree enforcing the first mortgage could not be executed against the property, but the holder of such decree was bound to bring a fresh suit against the purchaser of the property to enforce his decree.

Per. STRAIGHT, BRODHURST, and TYRRELL, JJ., that a fresh suit was the most convenient and expeditious remedy.

Per. OLDFIELD, J., that, the purchaser not being the "representative" of the judgment-debtor, within the meaning of s. 244 (c) of Civil Procedure Code, the holder of such decree must bring a fresh suit to enforce it. **JAGAI NARAIN AND ANOTHER v. JAG RUP AND OTHERS.**

[III-79]

(21). ————.] One *M* sued *S* for possession of certain property. By the final decree in this suit the title of *S* was established in part of the property claimed, namely *manzah X* and *M* became entitled to possession of certain other property claimed by him. In execution of this decree against *S*, *M* obtained possession of a one-seventh share of a grove called *Y*. Now one *F* who held a decree against *M* brought this one-seventh share in the grove to sale and bought it himself. Thereupon *S* brought the present suit to set aside the sale on the ground that the grove was in *manzah X*. Both the lower Courts held that the grove belonged to the plaintiff but the lower appellate Court held that the suit was governed by s. 244 of the Code of Civil Procedure and therefore no separate suit would lie. *Held* that the lower Court was wrong and the suit must be tried on the merits. **SHIB CHARAN v. FAZI ALI.**

[IV-59.]

(22). ————.] The purchaser of property which is under attachment in execution of a decree is a representative of the judgment-debtor under that decree within the meaning of s. 244, Civil Procedure Code. A person to whom s. 242, Civil Procedure Code, applies can not avoid the application of that section by filing his objection to execution under s. 278, Civil Procedure Code. *Shankar Dat Dube v. Harman &c.* (I. L. R. 17 All. 245) and *Imdad Ali v. Jagan Lal* (I. L. R. 17 All. 478) referred to. **LALJI MAL v. NAND KISHORE.**

[XVII-73]

See. also Nos. (46)—(49).

(23). ————. Judgment-debtor's transferee.] After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages

CIVIL PROCEDURE CODE, s. 244—
(continued)

for wrongfully keeping him out of possession. The effect of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold and was purchased by the decree-holder : one of the judgment-debtors had died during the execution proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently this son sold his rights and interests in the property ; and his vendee sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu widow, the defendant as purchaser could not acquire by the sale any rights superior to those of the widow ; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff's vendor and had thence passed to the plaintiffs. *Held* that the plaintiff's vendor was a party to the suit within the meaning of s. 244 (c) of the Code of Civil Procedure, and that he not having objected to the sale in execution of the decree, neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution proceedings: and that the suit was barred by s. 244. *Ram Ghulam v. Hazaru Kuar* (I. L. R., 7 All., 547) followed. *Behari Lal v. Gauri Sahai* (I. L. R. 8 All., 626) distinguished. *Mul-mantiri v. Ashfaq Ahmad* (I. L. R., 9 All., 605); *Rup Lal Dass v. Bakanimeah* (I. L. R., 15 Cal., 437) and *Ravunni Menon v. Kunju Nayar* (I. L. R., 10 Mad., 117) referred to. *RAGHUBAR DIAL v. HAMID JAN AND ANOTHER*.

[X-13]

(24) —————. A decree of the High Court, giving possession of certain shares in a bank to the plaintiff *R*, was reversed on appeal by the Privy Council. The defendant then applied to the Court of first instance to order restitution of the shares, which had been realized by the plaintiff. Upon being ordered to produce the shares, *R* made an application to the Court, professedly under s. 244 of the Civil procedure Code, in which he alleged that pending the appeal to the Privy Council, he had transferred the shares to *G*, his Counsel, in the case, who had failed to restore them, and he prayed, "that the said person might be brought upon the record, and that execution for recovery of the said shares might be given against him." The Court passed an order upon this application, calling on *G* to show cause why he should not be called upon to restore the shares made over to him by *R*, and he thereupon filed an answer denying that he was the custodian of the shares, and alleging that he was their purchaser for value. The Court passed an order directing that *G*'s name should be placed on the record, so that

CIVIL PROCEDURE CODE, s. 244—
(continued.)

the decree might be executed against him. *Held* that *G* could not be regarded as a representative of *R* within the meaning of that section ; that the application by *R* was meant to be and actually was one praying that, in respect of the share restitution of which was being enforced against him, the person to whom some interest in it, more or less, had come pending the suit, might, in addition to himself, in so far as such interest had passed from him, be brought under the operation of the execution proceedings; that this was an application under s. 372 of the Civil Procedure Code ; and the order passed on it, being appealable under s. 588, (21), was not open to revision by the High Court under s. 622. *RAYNOR v. THE MUSSOORIE BANK, LIMITED*.

[V-204]

(25.) —————.

The purchaser by private sale of the rights of a judgment-debtor is a representative of such judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure. *Janki Prasad v. Ulfat Ali* (W. N. 1894, p. 38) followed. *MOHAN LAL v. JWALA DEI*.

[XIV-145]

(26.) —————.

For the purposes of s. 244 of the Code of Civil Procedure the vendee by private sale of the rights of a mortgagor must be regarded as the representative of such mortgagor. *JANKI PRASAD AND ANOTHER v. ULFAT ALI*.

[XIV-38]

(27.) —————.

Certain persons, claiming by right of inheritance to *C*, sued *B*, *N*, *A*, *K* and others for possession of certain immoveable property and obtained a decree dated in August, 1876 for possession of the same. In the course of the litigation which ended in that decree *Z* purchased certain immoveable property from *B*, *N*, *A*, and *K*. *Z* was subsequently dispossessed of such property in execution of the decree of August, 1876. He thereupon sued holders of that decree for possession of the same, alleging that his vendors had inherited the same from *D*, that it was not affected by that decree, and that he had been improperly dispossessed of it in execution of that decree. *Held* by the Court that, the plaintiff not being the representative of any of the parties to the suit in which that decree was passed, in the sense of section 244 of the C. P. Code, but being, if his allegations were true, a purchaser from certain of the judgment-debtors of property not affected by that decree, the suit was not barred by the provisions of that section. *Pertab Singh v. Beni Ram* (I. L. R., 2 All., 61) distinguished. Observations by Stuart C. J. on his judgment in *Agra Savings Bank v. Sri Ram Millar* (I. L. R. 1 All., 38) and on the judgment of the Full

CIVIL PROCEDURE CODE, s. 244—
(continued.)

Bench in *Perlab Singh v. Beni Ram* (J. L. R., 2 All. 61) referring to that judgment. **ZAUKI LAL v. JAWAHIR SINGH AND OTHERS.**

[II-188

(28.) ———— *Transferee of decree-holder.*] A person who, within the meaning of s. 232 of the Code of Civil Procedure, is a transferee of a decree is a representative within the meaning of s. 244, *qua* the decree, of the party to the suit under whom he immediately, or by mere assignment in writing, or by operation of law, has derived title to the decree in the suit. It is the assignment in writing from the decree-holder, and not the recognition by a Court of him as a representative, which makes such transferee a representative of a party to the suit. A Court upon the application of such a transferee for execution of a decree may wrongly decide that he is not a transferee within the meaning of s. 232, or that, although he is a transferee within the meaning of that section, he is not representative of a party to the suit, or that by reason of limitation he is not entitled to obtain execution of the decree, and if the Court has so decided, it has determined a question or questions mentioned or referred to in s. 244 of Act No. XIV of 1882, but not specified in s. 588 and an appeal lies under s. 540 of that Act. **BADRI NARAIN v. JAI KISHEN DAS AND OTHERS.**

[XIV-184

(29.) ————.] The transferee of a decree for costs, associating with him the transferor, made an application under s. 232 of the Civil Procedure Code, to be allowed to execute the decree. The application was opposed by judgment-debtor, and was rejected, and the Court referred the transferee to a regular suit. After taking various proceedings ineffectually, instituted a suit for the recovery of the sum to which he was entitled as costs under the decree transferred to him. *Held* that the plaintiff, the holder of the decree by assignment, could only recover the amount under it by executing the decree, and not by a separate suit; but that he was entitled to have a decree declaring that the assignment to him of the decree-holder's rights under the decree was valid, and gave him a right to execute it, and that the Court's order under s. 232 which disallowed the execution was an improper one, a suit for this relief being maintainable, for, there would otherwise be no remedy; and that, looking at the plaint and the issues on which the parties were divided, and the fact that the Court which refused the plaintiff's application for execution, referred him to a regular suit, this relief might properly be given in the present suit.

Per MAHMOOD, J., that the suit was maintainable, inasmuch as the present plaintiff never having been accepted on the record as holder of the decree, the questions which were disposed

CIVIL PROCEDURE CODE, s. 244—
(continued.)

of by the Court executing the decree, as between the plaintiff and the judgment-debtor could not be regarded as questions within s. 244 of the Civil Procedure Code. **RAM; BAKHISH v. PANNA LAL AND ANOTHER.**

[V-72

(30.) ————.] On an application for substitution of the name of the assignee in place of that of the original decree-holder, the following order was made:—"That the objections taken by the judgment-debtor be disallowed with costs and the name of the purchaser of the decree be substituted in place of the original decree-holder, and that the case be struck off the miscellaneous file and a report be called for from the execution department." *Held* that the above order was an order coming within the provisions of s. 244 of the Code of Civil Procedure, and not merely an order preliminary to something to be done in the execution department; and, being such, was appealable. **PESCHE v. AULAD FATIMA.**

[XI-87

(31.) ————.] Where a person alleging himself to be the transferee of a decree had made an application under s. 232 to be entered on the record as such transferee and that application had been rejected, but it did not appear, that the application was rejected under such circumstances as would debar the applicant from making a fresh application to the same effect; it was *held* that the applicant was not debarred from bringing suit to have his right as transferee of the decree declared. **IMDAD HUSAIN AND ANOTHER v. LALTA PRASAD.**

[XVI-201

(32.) ———— *Official assignee.*] *Held* that an official assignee appointed under statute 11 and 12, *Vic. c. 21*, s. 7, could not be held to be a legal representative of the judgment-debtors within the meaning of s. 244, Civil Procedure Code, and an application by him for the release of the property from attachment and that the property be made over to him could not be regarded as an application relating to the execution, discharge or satisfaction of the decree. **KASHI PRASAD AND ANOTHER v. MILLER.**

[V-166

(33.) ———— *Person wrongly impleaded as.*] One *B D* was made a party to an application for execution of a decree as one of the representatives of a deceased judgment-debtor. It had been decided in a previous suit that *B D* was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative and his objection was allowed and the order allowing it remained unappealed and

CIVIL PROCEDURE CODE, s. 244—
(continued.)

became final. The Court, however, while allowing the objection, did not give the objector his costs. *Held* that the objector did not by being improperly brought into the execution proceedings lose his right of appeal, and further that he could under the circumstances appeal on the question of costs alone. **BISHAN DYAL v. THE BANK OF UPPER INDIA, LIMITED.**

[XI-94

(34) ———— *Person not treated as*. The defendants, along with one *N* and *C* had brought a suit against one *A* in the Civil Court at Peshawar in the Panjab and obtained a decree on the 23rd July, 1878, for Rs. 30,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June, 1883, *A* died. On the 30th April, 1884, the defendants again applied to the Court at Peshawar treating their judgment-debtor as being then alive for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th August, 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was for execution against Ajudhia Prasad and after his death against Angan Lal, the own brother, and Durga Kuar, widow, and Luchman Prasad and other sons of Ajudhia Prasad, residents of Kundarkhi and the said Angan Lal at present residing at Umballa and employed in the Commissariat Transport Department, judgment-debtors. It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal himself has realised Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same; therefore to that extent the person of the said Angan Lal was liable. Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him stating that, although he was the brother of *A*, deceased, yet he always lived separate and carried on business separately, that there was no connection or partnership between him and the deceased judgment-debtor and that he had no property of the deceased in his possession. Further, that as *A* left issue it was wrong to call him as heir to *A*, and take out execution process against him. In reply to these objections the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased, and therefore liable to the extent of the sum so received by him. The Subordinate Judge holding that Angan Lal was the brother of the deceased, and had realised the amount from the Commissariat Office, which he failed to prove that he paid to the deceased, ordered execution to proceed

CIVIL PROCEDURE CODE, s. 244—
(continued.)

against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended first, that the suit was in effect a suit under s. 283 of the Code of Civil Procedure and therefore barred as not having been brought within a year from the order of the Subordinate Judge, and secondly, that the proceedings of the Subordinate Judge were held under s. 244 of the Code and therefore no separate suit would lie. *Held*, that the first contention must fail inasmuch as an essential condition precedent to a suit under s. 283 of the Code is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection, and lastly of its being allowed or disallowed and these do not exist in this case. The second contention also must fail as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor. *Mirza Mahomed Aga Ali Khan Bahadur v. Balmukund* (L. R., 3 I. A., 241); *Sayid Nadir Hossain v. Bipen Chund Bassarat* (3 C. L. R. 437) were referred to. **ANGAN LAL v. GUDAR MAL AND ANOTHER.**

[VIII-189

(35.) ———— *Person alleged but not brought on the record.* A certain judgment-debtor having died application was made by the decree-holders to execute the decree against his widow, not as his legal representative, "but as his wife and heir." Notice was issued on this application to the widow to show cause why execution should not be had against her, but nothing further appears to have been done at that time to bring the widow on to the record as legal representative of the deceased judgment-debtor. Subsequently another application was made by the decree-holders alleging that the widow had misappropriated certain moveable property of the deceased judgment-debtor and notice having been served on her she appeared and *inter alia* disputed the Court's jurisdiction over her under s. 244 of the Code of Civil Procedure. Orders were passed on this last mentioned application but it does not appear that any issue was then raised as to the widow being either the legal representative of her deceased husband in the sense of s. 234 of the Code of Civil Procedure or his representative in the sense of s. 244. *Held* in appeal from the order of the Court on the widow's objection to the second of the above mentioned applications, that on the facts as stated above the widow had never been brought on the record as the representative of the deceased judgment-debtor and therefore no appeal could lie from that order by virtue of s. 244, Civil Procedure Code. **VILAYATI BEGAM AND OTHERS v. INTIZAR BEGAM.**

[XIII-106

CIVIL PROCEDURE CODE, s. 244—
(continued.)

(4). "Relating to execution, discharge, &c."

(36.)—*Order staying execution.*] The provisions of s. 244 of the Code of Civil Procedure govern equally the procedure of the Court which passed the decree when executing such decree and the Court to which the decree is sent for execution. *Cooke v. Hiseeba Beebee* (N. W. P. H. C. Rep., 1874, p. 181) referred to. All orders staying execution of decrees whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof within the meaning of s. 244 (c) of the Code of Civil Procedure, and, as such, appealable, irrespective of the provisions of s. 588. *Kristo Mohiny Dassee v. Bama Churn Nag Chowdry* (I. L. R., 7 Cal., 733, and *Lachmeput Singh v. Sita Nath Doss* (I. L. R., 8 Cal., 477) followed. The widest meaning should be attached to clause (c) of s. 244 of the Code of Civil Procedure so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution. *GHAZIDEEN v. FAKIR BAKHSH*.

[IV-226]

(37.)—*Mesne profits not awarded by decree.*] The plaintiff in a suit for possession of immovable property obtained a decree for possession thereof, and in execution of the decree obtained possession of the property. This decree was subsequently reversed on appeal by the defendants. The decree of the appellate Court was silent in respect of the mesne profits which the plaintiff had received while in possession. The defendant instituted a suit to recover those profits. *Held Per PETHERAM, C.J., and OLDFIELD, BRODURST, and DUTHORT, J.J.*—That the suit was not barred by s. 244 of the Code of Civil Procedure, the question raised by such suit, although it might have arisen out of the decree of the appellate Court, not "relating to the execution, discharge or satisfaction of the decree," within the meaning of that section, (because, at that time, no such question had arisen or was in existence) and therefore not one in respect of which a separate suit is barred by that section. *Partab Singh v. Beni Ram* (I. L. R., 2 All., 61) distinguished by Oldfield J.

Per MAHMOOD, J., that the suit was not barred by section 244, the mesne profits sought to be recovered not having been realised in execution of the decree reversed on appeal.

Per DUTHORT J., The words in clause (c) of s. 244 "any other question arising etc.," should be read as "any other questions directly arising;" otherwise the most remote enquiries would be

CIVIL PROCEDURE CODE, s. 244—
(continued.)

possible in the execution department. *RAM GULAM v. DWARKA RAI AND OTHERS*.

[IV-319]

(38.)—*Decree to be executed.*] The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment debtor on the ground that that was not the decree which could be executed. *Held* by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the appellate Court, and that the decree had been altered by the first Court, which had no power to alter it. *Abdul Hayat Khan v. Chunia Kuar* (I. L. R., 8 All. 377) referred to. *Held* by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed, could not be regarded as passed under s. 206 of the Civil Procedure Code, but was an order passed in execution of decree and as such was appealable. *MUHAMMAD SULAIMAN KHAN AND OTHERS v. FATIMA*.

[IX-107]

(39.)—*Payment of pre-emption-money.*] The plaintiff in a suit to enforce a right of pre-emption obtained a decree to the effect mentioned in s. 214, Civil Procedure Code, on payment by him of the purchase-money into Court. The defendant objected in the execution department to such payment on the ground that it had not been made within time. *Held* that the question was not one relating to the execution of the decree within the meaning of s. 244, Civil Procedure Code, but was one which should be decided in the suit itself and therefore the proceedings in the execution department touching that question were ill-founded. *MUHAMMAD ALI AND OTHERS v. DEBI DIN RAI*.

[II-94]

(40.)—*Question relating to legality of purchase by judgment-debtor.*] *Held* that disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within the purview of section 244, clause (c), and must be determined by order of the Court executing the decree. *Benarsi Das v. Maharani Kuar* (I. L. R. 5 All., 27); *Wise v. Abdul Ali* (7 W. R. 136); and *Pogose v. Futurooddeen Mahomed Ahsan* (25 W. R. 343) referred to. *KUDHAI v. SHEO DAYAL AND OTHERS*.

[VIII-231]

CIVIL PROCEDURE CODE, s. 244—
(continued.)

(41)——Application to certify payment.]
See s. 258.

(42)——Assignment of decree to judgment-debtor.] *M*, who held a decree against *S* for possession of certain immoveable property and costs, assigned such decree to *S* by way of sale, agreeing to deliver the same to him on payment of the balance of the purchase money. He subsequently applied for execution of the decree against *S*, claiming the costs which it awarded. *S* thereupon paid the amount of such costs into Court, and, having obtained stay of execution, sued *M* for such decree, claiming by virtue of such assignment. The lower Court held that the suit was barred by the provisions of s. 244 of Act X of 1877, and also treating such assignment as an uncertified adjustment of such decree, that it was barred by the terms of the last paragraph of s. 258 of that Act. Held that the suit was not barred by anything in either of those sections. The words "any Court" in the last paragraph of s. 258 referred to proceedings in execution and to the Court or Courts executing a decree. *SITA RAM AND ANOTHER v. MAHPAL AND ANOTHER.*

[I-21

(43)——Suit to set aside sale—Adjustment of decree—Certification.] Held that no separate suit would lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court when in fact no such adjustment of the decree had been certified in the manner provided by s. 258, Civil Procedure Code. *Shadi v. Ganga Sahai (I. L. R., 3 All., 538)* and *Kalyan Singh v. Kampta Prasad (I. L. R., 13 All., 339)*, distinguished. *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami (I. L. R., 9 Calc., 788)* and *Pat Dasi v. Sharup Chand Mala (I. L. R., 14 Calc., 376)* not followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal (I. L. R., 19 Calc., 683)*; *Azizan v. Matuk Lal Sahu (I. L. R., 21 Calc., 437)* and *Bairagulu v. Bapanna (I. L. R., 15 Mad., 302)* referred to. *JAIKARAN BHARTI v. RAGHUNATH SINGH,*

[XVIII-37

(44)——Application to certify payment under s. 258, Civil Procedure Code.] A judgment-debtor applied to the Court executing the decree to call upon the decree-holder to certify the receipt of payment in part of the decretal amount under s. 258 of the Civil Procedure Code. The Court dismissed the application on the ground that it was beyond time. The judgment-debtor brought a suit for cancellation of this order, for disallowance of the decree-holder's objection, and for a declaration that the alleged payment had been made and that the application for a certificate had been presented within time. Held that the question involved being one relating to the execution, satisfaction or discharge of the decree, within

CIVIL PROCEDURE CODE, s. 244—
(continued.)

the meaning of s. 244 of the Code, could not be made the subject of a separate suit, and that the suit must therefore be dismissed, notwithstanding that the defendant's plea to this effect was made for the first time at the stage of second appeal; but that, in consequence of the defendant's delay in taking the plea, each party must pay his own costs. *TULSHA v. BADRI DAS.*

[IX-95

(45)——Proceeding after execution.] S. 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a decree after it has been executed as it would to a dispute between such parties relating to the execution of a decree before it had been executed. *Haji Ahmed v. Purmanand Nursey (I. L. R., 15 Bom., p. 216)* referred to. *IMDAD ALI v. JAGAN LAL AND ANOTHER.*

[XV-109

(46)——Proceedings after sale.] An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under s. 311 of the Civil Procedure Code, so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. *Ram Gopal v. Khiali Ram (I. L. R., 6 All., 448)* and *Fanki Singh v. Ablakh Singh (I. L. R., 6 All., 393)* distinguished.

Per MAHMOOD J.—The scope of s. 244 of the Civil Procedure Code is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor and covers all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution etc., of the decree. Questions that may arise after the sale are not, strictly speaking, questions relating to the execution, discharge, or satisfaction of the decree within the meaning of clause (3), s. 244; but, as soon as there has been a sale, the execution of the decree so far as the decree-holder is concerned, is over and the question whether the purchaser has purchased any thing by the sale is not a question as to the execution of the decree-holder's decree.

Also *per MAHMOOD, J.*, the expression "conducting the sale" as used in s. 311 of the Civil Procedure Code does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale. *Olpherts v. Mahabir Pershad (I. L. R., 10 I. A., 25)* referred to. *RAM CHHAIBAR MISR v. BECHU BHAGAT AND ANOTHER.*

[V-190

CIVIL PROCEDURE CODE, s. 244—
(continued.)

(47)———.]. *A* obtained a decree against *B* on a hypothecation bond and sought to attach the property but his application was struck off for default. *B* sold the property to *C* under a registered sale-deed. When *A* again applied for execution of his decree *C* petitioned for leave to deposit the judgment-debt together with costs under s. 291, C. P. C. The application of *C* was refused and the sale of the property was proceeded with, the decree-holder purchasing it himself. This suit has been brought by *C* to set aside the sale. *Held* that the decree-holder was entitled to his debt and nothing more, the sale must therefore be set aside. *Held* further that the suit was not barred by s. 244, C. P. C. *BIHARI LAL AND OTHERS v. GANPAT RAI AND ANOTHER.*

[VII-238]

(48)———.]. Certain holders of a decree for sale upon a mortgage having brought the property ordered to be sold to sale purchased it themselves. Having taken out the certificate of sale they applied to be put in possession of the property purchased by them and obtained an order for possession. On appeal by the judgment-debtors against this order it was *held* that no appeal lay, the order objected to being one under s. 319 and not under s. 244 of the Code of Civil Procedure. *Sabhaijit v. Sri Lal, (I. L. R., 17. All. 222)* referred to. *GHULAM SHABIR v. DWARKA PRASAD AND OTHERS*

[XV-149]

(49)———.]. *Held* that a suit by a *quondam* judgment-debtor against the purchaser of his occupancy-tenure who was also his decree-holder, to set aside the sale is barred by the rule contained in s. 244 (c), C. P. C. *Narain v. Puran (W. N. 1883, p. 218)* overruled. *BASTI RAM v. FATTU.*

[VI-37]

JANKI SINGH v. ABLAKH SINGH AND ANOTHER.

[IV-135]

RAMGOPAL v. KHALI RAM.

[IV-159]

(50)———.

See also Nos. (19)—(22).

(51).———. *Restitution.*] *Held* that a suit for the recovery of money (Rs. 92), on the ground that the same had been realized by the defendant by taking out execution of a decree held by the defendant against the plaintiff, but which decree had been satisfied, though the Court executing the decree did not recognize such payment, as the payment had

CIVIL PROCEDURE CODE, s. 244—
(continued.)

not been certified, was not barred by s. 244, C. P. C. *In re PETITION OF JHANDA AND ANOTHER.*

[I-25]

(52).———.]. This was a suit to recover certain money which had been deposited in Court to the credit of the plaintiff, but which money the defendants had got attached and paid to them in the execution of a decree which the defendants held against the present plaintiffs. The plaintiff alleged that he had been specially exempted from the operation of the decree held by the defendants. *Held* that the suit was a suit brought by a judgment-debtor to recover money alleged to have been wrongly realized from him by execution of a decree in a suit to which he was a party and was therefore not maintainable under s. 244 of Act X of 1877. *Partab Singh v. Beni Ram (I. L. R., 2 All., 61).* *RAMAPAT MISR v. KALARATH PANDAY AND OTHERS. (Obsolete).*

[I-79]

(53).———.]. *A* sought to execute a decree by attachment of certain property. *B* objected under s. 280, Civil Procedure Code. His objection was allowed, and Rs. 20-4 were awarded to him as costs. This order was set aside in a regular suit by *A*, but no relief was sought or given in respect of the Rs. 20-4. *A* then applied to the Court which had made the order to order a refund of the cost. *Held* that the Court had no jurisdiction and therefore it could not make the order. *Held* further that the order disallowing the application, was not appealable, as it was not one made under s. 244, Civil Procedure Code. *RA-GHUNATH DAS v. BADRI PRASAD AND OTHERS.*

[III-177]

(54)———.]. In a suit for redemption of a mortgage a decree was passed for possession by redemption on the plaintiff paying the sum of Rs. 43,625-7-0 the amount of the mortgage-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage and the plaintiff paid the above-mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs. 43,625-7-0 as the mortgage-debt and obtained a decree by which the decree of the first Court was modified and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant, the difference between the two sums with interest. *Held* that the effect of the appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the appellate Court's decree, and that the question was clearly one for determination by the Court executing the decree, and not by separate suit

CIVIL PROCEDURE CODE, s. 244—
(continued.)

being expressly provided for by s. 583 of the Civil Procedure Code. *Held* also that the decree-holder was entitled to restitution of the amount with interest. *Rogerv. The Comptoir d'Escompte de Paris* (L. R., 3 P. C., 465) referred to. *Ram Gulam v. Dwarka Rai* (L. R., 3 P. C., 170) distinguished by Mahmood, J. **JASWANT SINGH AND OTHERS V. DIP SINGH AND OTHERS.**

[V-67]

(55). —————.] A suit for pre-emption was decreed conditionally on the plaintiff paying Rs. 1,595. He paid the amount, and it was certified under s. 258 of the Civil Procedure Code. Subsequently the decree was modified on appeal by increasing the amount which the plaintiff was required to pay as the condition of pre-emption. He failed to pay the additional amount, and the suit consequently stood dismissed. His assignee brought a suit to recover the Rs. 1,595 paid by him under the original decree. *Held* that the suit was barred by s. 244 of the Civil Procedure Code. **ISHUR DAS AND ANOTHER V. KOJI RAM.**

[VIII-57]

(56). —————.] *D* obtained a decree which enabled him to execute a prior decree No. 108 held by his judgment-debtor. He obtained an order for execution of decree No. 108, and attached a subsequent decree No. 52, which had been obtained by the former holders of decree No. 108, for the balance remaining due on that decree. Under the order for execution, he realized certain moneys. Subsequently the decree No. 52 was reversed on appeal, and the judgment-debtors under that decree (who were not parties to decree No. 108) applied for restitution of the moneys realized, on the ground that the moneys had been realized in pursuance of an order which was for execution of the decree No. 52. It was also alleged that decree No. 108 was time-barred when the order for execution was made. *Held* that it was immaterial whether the decree No. 108 was time-barred or not, as the order for execution was a subsisting order, which had never been appealed against, and which, owing to lapse of time, could not now be appealed against. *Held* also that it was immaterial whether the order for execution was for decree No. 52 as well as for decree No. 108 or not, as *D* could defend himself against the application under the order in respect of decree No. 108 under which the moneys were realized and to which the applicants were not parties, that s. 583 of the Civil Procedure Code could not apply to that decree or to anything which took place in respect of it, as it had never been appealed, and that as the order for its execution entitling *D* to execute decree No. 108 had become final, the present application could not be treated as one under s. 244 of the Code by which the applicants were entitled to

CIVIL PROCEDURE CODE, s. 244 —
(continued.)

question that order. **SHIB LAL AND ANOTHER V. PEARE LAL AND OTHERS.**

[IX-168]

(57). ————— *Restitution.*]

See s. 583.

(58). ————— *Order under s. 87 of Act IV of 1882.*] The order mentioned in s. 87 of the Transfer of Property Act (IV of 1882) is an order in execution of the substantive foreclosure decree, and is appealable under s. 244 of the Civil Procedure Code, upon the stamp payable in respect of such orders. So *held* by the Full Bench, Edge, C.J., doubting. **KIDAR NATH V. LALJI SAHAI AND ANOTHER.**

[IX-198]

(59). —————.] An order under s. 87 of Act IV of 1882 extending the time for payment of the mortgage money by a mortgagor is a decree within the meaning of ss. 2 and 244 of the Code of Civil Procedure, 1882; and therefore no application will lie under s. 622 of that Code for revision of such order. **RAHIMA V. NEPAL RAI.**

[XII-99]

(60). ————— *Ministerial order.*] *M* obtained a mortgage decree for the sale of an eight-annas share belonging to *SK* and one another. Before the sale in execution of the decree, *SK* applied to the Subordinate Judge that *M* sought to put up for sale an eight-annas share which was exempted from sale, she having paid the amount due from her before the decree was passed. The Court passed the following order:—It is ordered that the objection be disallowed and that a copy of this *rubbar* be sent to the sale officer in order that it may be notified at the time of the sale that the eight-annas exempted share is not being sold. *SK* appealed to the High Court. *Held* that the order was a purely ministerial one which did not fall within the scope of s. 244 and consequently no appeal lay. **SITLA KOER V. MARKANDE.**

[VII-134]

(61). —————.] The appellant obtained a foreclosure decree which was prepared in accordance with s. 86 of the Transfer of Property Act. The date on which the money was to be deposited by the mortgagor (judgment-debtor) was a close holiday. He therefore applied to be allowed to deposit the money on the next day. That application was granted, and this is an appeal from that order. *Held* that it was purely a ministerial order not falling within the purview of s. 244 or s. 588 and as such can not be made the subject-matter of appeal. **HULAS RAI AND ANOTHER V. PIRTHI SINGH.**

[VII-109]

(62). ————— *Interlocutory order.*] In the execution of a decree by persons

CIVIL PROCEDURE CODE, s. 244—
(continued.)

claiming to be the legal representatives of the deceased decree-holder, the Court passed an order in the following terms:—"That the sale be adjourned, the Collector be required to strike off the execution case, if within the term to be fixed by him, none of the persons applying for execution file a certificate to recover the debt." Held that the order was not a "decree" within the meaning of s. 2 of the Civil Procedure Code, or appealable under s. 244 or otherwise. *CHAMPA LAL v. MAHESH SITLA BAKHSH SINGH.*

[VIII-82]

(63).—Decree for maintenance—Declaratory decree.] Where a decree in a suit for maintenance gave the plaintiffs a right to recover maintenance for the year previous to the suit and also declared their right to maintenance in future, but omitted to specify any precise date on which such maintenance should become payable. Held that such decree was one which could be enforced from time to time by suit. *Vishnu Shambhog v. Manjamma* (I. L. R., 9 Bom. 108) approved. *Ashutosh Bannerjee v. Lakhimoni Debya* (I. L. R., 19 Cal. 139) distinguished. *RAM DIAL v. INDAR KUAR AND ANOTHER.*

[XIV-17]

(64).—[MH and others obtained a decree in 1882, in accordance with an award directing "that MS, defendant, and after her, her representatives, should pay without any objection, from the beginning of 1289 Fasli, Rs. 150 annually to MH and others." Subsequently MH and others applied for execution of this decree seeking to recover the arrears of the annuity for 1291 and 1292 Fasli. MS objected that these arrears were not recoverable in execution of the decree but a fresh suit should be brought. The objection being allowed by the Court executing the decree, MH and others brought the present suit for the arrears in question and interest. The suit has now been resisted on the ground that the suit was barred by s. 244, Civil Procedure Code. Held that the decree of 1882 was not a mere declaratory decree and the plaintiffs' only remedy was by way of execution and not by separate suit. *Mansa Debi v. Jiwan Lal* (W. N. 1886, p. 248) followed. Though the plea comes with the worst possible grace from the mouth of the defendant, the Court was bound to give effect to it as it affected jurisdiction. The Court however intended that the Subordinate Judge who refused execution will, when moved by way of review, reconsider his order and will relieve the present plaintiffs from the difficulties into which they have been led by the defendant. *SUGHA v. MUHAMMAD HUSAIN AND OTHERS.*

[VIII-230]

(65).—Held that a decree for maintenance by payment of a fixed rate *per mensem*, stands exactly on the same footing as a decree ordering payment by

CIVIL PROCEDURE CODE, s. 244—
(continued.)

instalments, and the sum so fixed can be obtained by the decree-holder in execution thereof and the decree-holder is not obliged to bring separate suits for those sums. *MARSA DEBI v. JIWAN LAL AND OTHERS.*

[VI-248]

(65).—Order rejecting application under s. 643, Civil Procedure Code.] The appellant who held a decree against the respondent, S P, preferred an application to the Court executing the decree, in which he accused the respondent and his servant of fraudulently removing certain property in order to prevent it from being taken in the execution of the decree, an offence punishable under s. 206 of the Indian Penal Code; and he prayed the Court to send the case, under s. 643 of Act X of 1877, to the Magistrate. The Court rejected the application. Held that the order rejecting the application did not fall under s. 244 of Act X of 1877, and was not appealable. *KRISHNA RAM v. SARJU PRASAD AND ANOTHER.*

[I-14]

(67).—Question as to who is representative.] Certain decree-holders obtained during the life time of their judgment-debtor attachment of certain immoveable property as belonging to the said judgment-debtor; but on the decree-holder's seeking to bring the property to sale one S D came forward with an objection that the property was his and was not liable to sale in execution of the decree in question. Pending the decision of the Court on this objection the decree-holders applied to the Court to have the names of S D and the widow of the judgment-debtor (who died about the time the previous objection was filed) placed on the record as representatives of the judgment-debtor. S D filed a similar objection to this application also; but both objections being heard together on the 6th September, 1892, were dismissed and he was placed on the record as representative of the deceased judgment-debtor. On appeal by S D against "the order of the District Judge of Jaunpur of the 6th September 1892" it was held that the order making S D a party to the execution proceedings as representative of the judgment-debtor rendered any order as to his former objection superfluous and that order was appealable under s. 244 of the Civil Procedure Code. *SHANKER DAT DUBE v. J. G. HARMAN AND Co.*

[XV-66]

(1.) s. 245.—Amendment.] The mere fact that a decree-holder in applying for execution of his decree has overstated the amount due to him under the decree, will not prevent such decree-holder from obtaining execution, if otherwise entitled to it, up to the amount due to him, nor will he be obliged to amend his application under the provisions of s. 245 of Civil Procedure Code. *ZABAR DAST KHAN v. KAMTA PRASAD.*

[XV-18]

CIVIL PROCEDURE CODE, s. 245—
(continued.)

(2.) —————.] In this case while the defendant's appeal was pending in the High Court, the plaintiff, on the 21st June, 1880, took out execution of the Judge's decree in their favor for possession, and having obtained it the proceedings were struck off on the 17th December, 1880. Subsequently a fresh application was made and on the 19th May the judgment-debtors were arrested but were released on payment of a certain sum. On the 31st May, 1881, the defendants' appeal in the High Court was dismissed in the following terms.—“The lower Court's decree is affirmed and the appeal is dismissed.” On the 27th July, 1881, the plaintiffs again applied to the Subordinate Judge for execution of the Judge's decree (and not that of the High Court) and similar proceedings were taken from time to time, up to July, 1884, when for the first time the defendants objected that all the applications for execution subsequent to the decree of the High Court were informal and the High Court's decree was accordingly time-barred. The Subordinate Judge accepted this contention in its entirety. The lower appellate Court rejected the application as informal but refused to give any opinion as to whether an application for execution of the High Court's decree would be time-barred or not. *Held* that as the error was a mere technical one the judge should have allowed the application to be amended under s. 245 of the Civil Procedure Code, and should then have disposed of it according to law. **GANGA DIAL AND ANOTHER v. KHARSARAN AND OTHERS.**

[V-304]

(3.) —————-*Limitation.*] Where an application to execute a decree was made by certain decree-holders within limitation but the date of the decree of which execution was sought was erroneously entered therein and where after notice to the judgment-debtors, the decree-holders were permitted by the Court, after the period of limitation in respect of such an application had expired, to amend their application by inserting the correct date of the decree and such amendment was not at the time challenged by the judgment-debtors. *Held* that such amendment must be taken to relate back to the time when the application was originally made, and that it was not barred by limitation. **AJUDHIA RAM AND OTHERS v. MUHAMMAD MUNIR AND ANOTHER.**

[XIII-112]

(4.) —————-*Proviso—Appeal.*] This is an appeal by a judgment-debtor whose moveable property has been attached in execution of a claim for money under an order by the Subordinate Judge of Mainpuri. The appellant had applied to the Court below under the last clause of s. 245 Civil Procedure Code, representing that whereas the claim against him was inconsiderable, being some Rs. 1,300 or 1,400 only, and whereas landed property of his worth Rs. 40,000 had

CIVIL PROCEDURE CODE, s. 245—
(continued.)

been attached in execution and Rs. 300 belonging to him were impounded in the Court, still the decree-holder has unnecessarily and injuriously procured an order of attachment against the appellant's household property consisting of chandeliers, lamps, plants and the like perishable articles. The Subordinate Judge disposed of the application in the following words—“No part of the property under attachment can be released. When the judgment-debtor pays into Court the whole amount of the decree; the attached property will be released. Ordered that the petition be disallowed.” *Held* that the order amounted to a decree as defined in s. 2, Civil Procedure Code, and was appealable as such. That the order of the Court below was very perfunctory and inadequate, which simply amounts to a refusal to exercise jurisdiction. The case must be remanded under s. 562, Civil Procedure Code. **JASWANT SINGH v. BISHUN LAL.**

[VIII-155]

s. 246.—Set off—Between same parties—Joint decree.] Where a decree-holder holds a decree against several persons jointly, one of whom holds a decree against him singly, both decrees being executable in the same Court, it is competent to the holder of the joint decree under the provisions of s. 246 of the Civil Procedure Code to plead such decree in answer to an application for execution of the decree against him singly. **RAM SUKH DAS AND ANOTHER v. TOTA RAM.**

[XII-12]

ss. 246 & 247.—Set off—Pauper suit—Court-fees.] A plaintiff suing in *forma pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1439. The Court with reference to the provisions of s. 411, Civil Procedure Code, directed that the plaintiff should pay Rs. 1196 as the amount of court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross suit in the same Court should be set off against the Rs. 1439 payable by her to him with reference to ss. 246 and 247 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his Rs. 1439 or by the defendant for her costs. *Held* that the contention had no force as execution had not been taken out by the plaintiff or the defendant or both and it could not be said that the Government had been trying to execute the plaintiff's decree or was a representative of the plaintiff so as to bring into operation the rules

CIVIL PROCEDURE CODE, ss. 246 & 247—(continued.)

of ss. 246 and 247 between him and the defendant. *JANKI v. THE COLLECTOR OF ALLAHABAD.*

[VI-300]

(1). **s. 247—Set off—Equity.** Under two decrees of the S. D. Adalat passed in 1864, *A* was entitled to two-thirds and *B* to one-third of certain immoveable property with *mesne profits* in proportion. Each obtained possession of the immoveable property decreed to him. *B* appealed to the Privy Council from both decrees in respect of the two-thirds awarded to *A*. In April, 1866, pending the appeal, *A* applied for an account of the *mesne profits* due to him after setting off the *mesne profits* due to *B*, but as he failed to comply with a condition requiring him to give security for the amount claimed in case the Privy Council should allow *B*'s appeal the application was struck off. In January 1867, *B* applied for the *mesne profits* of the one-third decreed to him, and the Court found Rs. 18,000 to be the amount so due, but, on application by *A*, stayed further execution pending the Privy Council's decision. In 1873, the Privy Council dismissed *B*'s appeal. In 1885, *A*, in execution of the Privy Council's decree, applied for Rs. 50,000 as *mesne profits* in respect of the two-thirds. *B* at the same time applied that the Rs. 18,000 declared in 1867 to be due to him in respect of the one-third might be set off against the amount claimed by *A*. Held that the question of the amount due to *A* up to the date when he acquired possession of the two-thirds and which had never yet been decided should be re-opened from the point at which it was left in 1860, that if this amount exceeded the Rs. 18,000 declared in 1867 to be due to *B*, satisfaction of *A*'s claim to that extent should be entered up and the balance recovered from *B*; and that this course if not strictly in accordance with the latter was in accordance with the spirit of ss. 246, and 247 of the Civil Procedure Code and at all events should be allowed on principle of natural equity. Held also that until the amount due to *A* had been definitely ascertained in the execution department *B*'s right to maintain his set off did not arise; that the set off was therefore not barred by limitation; that the order of January 1867, was equivalent to a decree for the amount declared thereby as due to *B*; that when the execution department had determined the amount due to *A* that decision also would be a decree; and that s. 246 of the Code could then be applied. *MATADIN AND OTHERS v. CHANDI DIN AND OTHERS.*

[VIII-66]

(2). ——— **Identical rights.** S. 247 of the Code of Civil Procedure is not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. Thus where one party to a suit was entitled to recover certain costs by means

CIVIL PROCEDURE CODE, s. 247—(continued.)

of the sale of hypothecated property and the other party under the same decree was entitled to recover a smaller sum as costs from his opponent personally, it was held that s. 247 of the Code applied and that the costs recoverable personally could be set off against the costs recoverable by sale of the hypothecated property. *Kalka Prasad v. Ram Din* (I. L. R., 5 All., 272) dissented from. *BHAGWAN SINGH v. RATAN.*

[XIV-133]

s. 251—Warrant—Signed by Munsarim. Held that the munsarim has no authority to sign warrants for execution of decrees under s. 251, unless he has been actually appointed to do so by the Court. *HULASI v. RAM DIN AND OTHERS.*

[VII-42]

(1). **s. 253—Before the passing of decrees.** S. 253 of the Civil Procedure Code contemplated a suit pending at the time security is given for performance of the decree, and does not apply to a case where the litigation in the Courts of first instance and of first appeal has ended, and no second appeal has been instituted in the High Court when security is given. The holder of a decree affirmed on appeal by the District Court took out execution to recover costs awarded. Costs were deposited by the judgment-debtor and paid to the decree-holder, and a surety gave a bond by which he undertook to refund the amount to the judgment-debtor in the event of the latter succeeding in appeal to the High Court, and of the decree-holder failing to repay him. The judgment-debtor subsequently filed an appeal to the High Court and was successful, and he then applied in the execution department to recover the amount from the surety. Held that the Court executing the High Court's decree had no jurisdiction to execute it against the surety. *HARDEO DAS v. MUHAMMAD SAHIB ZAMAN KHAN.*

[VI-238]

(2). ——— **Revenue Court.** Where after the passing of a decree for arrears of rent a friend of the judgment-debtor entered into a security bond whereby he rendered himself personally liable and hypothecated a share in certain zemindari property to secure the due performance of the decree, it was held that the obligation created by such security bond could not be enforced by a Court of Revenue by the sale of the hypothecated property. *BEHARI LAL, v. JAGNANDAN SINGH.*

[XVII-20]

(3). ——— **Surety—Liability of—Appeal.** Held that a surety under section 253 puts himself into the position of a defendant in the cause and is considered for the purposes of the suit a party to it so that an appeal against him is maintainable though he was not made a defend-

CIVIL PROCEDURE CODE, s. 253—
(continued.)

ant in the first Court. *Bans Bahadur Singh v. Mughla Begam* (I. L. R., 2 All., 604) followed. Held further that if the principal debtor does not pay the decretal amount nor does he intend to pay, the surety will be liable to be proceeded against although proceedings are still pending against the principal debtor. **MAKHAN LAL v. MUHAMMAD YAHIA.**

[VIII-18]

(4.)—*Restitution.*] This was an application by a surety for the costs of an appeal to the lower Court for the refund of money paid by him in excess of amount due under a decree. The lower Court rejected the application on the ground that the Court executing the decree was not competent to refund the money to the surety. Held that the Court was competent that surety stands in the same position as the judgment-debtor, and that the lower Court in rejecting the application has declined to exercise a jurisdiction vested in him by law. **BALDEO DUBE v. MUHAMMAD KAZIM.**

[VI-38]

(1.) s. 254.—*Decree against person and property—Execution.*] In this case the decree-holder obtained a decree against the hypothecated property and against the defendants personally. Held that the decree-holder was entitled to enforce his decree either against the person or the property of the judgment-debtor. It was not necessary for the decree-holders, first, to execute it against the hypothecated property and then, if any balance remain due, to proceed against the person of the judgment-debtor. **JOHARI MAL AND ANOTHER v. SANT LAL AND OTHERS.**

[VII-101]

(2.)—*Execution.*] W, the holder of a decree for money, which ordered the sale of certain immoveable property in satisfaction of its amount, applied for execution of the decree, praying for the arrest of the judgment-debtor. W's brother had previously purchased such property at a sale in execution of another decree against the judgment-debtor, paying a small amount for it in consequence of the existence of his brother's decree. Held that, under these circumstances, applying equity, the decree should in the first place be executed against such property, and not against the person of the judgment-debtor. **WALI MUHAMMAD v. TURAB ALI.**

[II-127]

(1.) s. 257 (a).—*Adjustment of decree—Sanction of Court.*] A decree having been transferred for execution and property having been sold in execution thereof, but before the sale had been confirmed the decree-holder and the

CIVIL PROCEDURE CODE, s. 257 (a)—
(continued.)

judgment-debtors entered into an agreement, which was filed in the Court executing the decree to the effect that the judgment-debtors should pay Rs. 500 to the decree-holders and that they should pay the amount of the decree within three months and that the sale should be cancelled. The judgment-debtors paid the Rs. 500, but on their failing to pay the decretal money the sale was confirmed. Held that the above agreement was adjustment of the decree within meaning of s. 257 A of the Civil Procedure Code, but that, not having been sanctioned by the Court which passed the decree, it was void. *Mirza Zahur Muhammad v. Chedi Lal* (W. N. 1891, p. 12) and *Gandharap Singh v. Sheodharshan Singh* (I. L. R., 12 All., 571) referred to. **SANT LAL AND ANOTHER v. SRI KISHAN DAS.**

[XV-149]

(2.)—*Adjustment of decree.*] The decree-holder and judgment-debtor of a decree filed a petition (*sulehnama*) in the Court executing the decree, praying that the Court would sanction an arrangement providing for the payment of the decree by instalments, and enhancing the rate of interest made payable by the decree. The Court sanctioned the arrangement. Held that the *sulehnama* was within s. 257 A of the Civil Procedure Code, and the decree might be executed in accordance with its provisions. **SITA RAM v. DASARATH.**

[III-68]

(3.)—*Execution.*] A decree of the Subordinate Judge, dated the 27th June, 1881, having been transferred to the Collector for execution, the parties to it submitted to the Collector an agreement for the satisfaction of the decree by instalments. The Collector approved the agreement and sent it to the Court which passed the decree. On receipt thereof that Court made the following order on the 31st July, 1885:—"Having been received to-day let it be forwarded to the District Court to be put off with the record." On the 4th August, the District Judge ordered that the document was to be sent to the record-keeper to be filed with the record of the execution proceedings. On the 16th June, 1888, an application was made for execution of the decree by giving effect to the terms of the agreement. Held that the order of the Subordinate Judge above quoted was not such an order as was contemplated by s. 257 A of Civil Procedure Code, and was incapable of validating the agreement for the payment of the decree by instalments and that since the Court executing the decree was not capable of sanctioning such an agreement, execution of the decree was barred by limitation. **MIRZA ZAHUR MUHAMMAD v. CHEDI LAL AND ANOTHER.**

[XI-12]

CIVIL PROCEDURE CODE, s. 257 (a)
—(continued.)

(4.) —————.] Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of s. 375 read with s. 647 of the Civil Procedure Code is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by s. 375, to give effect to the compromise. In execution proceedings the word "suit" in s. 375 must, with reference to s. 647, be read as meaning "execution of decree." By reason of the words in s. 375, "lawful agreement or compromise," the provisions of s. 257 A become applicable to such a case; and, so long as the requirements of that section are satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree. When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can resile from the position assumed by them in the matter of the compromise. Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside, and, until that happens, the parties are bound by it in all proceedings relating to the execution of the decree, and, where they have acted upon it, they are estopped thereafter from questioning its validity. *Sita Ram v. Dasrath Das* (I. L. R., 5 All., 492) followed. *Debi Rai v. Gokal Prasad* (I. L. R., 3 All., 585); *Ram Lakhan Rai v. Bakhtawar*, (I. L. R., 6 All., 623); *Fateh Muhammad v. Gopal Das* (I. L. R., 7 All., 424); *Ganga v. Murlidhar* (I. L. R., 4 All., 240); *Sheoghulam Lal v. Beni Prasad* (I. L. R., 5 Calc., 27); *Lakshmana v. Sukiya Bai* (I. L. R., 7 Mad., 400); *Yella Chetti v. Munisami Reddi* (I. L. R., 6 Mad., 101); *Pisani v. Attorney General of Gibraltar* (L. R., 5 P. C. 16); and *Sadasiva Pillai v. Ramalinga Pillai* (L. R., 2 I. A., 219) referred to. MUHAMMAD SULAIMAN v. JHUKKI LAL.

[IX-53]

(5.) —————.] A judgment-debtor, against whom a decree for money was in course of execution, presented a petition to the Court executing the decree in which it was stated that a part of the money payable under the decree had been paid; that it had been agreed that a part of the balance should be set off against a debt due to the judgment-debtor to be realized by the decree-holder, and the remainder should be paid by the judgment-debtor by certain instalments; and that, if default were made in payment of any one

CIVIL PROCEDURE CODE, s. 257 (a)
—(continued.)

instalment, the decree-holder should be at liberty to execute the decree for the whole amount, and the judgment-debtor asked the Court to sanction the arrangement. The decree-holder expressed his assent to the arrangement, and the Court recorded a proceeding reciting the arrangement, and releasing from attachment property of the judgment-debtor which had been attached. Default having been made the decree-holder applied for execution of the decree. *Held* that the petition of the judgment-debtor set out above did not amount to nor was it any evidence of a new contract superseding the decree, and the decree might be executed. *Debi Rai v. Gokal Prasad* (I. L. R., 3 All., 585) distinguished. GANGA v. MURLIDHAR.

[II-24]

(6.) —————.] The parties to a decree presented a petition to the Court executing the decree in which they stated that they had agreed that the principal amount of the decree was to be paid within 8 years; that a sum of Rs. 50 was to be paid annually as interest on the principal amount; and that upon default of payment of the interest the whole amount due should be realized by execution of the decree. On this petition being presented the Court struck the case off its file. *Held* that upon default being made, the decree-holder's remedy was by execution of his decree, and not by suit to enforce the terms of the agreement. CHAMPAT RAI v. PITAMBAR DAS AND OTHERS.

[III-174]

(7.) —————.] An agreement between the decree-holder and the judgment-debtor for the satisfaction of a decree by which any sum in excess of the decretal amount is payable and which has not been sanctioned by the Court which passed the decree can not be made the basis of a subsequent suit. DALU MALWAHI v. PALAKDHARI SINGH.

[XVI-160]

(8.) —————.] A judgment-debtor asked for time to pay the decretal amount. The decree-holders agreed to give time on condition that the judgment-debtor gave them a *hundi* for Rs. 1500, that sum representing a portion of the decree-holder's claim which had been dismissed as barred by limitation. The judgment-debtor gave the *hundi* but the sanction of the Court was not obtained to the transaction. On suit by the decree-holders to recover the money secured by the *hundi* given under the circumstances mentioned, it was *held* that the transaction was one contemplated by s. 257 A of the Code of Civil Procedure and that, as it had not been made with the sanction of the Court, it could not be enforced and the suit must be dismissed. *Hukum Chand Oswal v. Taharunnessa Bibi* (I. L. R.,

CIVIL PROCEDURE CODE, s 257 a.—
(continued)

16 Cal., 504) dissented from. **DAN BAHADUR SINGH v. ANANDI PRASAD AND ANOTHER.**

[XVI-130]

(9).—*Assignee.* One *R C* obtained a decree against *B L* and another (the respondents). On application for execution being made, the respondents agreed in writing to pay the amount decreed by instalments. This agreement was subsequently put up for sale in execution of a decree held by the appellant against *R C*, and was purchased by the appellant himself. Default having been made in the payment of instalments, he applied for execution of the original decree. *Held* that the appellant being the assignee of the instalment agreement and not the transferee of the decree, could not enforce the agreement by proceedings in execution, which had reference solely to the decree. **KANIK MAL v. BECHAI LAL AND ANOTHER.**

[I-101]

(10).—*Court competent to grant sanction.* The Court to which the decree has been transferred for execution has no power to sanction an agreement under s. 257 A of the Code of Civil Procedure for the satisfaction of the decree by instalments. Nor does the granting of a subsequent application for retransfer, by the Court which passed the decree operate in any way to sanction such an agreement between the parties for the satisfaction of the decree by instalments; still less to change, the decree as it originally stood into a decree in the terms of such agreement. **CHOU DHRI GANDHARAP SINGH v. RAO SHEODARSHAN SINGH.**

[X-197]

(11).—*By one judgment-debtor.* *A* obtained a decree against *B* and *C* for Rs. 102-11-6 with interest at 6 annas per cent. on the 7th March, 1876. *C* paid Rs. 65 into Court but he acknowledged in a *sulehnamah* that he was still liable for Rs. 50, which he promised to pay in specified instalments with interest at 2 per cent. *B* was no party to this contract. In 1879 *A* sued out execution of the decree as determined by the *sulehnamah*. *B* objected. *C* having meanwhile died, *A* dropped the proceedings. In 1881, *A* again attempted to execute the altered decree. *Held* that the decree thus modified could not be executed. **SAHIB SINGH v. HIRAN SUKH.**

[II-183]

(12).—*Appcal.* No appeal lies from an order of the Court executing a decree granting or refusing an application for extension of time for payment by the judgment-debtor of the amount due under the decree. **SHEONARAIN AND OTHERS v. HAIT RAM.**

[X-08]

CIVIL PROCEDURE CODE, (continued.)

(1). s. 258.—*Payment under a sulehnama under s. 257 A—Certification.* The parties to a money decree executed and filed in Court a *sulehnamah* whereby the judgment-debtor agreed to pay a certain sum of money by a certain date, and the decree-holder agreed to relinquish the balance of the decretal amount; and it was stipulated that in case of default in payment by the date fixed, the decree-holder should be entitled to recover the whole amount due under the decree. Subsequently, the decree-holder having applied for execution of the decree, the judgment-debtor pleaded payment in accordance with the *sulehnamah*. No payment had been certified to the Court. *Held* that the *sulehnamah* was an agreement to give time, within the meaning of s. 257 A of the Civil Procedure Code, and the alleged payment, not having been certified under s. 258, could not be recognized by the Court executing the decree. **MADHO SINGH AND ANOTHER v. RAM PRASAD.**

[X-68]

(2).—*Uncertified agreement—Recognition.* The parties to a decree for the payment of money altered by agreement such decree as regards the mode of payment and the interest payable. For many years such agreement was executed as a decree, without objection being taken by the judgment-debtor. On the 1st March, 1878, the holder of such decree applied for execution of such agreement. The judgment-debtor objected that such agreement could not be executed as a decree, and such application should therefore be disallowed. *Held* (Oldfield, J., dissenting) that such agreement could not be executed as a decree, and such application could not be entertained, and that the judgment-debtor was not, by reason that he had submitted to the execution of such agreement as a decree, estopped from objecting to its continued execution as a decree. **DEBI RAI v. GOKUL PRASAD.**

[I-42]

(3).—*Adjustment of decree—Novation.* In the course of proceedings in execution of a decree dated the 14th June, 1878, the parties, on the 11th January, 1881, entered into an agreement, which was registered, and filed in the Court executing the decree. The deed recited that the decree was under execution, and that a mortgage bond, dated the 1st December, 1873, in favour of the judgment-debtor by a third party, had been attached and advertized for sale, and that the decree-holder and judgment-debtor had arranged the following method of satisfying the decree: that the judgment-debtor should make over the said bond to the decree-holder, in order that he might bring a suit thereon at his own expense against the obligor, and realize the amount secured by the bond, and out of the amount realized satisfy the decree under execution, with costs and future interest,

CIVIL PROCEDURE CODE, s. 258—
(continued.)

together with all costs of the suit to be brought against the obligor, and together with a sum due by the judgment-debtor to the decree-holder under note-of-hand for Rs. 250 with interest; and other details which need not be stated. On the same day that this deed was executed, the decree-holder filed a petition in the Court, to the effect that under the agreement an arrangement had been made for payment of the judgment-debt, by which the judgment-debtor made over to him the bond advertized for sale, in order that the petitioner should file a suit under it at his own cost against the obligor, and realize the debt due under the decree in execution, with interest and costs; and he prayed that the sale to be held that day might be postponed, and the application for execution struck off for the present, and the previous attachment maintained; and stating that, after realization of the amount entered in the bond advertized for sale, an application for execution would be duly filed. On this the order was that the execution case be struck off the file, and the attachment maintained. On the 24th December, 1883, the decree-holder applied for execution of the decree, alleging that the judgment-debtor had failed to make over the bond to him according to the agreement. The judgment-debtor objected that the decree was no longer capable of execution, having been superseded by the agreement of the 11th January, 1881.

Per OLDFIELD, J.—That the agreement of the 11th January, 1881, did not contemplate, and had not the effect of cancelling the decree and substituting for it a new contract, inasmuch as the deed contained nothing to the effect that the decree was superseded, and all it did was to provide means by which the decree, together with another small sum due by the judgment-debtor to the decree-holder, might be satisfied without having recourse to the sale of the bond attached, and the effect would be that, on realization, satisfaction would be certified in whole or in part to the Court executing the decree. Further, if the arrangement was to be regarded as within the meaning of an adjustment of the decree under s. 258 of the Civil Procedure Code, it could only be recognized by the Court when certified by the decree-holder or judgment-debtor: and in this case the only certification which was made was by the decree-holder, by his petition of the 11th January, 1881, which was in respect of a temporary arrangement under which the decree remained in force.

Per MAHMOOD, J.—That the agreement of the 11th January, 1881, was intended by the parties as a performance of the obligation created by the decree, by substituting a fresh obligation founded upon contract; but that the deed could not be regarded as such an adjustment of the decree as satisfied the requirements of s. 258 of the Civil Procedure Code, because the creditor, whilst admitting the creation of a separate contract, took care to say that the decree was to be

CIVIL PROCEDURE CODE, s. 258—
(continued.)

kept alive, and the attachment thereunder was to subsist; and that therefore the certification of the adjustment was inadequate, and could not be recognized in executing the decree. **FATEH MUHAMMAD v. GOPAL DAS.**

[V-76]

(1)———[*Uncertified payment out of Court—Recognition.*] *Held* that the Court executing a decree could not recognize a payment out of Court and not certified under s. 258, Civil Procedure Code. *Sham Lal v. Kanahia Lal* (I. L. R., 4 All., 316); *Zahur Husain v. Bakhtawar* (I. L. R., 7 All., 317) not followed. **MITHU LAL AND OTHERS v. KHAIIRATI LAL.**

[X-79]

Per contra.

SHAMLAL AND ANOTHER v. KANAHIA.

[II-47]

ZAHUR HUSAIN v. BAKHTAWAR.

[V-26]

(5.)———[*To save limitation.*] Section 258 of the Code of Civil Procedure will not debar a decree-holder from giving evidence of uncertified payments made to him out of Court in partial satisfaction of the decree by the judgment-debtor where the judgment-debtor has, in answer to an application for execution of the decree against him, put forward a plea of limitation. *Pakir Chant Bose v. Maulan Mohan Ghose* (I. L. R., (F. B.) 130); *Purnananddas Jirawandas v. Vallabdas Wallji* (I. L. R., 11 Bom., 506); *Sham Lal v. Kanahia Lal* (I. L. R., 4 All., 316); *Zahur Khan v. Bakhtawar* (I. L. R., 7 All., 327) and *Harri Pershad Chowdhry v. Nasib Singh* (I. L. R., 21 Cal., 511) referred to. **KISHEN SINGH AND OTHERS v. AMAN SINGH.**

[XIV-198]

(6.)———[*Application to certify—What is.*] Where a judgment-debtor pleads payment to the decree-holder out of Court by way of objection to an application for execution of the decree, such objection cannot, strictly speaking, be considered as a proceeding in conformity with the second paragraph of s. 258 of the Code of Civil Procedure. In order to establish the fact of payment, or adjustment out of Court, under the provisions of the abovenamed section, the judgment-debtor ought of his own motion to move the Court to call upon the decree-holder to show why such payment or adjustment made should not be certified. **RADHA AND ANOTHER v. BECHU RAM.**

[XI-11]

(7.)———[*Application to certify—What is.*] A decree-holder applied for execution of his decree on the 1st May, 1881. Notice on the

CIVIL PROCEDURE CODE, s. 258—
(continued.)

ingly issued to the decree-holder, who denied having received the money and the Court disbelieving the witnesses produced by the judgment-debtors refused the application. In appeal the lower appellate Court holding that the mere denial of the decree-holder to have received the money was sufficient for the refusal of the application, dismissed the appeal. *Held* that the lower Court was wrong. It should determine on evidence adduced by the parties whether the disputed payment had been, made or not.

ARJAN SINGH AND OTHERS *v.* HARCHARAN SINGH.

(10). _____.] Where on an application by a judgment-debtor under s. 258, Civil Procedure Code, that an alleged payment out of Court under the decree might be recorded as certified, the decree-holder denied that such payment had been made. *Held* that the Court had acted rightly in taking evidence on the point, and deciding it on such evidence, instead of leaving the judgment-debtor to bring a suit. **TIKA RAM v. RAM CHAND.**

(11).—“*The Court whose duty it is to execute the decree*”—Collector.] Where, after a decree had been sent to the Collector for execution under the provisions of s. 320 of the Code of Civil Procedure, the decree-holder and judgment-debtor joined in an application to the Collector in which they stated, on the one hand, that the decree-holder had received Rs. 2,900 in part-payment of the decretal amount, and, on the other, that there was a certain balance due from the judgment-debtor under the decree, and that arrangements had been made between the parties for the payment of such balance. Held that the above application was properly made to the Collector as being, within the meaning of s. 258 of the Code of Civil Procedure, “the Court whose duty it is to execute the decree,” and that the application was a valid acknowledgment for all purposes and sufficient under ss. 19 and 20 of the Indian Limitation Act, 1877, to save limitation in respect of the execution of the decree. MUHAMMAD SAID KHAN v. PAYAG SAHU.

(12.)—*Certification—Legality.*] The plaintiff is the administrator of the estate of the late *W H*, and sues the defendant *M R* for two billiard tables and some timber, on the ground that they form part of the estate. The defence is that the defendant who purchased a decree held by one *P D* against *W H*, obtained the property in the life-time of *W H*, in satisfaction of his decree. It appears that on the 16th September, 1881, *W H* wrote a letter to *N*, authorising him to give *M R*, the assignee of *P D*'s decree, the two billiard tables and timber in suit, if he would give a receipt in full payment of all demands in the matter of *P D*'s

(8) —————.] On the 3rd January, 1886, a judgment-debtor executed in favor of the decree-holder a bond purporting to liquidate the entire amount due under the decree. No proceedings were taken by either party for certification of the adjustment under s. 258 of the Civil Procedure Code. In defence to a subsequent application for execution the judgment-debtor pleaded that the decree had been satisfied by execution of the bond. In reply the decree-holder by a petition, dated the 12th June, 1886, admitted acceptance of the bond as part-satisfaction only of the decree. *Held* that the last paragraph of s. 258 of the Code did not preclude the Court from considering to what extent the decree had been adjusted by execution of the bond; that the decree-holder's petition of the 12th June, 1886, was a sufficient certification under s. 258; and that art. 161 of the second schedule of the Limitation Act did not bar certification, inasmuch as that article did not apply where the decree-holder took steps *suo motu*. GOPAL DAS *v.* GANGA RAM AND ANOTHER.

(9). _____ *Question to be determined.*] In this case the appellants, judgment-debtors, alleging that they had paid a part of the decretal money to the decree-holder out of Court, applied to the Court executing the decree that "proceedings might be taken under s. 258 of the Code of Civil Procedure." Notice was accord-

CIVIL PROCEDURE CODE, s. 258—
(continued.)

decree. *N*, under the authority of this letter, transferred the property to *M R* which fact he endorsed on the back of the letter on the 17th September, 1881. Two days after *WH* died, and *M R* gave a receipt, dated the 5th September, 1881, and satisfaction of his decree was certified to the Court executing the decree. It was contended on behalf of the plaintiff (i) that *M R* is not *bona fide* assignee of the decree; (ii) that there was no valid transfer of the property under *WH*'s authority; (iii) that as the execution of the decree was in abeyance after the death of *WH*, until an executor had been appointed, there was no certification of its satisfaction which could be noticed or have effect. *Held*:—(i) that the assignment was made in favor of *M R* before *WH*'s death and was recognized by him and there was nothing to show its *mala fides*; (ii) that *N* had a valid authority from *WH* who had the power to make the conveyance; (iii) that the remaining objections were merely technical and could not be given effect to. The appeal must be dismissed. **GOBIND SAHAI v. MANSA RAM.**

[V-45]

(13).—“By any Court executing the decree”—*Other Court.*] Certain immoveable property having been attached in execution of a decree for money, dated in 1879, directing the sale of such property, *T*, who had purchased such property in 1880, objected to the attachment. His objection having been disallowed, he sued to establish his right to the property and for the removal of the attachment. He claimed on the ground, amongst others, that the decree of 1879 had been wholly adjusted. The alleged adjustment had not been certified under s. 258 of the Civil Procedure Code. *Held* that the provisions of that section did not debar the Courts trying the suit from determining as between *T* and the decree-holder, whether the decree of 1879 had been adjusted or not. *Sita Ram v. Mahipal* (1) (*I. L. R.*, 3 *All.*, 533) and *Shadi v. Ganga Sahai* (*I. L. R.*, 3 *All.*, 538) (2) followed. **TEGH SINGH v. AMIN CHAND AND ANOTHER.**

[III-18]

(14).—*Held* that the adjustment of a decree out of Court, if never certified to the Court, is under s. 258, Civil Procedure Code, ineffectual only so far as the execution of the decree is concerned. There was nothing in law to make such an adjustment invalid as the consideration for an agreement. **RAMGHULAM AND ANOTHER v. JANKI RAI.**

[IV-277]

(15).—The plaintiff brought a regular suit under s. 283 of the Code of Civil Procedure to establish his right to certain attached property on the allega-

CIVIL PROCEDURE CODE, s. 258.—
(continued.)

tion that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor. *Held* that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above mentioned relates only to the Court executing the decree. **KALYAN SINGH v. KAMTA PRASAD.**

[XI-100]

(16).—*Appeal.*] An appeal will lie from an order under s. 258 of the Code of Civil Procedure, refusing an application to record an adjustment of a decree made out of Court. *Lin-gayya v. Narasimha* (*I. L. R.*, 14 *Mad.*, 99) and *Rangji v. Bhaiji Harjiwan* (*I. L. R.*, 14 *Bom.*, 57) cited. **JAMNA PRASAD v. MATHURA PRASAD.**

[XIV-6]

(17).—*Application to certify payment—Application relating to execution, &c., within s. 244, Civil Procedure Code.*

See s. 244, Nos. (42), (43), (44).

s. 260.—*Informal application.*] The holder of a decree for removal of certain projecting eaves applied for the issue of a notice to the judgment-debtors “to show cause why the projection should not be removed” on the ground that more than one year had elapsed from the date of the decree. Both the lower Courts rejected the application on the ground that it was not made in accordance with s. 260, Civil Procedure Code. *Held* that though the application was not strictly accurate yet the lower Court should have issued a notice under s. 260. **GAYA PRASAD v. BIHARI AND ANOTHER.**

[III-149]

(1). s. 265.—*Decree for partition—Court in which application for execution should be made.*] A decree-holder whose decree entitled him to separate possession of a share of an undivided estate applied under s. 235, Civil Procedure Code, to the Court executing the decree for “possession according to procedure,” and did not otherwise specify the mode in which the assistance of the Court was required. *Held* that the application was rightly made not to the Collector but to the Civil Court which alone could order execution of the decree but that in execution the Civil Court should order the Collector to act under s. 265, Civil Procedure Code. *Held* further that as the application was not precise the appeal should be allowed but without costs. **KALP KUAR v. BISHESHAR KUAR.**

[X-75]

(2).—*Decree for partition—Co-defendants.*] In a suit brought by *A* against *B*, *C*, *D* and others for the partition of his share of the property common to them all his claim was

CIVIL PROCEDURE CODE, s. 265—
(continued.)

decreed, but the decree did not declare the respective shares of the defendants, or ordering the partition of such shares. *A* took out execution and *C, D.* and others applied in the course of execution for their shares which was allowed by the Judge. *Held* on appeal by *B* that the shares of the respondents (co-defendants in the suit) could not be ascertained and partitioned in execution of the decree obtained by *A.* **BALKISHUN DAS v. SITA RAM AND OTHERS.**

[IV-215]

(3).—*Share of an undivided estate.* The holder of a decree for possession over 50 *bighas* of land (in a redemption suit) applied for its execution. The Court of first instance dismissed the application on the ground that as the numbers or boundaries of the lands were not specified in the decree it was not capable of execution. In appeal the lower appellate Court held that the Court of first instance should apply to the Collector for assistance under s. 265 of the Code of Civil Procedure. *Held*, that both the Courts were wrong. S. 265 was not applicable to the case. Possession must be given in execution after ascertaining what particular lands the decree-holders are entitled to under their decree. **GOBIND SINGH AND ANOTHER v. KALLU AND OTHERS.**

[IV-118]

(4).—*“Decree for partition or separate possession.”* *M* obtained against *R* a decree for possession of “a one-fourth share of the two fallow lands, Nos. 490 and 541, measuring 7 *bighas* and 2 *bighas* 16 *biswas* respectively, after removal of the trees planted thereon.” The Court, in executing the decree, placed the decree-holder in joint possession of the two plots, to the extent of the one-fourth share decreed to him, but declined to remove the tree until the said share had been specifically ascertained and partitioned by the Collector, in reference to s. 265 of the Code of Civil Procedure. *Held* that the decree could not be understood to entitle the plaintiff to remove the trees from a larger area than that to which he was entitled under that decree; and that, so long as that area remained joint and unascertained, the plaintiff could not execute the decree in the manner sought. *Held* also that the decree in the present case could not be called a “decree for the partition or for the separate possession of a share of an undivided estate paying revenue to Government,” within the meaning of s. 265 of the Code of Civil Procedure so as to require the intervention of the Collector for the purpose of executing the decree, and that the Court of first instance, in order to meet the exigencies of the decree should have separated the one-fourth to which the plaintiff was declared entitled, and, in executing the decree, should have ordered that the trees standing on the one-fourth area should be uprooted. **RAM DAYAL v. MEGU LAL.**

[IV-165]

CIVIL PROCEDURE CODE,—(continued.)

(1.) s. 266.—*“Saleable property.”* With reference to Government notification, dated 11th October, 1827, a lease of certain land situate in the Kasganj Cantonment had been granted to one *A.* Under the terms of the lease *A* held the land at the pleasure of Government. *Held* that *A* had a saleable interest in the land within the meaning of s. 266 of Act X of 1877. **MUL CHAND v. D. GARDNER.**

[II-100]

(2).—*Belonging to judgment-debtor—Unregistered gift of moveables.* *K*, a servant in the employment of the *E. I. R.* Company, was recommended by the Traffic Manager a bonus in consideration of long and good services. This recommendation was sanctioned and the amount of the bonus was received by the District Paymaster. Before payment to *K* the money was attached in execution of a decree obtained against him by *J.* *Held* that inasmuch as the bestowal of the money was a gift of moveable property of date subsequent to the 1st July, 1882, and was not evidenced by a registered instrument it could only be effected by actual delivery, that as there had been no such delivery as completed the transfer (s. 123 of Act IV of 1882 and s. 90 of Act IX of 1872) the money was not at *K*'s disposal and he could not have enforced payment; that the money was therefore not liable to attachment in execution of a decree against him. **JANKI DAS v. THE E. I. R. COMPANY.**

[IV-210]

(3.) s. 266 (c). *House of occupancy tenant.* In execution of a simple money decree against an occupancy tenant a house owned by him was put up for sale and purchased by *T R.* one of the defendants. The plaintiffs, *zamin-dars* of the village, brought this suit, more than eight years after the date of the sale, for possession of the house on the ground that under s. 266 (c), Civil Procedure Code, it was not saleable in execution of the decree and the tenant having abandoned the village the house reverted to the *zamin-dars*. The suit was resisted on the ground that the legality of the sale not having been challenged by the tenant the sale was not inoperative. *Held* that the sale was expressly prohibited by the law and could not therefore convey any title to the purchaser. *Bhagwan Das v. Hathibhai* (I. L. R., 4 Bom., 25); *Manik Lal Veni Lal v. Lakha* (I. L. R., 4 Bom., 429); *Radha Kisan Hakimji v. Balwant Ramji* (I. L. R., 7 Bom., 530) distinguished. *Ahmadud-din Khan v. Majlis Rai* (I. L. R., 3 All., 12) followed. **TOTA RAM AND OTHERS v. CHAIN SUKH AND OTHERS.**

[VIII-154,

(4).—*House of ex-proprietary tenant.* *A* at a time when he was possessed of proprietary rights in a certain village, built himself a large and valuable dwelling house in such village.

CIVIL PROCEDURE CODE, s. 266 (c)—
(continued.)

Subsequently his proprietary rights were sold and he became an exproprietary tenant in respect of the sir-lands. He continued to reside in the house. *Held* that the house was not exempt from attachment within the meaning of s. 266 (c) of Act X of 1877. **BISHEN CHAND v. FATTEH BAHADUR.**

[II-13]

(5.) s. 266. (f).—*Birt jajmani.*] A *birt Mahabrahmani*, or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district, is a right of personal service within the meaning of s. 266 (f) of the Civil Procedure Code, and as such is not liable to attachment or sale in execution of decree. *Jhummun Pandey v. Dino Nath Pandey* (16 W. R., 171) and *Ganesh Ram Chandra v. Shankar Ram Chandra* (I. L. R., 10 Bom., 395) referred to. **DURGA PRASAD AND ANOTHER v. GENDA AND OTHERS.**

[IX-169]

(6.) s. 266. (g).—*Gratuity for past services.*] The bar in s. 266 of the Code of Civil Procedure to the attachment of gratuities allowed by Government to its ex-servants, Military and Civil, is not limited to such gratuities as are allowed to "pensioners" but applies to a gratuity granted in consideration of past services. **BAWAN DAS AND ANOTHER v. MULCHAND AND OTHERS.**

[IV-16]

(7).—*Pension.*] *K M* borrowed certain money from *D D* and hypothecated an annual pension of Rs. 425-3-8 granted to him and his heirs by the Government by way of compensation for the assumption of an *altamgha jagir* belonging to *K M*. *D D* brought a suit thereupon and obtained a decree for Rs. 428-4-3 against *K M* "and Rs. 425-3-8 the hypothecated money." *D D* applied for the attachment and sale of *K M*'s pension in execution of this decree. On *K M*'s behalf it was contended that the pension was exempted from attachment and sale, (i) because it was exempted by s. 266 of Act X of 1877; (ii) because it fell under the class of pensions specially made inalienable by Act XXIII of 1871. *Held* that there was no force in the second plea. As to the first, even assuming that the pension in question was the "political pension" of (g) of s. 266, it did not follow that the judgment-debtor who had pledged it as an available asset in security for his debt should be allowed to avail himself of the protection of the section. The decree however did not apply to the pensioner's entire estate in such pension but only to one year's annual income thereof. Such a decree should not be executed by attachment and sale of the pensionary right but under the appropriate procedure provided in other sections of part F of Chapter XIX of Civil Procedure Code. The present application was therefore properly dismissed by the

CIVIL PROCEDURE CODE, s. 266 (g)—
(continued.)

lower Courts. **DAMODAR DAS v. KIIWAJAH MIR MUHAMMAD.**

[I-147]

(8).—*Money contributed to a Provident Fund.*] Certain creditors of a deceased employe of a Railway Company sued and obtained a decree against his widow and children for a debt owing by the deceased. In execution of that decree they sought to attach certain moneys which, under certain rules, framed by the Company, had been contributed to the Provident Fund of the Railway Company by the deceased debtor. *Held* that the attaching creditors were bound to show that the property sought to be attached was property which was attachable under the decree which they had obtained and that in order to do so it was necessary for them to produce the rules under which the deceased had made the contributions to the fund which it was sought to attach. **BINDRABAN v. THE INDIAN MIDLAND RAILWAY COMPANY AND ANOTHER.**

[XVII-88]

(9). s. 266 (k) & (l).—*Contingent right—Future maintenance.*] *A* applied to execute a decree held by him against *B*, a Hindu widow, by attachment and sale of a village which was given to *B* by her husband with every right except the power of alienation. This application was refused by the Court on the objection of *C*, the next reversioner. *A* then applied for execution of his decree by sale of *B*'s right to receive the rents and profits of the village. *B* contended that the right was not saleable with reference to s. 266, Civil Procedure Code. *Held* that as the right to receive the rents and profits was neither a contingent right or interest, nor a right to future maintenance within the meaning of s. 266, Civil Procedure Code, that section had no application to the case. **JAIRAJ KUARI v. DEBI.**

[III-9]

(10). s. 266 (l).—*Immoveable property assigned in lieu of maintenance.*] *Held* that an interest in the income of immoveable property assigned by way of maintenance to a Hindu widow by the members of her family is not capable of being attached and sold in execution of a decree against the widow. *Diwali v. Apaji Ganesh* (I. L. R., 10 Bom., 342) referred to. **GULAB KUMAR v. BANSIDHAR AND OTHERS.**

[XIII-149]

(1). s. 268.—*Attachment—Interest of mortgagee out of possession.*] Where the rights and interests under his mortgage of a mortgagee out of possession are attached in execution of a decree the procedure by which such attachment must be effected is that prescribed by s. 268 of the Code of Civil Procedure. S. 274 of the Code cannot be applied in such a case. **KARIM-UN-NISSA AND OTHERS v. PHUL CHAND.**

[XIII-51]

CIVIL PROCEDURE CODE, s. 268—
(continued.)

(2)———*Suit for establishment of right to bond attached.*] Where a debt secured by a bond has been attached before judgment under s. 485 of the Code of Civil Procedure, s. 268, cl. (a) of the same Code does not debar the creditor under the bond from suing to establish his right to the bond debt. *THE COLLECTOR OF ETAWA v. BETI MAHARANI.*

[XII-27]

(3)———*Suit in respect of debt attached.*] S. 268, clause (a) of the Civil Procedure Code does not mean, that while a debt is under attachment the person to whom the debt was originally owing, should be barred from bringing a suit in respect of it. What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor. *SHIB SINGH v. SITA RAM.*

[X-194]

(4)———*Attachment under wrong section—Effect.*] Held that the sale of the mortgagee's rights under a mortgage duly held and confirmed was effectual to pass the mortgagee's rights to the auction purchaser even though the attachment subsequent to which such sale was held might have been made under a wrong section of the Code of Civil Procedure. *Balkrishna v. Masuma Bibi (I. L. R., 5 All., 142); Mahadeo Dube v. Bhola Nath Dichit (I. L. R., 5 All., 86); Ram Chand v. Pitam Mal (I. L. R., 10 All., 506) and Karim-un-nisa v. Phul Chand (I. L. R., 15 All. 134) referred to, SHEO CHARAN LAL v. SHEO SEWAK SINGH AND ANOTHER.*

[XVI-154]

s. 273.—*Sale of decree.*] Held that a decree can not be sold in execution of a decree. The decree-holder may proceed under s. 273. *Sultan Kuar v. Gulzari Lal (I. L. R., 2 All., 290)* followed. *TAKIYA BEGAM v. SIRAJ-UD-DULAHA.*

[V-123]

(1) s. 274.—*Attachment of the interests of mortgagee out of possession.*]

Sec. s. 268, No. (1).

(2)———*Attachment under wrong section—Effect.*]

Sec. s. 268, No. (4).

(3)———*Immoveable property—Standing crop.*] Standing crops are immoveable property in the sense of the General Clauses Act (1 of 1868), and clause (6) of the second schedule of Act IX of 1887, and of the Civil Procedure Code. *Madayya v. Yenkata (I. L. R., 11 Mad., 193)* approved. *Cheda Lal v. Mulchand.* *MINDAI v. KUNDAN SINGH.*

[XI-174]

(4)———*Notice to judgment-debtor—Personal service.*] Under s. 274 of Civil Procedure

CIVIL PROCEDURE CODE, s. 274—
(continued.)

Code it is not necessary that notice should be served on the judgment-debtor personally. When the order of attachment has been promulgated under the section, s. 276 comes into play and makes void any transfer within its terms pending the attachment as against all claims enforceable under the attachment. *BABU LAL AND ANOTHER v. NARAIN DAS.*

[IX-132]

(1) s. 276.—*Alienation pending attachment.*]

See s. 274, No. (4).

(2)———*Defective attachment.*] Held that where property had not been attached in the manner required by law, *e. g.* where a copy of the order of attachment was not fixed upon the Court-house or in the Collector's office its sale to a third person could not be affected by such attachment. *Noor Ahmad v. Altaf Ali (I. L. R., 2 All., 58)* followed. *BIRMH DEO v. GORI NATH.*

[I-65]

(3)———*Decree-holder.*] On the application of a decree-holder the Munsif attached a decree of the Revenue Court in favor of the judgment-debtor, in the manner required by s. 273, Civil Procedure Code, and directed notice to be served on the judgment-debtor who was said to be in a certain jail. The authorities of such jail returned such notice unserved, reporting that there was no such person in such jail. The decree-holder though informed of the matter took no further steps and the Munsif in consequence on the 24th December, 1878, ordered that the case should be struck off the file of pending cases. In May, 1879, the decree-holder sold his decree to *R K S.* Held that inasmuch as the order of the 24th December, 1878, declared in terms that no attachment had been perfected, the sale of the decree to *R K S* was not invalid and passed a good title. *RAO KARAN SINGH v. BAQAR ALI KHAN.*

[I-158]

(4)———*Application.*] Application was made for the attachment in execution of a decree of a *muafi*-holding belonging to the judgment-debtor. The numbers and areas given in such application as the numbers and areas of the land comprised in such holding were the numbers and areas of certain revenue paying lands, and were not the numbers and areas of any lands held as *muafi* by the judgment-debtor. The order of attachment described the property as described in the application for attachment. The judgment-debtor having alienated by sale a *muafi* holding belonging to him, the decree-holders sued to have such alienation set aside as void under the provisions of s. 276 of Act X of 1877. Held that, having regard to the

CIVIL PROCEDURE CODE, s. 276—
(continued.)

description given in the application for attachment and the order of attachment it could not be said that the *muafi*-holding alienated by the judgment-debtor was under attachment at the time of the alienation, and its alienation was therefore not void under s. 276 of Act X of 1877. *Held* also that the material misdescription of the property in this case in the order of attachment protected the alienees who were *bona-fide* purchasers from having the alienation set aside as void under s. 276, as the attachment could not under the circumstances be held to have been "duly intimated and known" as required by that section. **GUMANI v. BALRAM PANDAY AND OTHERS.** (*Obsolete*).

[I-59]

(5) —————. Behari Lal and Makund Ram purchased from the decree-holder a decree against the ancestor of certain persons who were joint owners of a *muafi* interest in the village of Dhak Shahid. Subsequently to this purchase a portion of the said *muafi* interest was sold; the plaintiffs, in the suit, brought a claim for pre-emption, and obtained a decree on the 21st December, 1885, under which decree they obtained possession. During the pendency of the suit, *viz.*, on the 11th May, 1884, an attachment was obtained by Behari Lal and Makund Ram of "an 8 biswa *zeminadari* share of *manza* Dhak Shahid," the judgment-debtors having no *zeminadari* in the village in question. The property which thus purported to have been attached was sold by auction on the 20th January, 1886, and purchased by the defendant who was formally put in possession. The plaintiffs then sued for a declaration of their proprietary right in the property. *Held* that the plaintiff's title as pre-emptors must prevail. The attachment was invalid by reason of material misdescription of the property which it was sought to attach, and could not operate so as to throw back the defendant's title to a date prior to that of the plaintiff's decree; the plaintiffs moreover were absolute strangers to the proceedings in pursuance of which the attachment took place. **HARGU LAL SINGH v. MUHAMMAD RAZA KHAN AND ANOTHER.**

[XI-16]

(6) —————. *Held* that an order of the Revenue Court, directing the attachment of a decree of the Civil Court in execution of its own decree, was *ultra vires* and could not therefore have the effect of invalidating a private sale of such Civil Court decree made after the order of attachment was passed. S. 276 of Act No. X of 1877, did not apply to such a case. **BALDEO DAS v. MEHRBAN ALI AND OTHERS.** (*Obsolete*).

[I-17]

(7) ———— *Subsisting attachment.* Where property has once been attached in execution

CIVIL PROCEDURE CODE, s. 276—
(continued.)

of a decree, the mere dismissal of an application for execution, which does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside, the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. *Ganga Rai v. Musammat Sakeena Begum* (N.W. P. H. C. Rep., Vol. 5, p. 72); *Nadir Hossein v. Pearoo Thovildarinnee* (14 B. L. R., 425) and *Golam Yaheya v. Shama Sundari Kuari* (12 W. R., 142) referred to. **THE BANK OF UPPER INDIA v. SHEO PRASAD AND OTHERS.**

[XVII-124]

(8) ———— *Alienation—Zar-i-peshgi lease.* *Held* that a *zar-i-peshgi* lease and an ordinary agricultural lease made by a judgment-debtor of property under attachment were alienations which were void by reason of the prohibition contained in s. 276 of the Code of Civil Procedure. **DEBI PRASAD v. BALDEO.**

[XVI-13]

(9) ———— *Private alienation—Award.* By agreement between L and Q, the parties to a suit, the matters in difference between them were referred to arbitration. An award was made directing that L should transfer certain property to Q by way of sale. Between the day the award was made and the day a decree was made in accordance with the award such property was attached in execution of a decree against L. After the attachment L, in compliance with the decree made in accordance with the award, executed a conveyance of such property to Q. *Held* by the Full Bench (affirming the decision of Straight, J., and reversing that of Spankie, J.) that such conveyance was not a "private alienation" in the sense of s. 276 of Act X of 1877, and was therefore not void under that section as against a claim enforceable under such attachment. **DURBAN ALI v. ASHRAF ALI AND ANOTHER.**

[I-75]

(10) ———— *Alienation with decree-holder's consent.* *Held* that a private alienation of property under attachment but with the decree-holder's consent cannot be impeached by the decree-holder. **FAKIR SAHU v. GANESH PRASAD.**

[VI-176]

(11) ———— *"Enforceable under the attachment."* *Held* that an alienation during a subsisting attachment is void only as against any claim enforceable under the attachment. **RAM PRASAD AND ANOTHER v. SALIK RAM SINGH AND OTHERS.**

[II-210]

CIVIL PROCEDURE CODE, s. 276—
(continued.)

(12). —————] A decree-holder in execution of a decree for money attached certain immoveable property of his judgment-debtor owing, however, to want of prosecution of the execution proceedings his application for execution was struck off, and with that the attachment was removed. The judgment-debtor subsequently mortgaged the property which had been attached to a third party, who, having obtained a decree on his mortgage, brought the property to sale and purchased it himself. Pending the mortgagee's suit the judgment-debtor made a usufructuary mortgage of the same property in favor of the decree-holder. *Held* on a suit for recovery of possession brought by the usufructuary mortgagee decree-holder who had been ousted by the simple mortgagee that the rights of the decree-holder under his usufructuary mortgage were subject to the defendant's rights under his prior simple mortgage, and this even though the attachment had subsisted, his claim under the usufructuary mortgage not being a claim enforceable under the decree within the meaning of s. 276, Civil Procedure Code. **NARAIN DAS v. SHEOAMBAR AHIR.**

[XVII-37]

(13). —————] The fact that a mortgage made by a judgment-debtor to a person other than his judgment-creditor may be void as against the judgment-creditor under the provisions of s. 276 of the Code of Civil Procedure will not prevent such mortgage from being a good consideration for an advance by the mortgagee. **LACHMAN SINGH v. KHETPAL AND OTHERS.**

[XV-117]

(14). —————] A private alienation of property under attachment is void, under s. 276, Civil Procedure Code, "as against all claims enforceable under the attachment" only. *Held* therefore where property attached in execution of a decree was alienated, and was after such alienation again attached, the first attachment having expired, and was brought to sale in pursuance of the second attachment, and the purchaser sued for possession of the property claiming on the ground that the alienation of the property was void under the provisions of s. 276, that as no claim was enforced or was enforceable under the first attachment, under which the property was alienated but the purchaser was claiming under the second attachment, such alienation could not be assailed under the provisions of s. 276. **GOBIND SINGH AND OTHERS v. ZALIM SINGH AND ANOTHER.**

[III-183]

(15). —————] A judgment-debtor whose property had been attached in execution of a money decree, sold the property and out of the price paid into

CIVIL PROCEDURE CODE, s. 276—
(continued.)

Court the amount of the decree, and prayed that the attachment might be removed. While the attachment was subsisting and prior to the sale, the holders of other money decrees against the same judgment-debtor preferred applications, purporting to be made under s. 295 of the Civil Procedure Code, and praying that the proceeds of the sale of the property might be rateably divided between themselves and the attaching creditor. The Court refused to remove the attachment until these creditors had been paid. It was found that the sale by the judgment-debtor was a *bona fide* transaction entered into for valuable consideration. *Held* that, inasmuch as no order for attachment of the property was passed in favour of the decree-holders in manner provided by s. 274 of the Civil Procedure Code, their claims were not entitled to the protection conferred by s. 276 against private alienations of property under attachment; that these claims were not enforceable under the attachment which was made; that the sale by the judgment-debtor was valid; and that execution of the decrees could not take place.

Per MAHMOOD, J. That s. 276 of the Civil Procedure Code being a restriction of private rights of alienation should be strictly construed, that before property can be subjected to such restriction, there must be a perfected attachment; that the orders passed under s. 295 did not amount to such attachment and that, even assuming them to amount to such attachment, they, not having been duly intimated and notified could not make the prohibition of s. 276 applicable to the case. *Mahadeo Dubey v. Bhola Nath Dichit* (I. L. R. 5 All., 86); *Anand Lal Dass v. Jullodhur Shaw* (14 Moo. I. A. 543); *Rameswar Singh v. Ramtani Ghose*, (4 B. L. R. A. C. 24); *Judro Chunder Baboo v. Dunlop*, (10 W. R. 264); *Gobind Singh v. Zalim Singh*, (I. L. R., 6 All., 33) and *Gumahi v. Hardwar Panday* (I. L. R., 3 All., 698) referred to. Also *per* Mahmood, J. While s. 295 of the Code gives a special right to judgment-creditors as distinguished from simple-creditors, it is an essential condition precedent to the exercise of that right that there should be a sale in execution, and that its result should appear in assets realized by the sale, and therefore until the sale takes place, no such right can be enforced. *Bishen Chunder Surma Chowdhry v. Mun Mohinee Dabee*, (8 W. R., 501) referred to. **GANGA DIN AND OTHERS v. KHUSHALI.**

[V-179]

(1). s 278.—*Order in favor of one decree-holder—Effect on others.* [An order in favour of one of several decree holders on an objection under s. 278 of the Code of Civil Procedure does not enure for the benefit of other decree-holders who are not parties to the proceedings. *Badri Prasad v. Muhammad Yusuf* (I. L. R., 1 All., 381) referred to. **JAGAN NATH v. GANESHI AND OTHERS.**

[XVI-129]

CIVIL PROCEDURE CODE, s. 278—
(continued.)

(2.)—*—Jurisdiction—Revision.*] The consideration of an objection under s. 278 of the Civil Procedure Code, having first been entertained and adjourned by an additional Subordinate Judge, subsequently came before the Subordinate Judge, who struck off the case for default. No order under s. 25 transferring the case to the Subordinate Judge was on the record nor was it otherwise shown how he obtained jurisdiction to deal with it. *Held* that the High Court in the exercise of its revisional powers under s. 622 of the Code should not presume that the Subordinate Judge had taken up the case without jurisdiction, that the proper remedy of the petitioner was an application under s. 103 read with s. 647, or a suit under s. 283, and that the High Court should not interfere in revision. *SHEO PRASAD SINGH v. KASTURA KUAR.*

[VIII-26

(3.)—*—Objection after an order under s. 351—Jurisdiction.*] Certain property was ordered to be attached in execution of a decree. An order was subsequently passed under s. 351 declaring the judgment-debtor an insolvent and appointing a receiver of his property. After this an application was made under s. 278 by one Paras Ram objecting that the property was his and not that of the judgment-debtor and therefore not liable to attachment. The District Judge refused to entertain the application holding that he had no jurisdiction. *Held* that the Judge was wrong. The mere circumstance that the judgment-debtor's property had been vested in a receiver did not oust the Court of its jurisdiction. *PARAS RAM v. KARAM SINGH AND OTHERS.*

[VII-20

(4.)—*—Objection—Section not exhaustive.*] A and others being judgment-debtors under a certain instalment-decree borrowed money to pay off the balance due under the decree giving a mortgage on the property affected thereby. The mortgagee paid the balance due under the above-mentioned decree into Court, in his own name, but expressly on behalf of his mortgagors and notice was issued to the decree-holder who drew out some of it. Subsequently the decree-holder sought to appropriate some of the amount so paid into Court to payment of debts other than that due under the decree and to obtain attachment and sale of the property affected by that decree which was then in the possession of the representatives of the mortgagee. *Held* that even if s. 278 of Civil Procedure Code were exhaustive and the mortgagees were not entitled within the meaning of that section to object to the attachment of the property in question, they would, still as mortgagees in possession, be entitled to claim, that the property should not be held liable to attachment under the former decree. *MITTHU LAL v. MUHAMMAD AHMAD AND ANOTHER.*

[XI-220

CIVIL PROCEDURE CODE, —(continued.)

s. 281. *Claim disallowed—Stay of sale.*] An objection to the sale of certain property was entertained under ss. 278-281 and disallowed. The Court entertaining the objection however made an order that the sale of the property should be stayed until the decision of a suit by the claimant to establish her right to the property. *Held* that the order of the Court staying the sale was illegal and must be quashed. *JAWAHIR LAL v. KHILLO.*

[III-205

s. 282.—*Order under s. 282 after one under s. 244.*] In this case the Court of first instance made an order under s. 244 of the Civil Procedure Code, which was confirmed in appeal. The case came again before the first Court and this time it made an order under s. 282 of the Civil Procedure Code. *Held* that the order was *ultra vires* and illegal and must be set aside. *BUNYAD ALI v. JAGAR NATH.*

[V-270

(1) s. 283.—*Orders falling within section—Order under s. 244.*

Sec. s. 244, Nos. (11), (12), (13), (15), (16), (17), (18), and (34).

(2.)—*—Ss. 278-281 not exclusive of the remedy.*] The provisions of s. 278, Civil Procedure Code, and the sections immediately succeeding are not exclusive of the remedy provided by s. 283 of the Code. *Man Kuar v. Tara Singh (I. L. R., 7 All., 583)* considered. *SUNDER SINGH AND OTHERS v. GHASI AND OTHERS.*

[XVI-126

(3.)—*—Suit to establish right—Proof of title.*] In execution of a decree obtained by the plaintiff for the enforcement of lien against the house in dispute, he caused the house to be advertised for sale. The defendants who claimed to have purchased the house from the same mortgagor, raised objection which was allowed by the Court executing the decree. Hence this suit by the plaintiff. In this case it has been found by the lower Courts that the alleged sale-deed of the defendant was fraudulent and collusive. The defendant contends that notwithstanding the finding he is entitled to put the plaintiff to the proof of his title or in other words, that the plaintiff should have proved his mortgage deed against him. *Held* that the defendant's basis of title having been found to be a mere nullity the plaintiff is entitled to succeed on the decree. *Held* further that the plaintiff is not entitled in this case to recover the costs incurred by him in the execution proceedings. *Mohram Das v. Ajudhia (I. L. R., 8 All., 452; W. N., 1886, p. 189)* followed. *KADIR BAKSHI v. SALIG RAM.*

[VII-95

CIVIL PROCEDURE CODE, s. 283—
(continued.)

(4). ———— *Onus.*] An objection under s. 278 was taken to an attachment by the sons of the judgment-debtor on the ground that the property attached belonged to them and not to the judgment-debtor, they relied in support of their contention upon a sale-deed. The objection however was overruled and the sons brought a regular suit to have their claim to the property established. In defence the decree-holders contended that the sale-deed was fraudulent and collusive. *Held* that though generally speaking the burden of proving fraud lies upon the party alleging it. In this case the burden of proof rested upon the plaintiffs who were impeaching the disallowance of their objections in the execution department. **TULSHI RAI AND OTHERS v. RAM DAS AND ANOTHER.**

[VII-71]

(5). ———— *Cause of action.*] On the 18th August, 1880, A sued X for a simple money debt and obtained a decree on the 25th August. On the 15th August, X sold a house to Y who sold it to B on the 26th October, 1880. On the 19th November the house was attached in execution of A's decree as the property of X and was proclaimed for sale on the 14th February, 1881. On the 14th January, 1881, B's objection to the attachment was disallowed. On the 11th February the amount of the decree was paid into Court on behalf of X and the house was released from attachment. In April 1881, B instituted the present suit against A claiming a declaration that the house belonged to him and to have the order disallowing his objection to the attachment set aside. *Held* that the house having been released from attachment there was no cause of action and the suit must be dismissed. **KALLIAN v. MAKBUL HUSAIN.**

[III-14]

(6). ———— *"Conclusive"—Dismissal for default.*] An order striking off an objection to the attachment of property attached in execution of a decree for default of prosecution is not "conclusive" as regards the right which the objector claimed to the property, within the meaning of s. 283 of Act X of 1877. *Held*, therefore, where a person objected to the attachment of certain moveable property attached in execution of a decree, claiming it as his own, and his objection was struck off for default of prosecution, that such person might sue for damages for the wrongful attachment of such property without suing to establish the right which he claimed thereto. *In re* PETITION OF KALLU MAL v. BROWN. (*Obsolete*).

[I-14]

(7). ———— *Summary rejection of objection.*] Where property not of the judgment-debtor but of a third person was attached in execution of a decree and, the owner having objected his objection was summarily rejected

CIVIL PROCEDURE CODE, s. 283—
(continued.)

on the sole ground that it was preferred on the day fixed for the sale, and the property was sold. *Held* that the owner was entitled to follow the property into the hands of the auction purchaser and to recover either the property itself or damages. **RAM PRASAD v. HAR BHAGWAN.**

[XIII-148]

(8). ———— *Informal trial.*] One GS gave a usufructuary mortgage of a certain share in a village to S and B. Subsequently, S and B gave a sub-mortgage of the same, with possession to SS. SS, having obtained a decree against S and B upon his mortgage bond, applied under s. 268 (a) of Act X of 1877 for the attachment of the mortgage-debt due to his judgment-debtors S and B from GS. The application was granted and the attachment was duly made. GS objected to this order of attachment under the provisions of s. 278. Civil Procedure Code, on the ground that he had paid off the mortgage-debt long before the order of attachment and had got the mortgage-deed returned from S and B. The objection was allowed by the Court on the 25th January, 1878, and the attachment was removed. Subsequently GS brought the present suit against SS, S and B for possession of the share, alleging that the money had been repaid and the share redeemed. The defendant SS contended that the mortgage-money had not been repaid. *Held* that, as SS had not brought a suit to contest the order, dated 25th January, 1878, removing the attachment, that order, if made after due investigation in the sense of ss. 278, 279 and 280, Civil Procedure Code, was conclusive against him. But as a matter of fact it had not been so made and was therefore not binding. **GANESH SINGH v. SURAT SINGH.** (*Obsolete*).

[I-126]

(9). ———— *Limitation.*] *Held* that the limitation of one year does not apply to a suit in effect (not expressly) under s. 283, Civil Procedure Code, where the essential conditions precedent to a suit under s. 283, namely, the making of an attachment of some property, of objection being taken to such attachment, of investigation being made into such objection of its being allowed or disallowed, did not exist. **ANGAN LAL v. GUDAR MAL AND ANOTHER.**

[VIII-189]

(10). ———— *Order under s. 282.*] An order under s. 282 of the Code of Civil Procedure must be an order passed on an adjudication on the claim asserted. Where an order of the nature of an order under s. 282 showed on the face of it that the Court passing such order had declined to enter into the question of the rights of the parties and had not adjudicated on the claim; it was *held* that such order could not be treated as an order under s. 282. **SHEO RATAN RAI v. SARAB RAI.**

[XIV-14]

CIVIL PROCEDURE CODE, s. 283—
(continued.)

(10).—*Appeal.* An objection to the attachment of property under s. 278 of the Civil Procedure Code having been disallowed, an appeal was preferred by the judgment-debtors who had taken no part in the objection before the Court of first instance. *Held* that the appeal was not maintainable. *BACHI AND ANOTHER v. SHEO KARAN SINGH AND OTHERS.*

[VIII-77]

s. 284.—*Ex-parte order for sale—Res Judicata.* *Held* that an *ex-parte* order for sale of mortgaged property in execution of a simple money decree held by the mortgagees against the mortgagor, no suit for sale upon the mortgage having been brought, could not be taken as barring an appeal by the judgment-debtor from an order of the Court which passed the decree ordering the Collector (who had allowed the judgment-debtor's objection to execution) to proceed with the sale. *HYDER SHER KHAN v. HAR KISHEN AND ANOTHER.*

[XIV-16]

(1) **s. 285—“Attached in.....than one.”** In execution of a hypothecation decree of the Munsif of Agra, dated in 1877, *A* attached two houses on the 13th February, 1878. The execution case was however struck off in September 1879 maintaining the attachment. *B* also obtained a decree from the Court of the Subordinate Judge of Agra, dated 5th December, 1879 enforcing lien on the same houses. He took out execution and caused the houses to be sold on the 29th March, 1880, himself becoming the purchaser. Subsequently on the 5th August, 1880, *A* applied to execute his decree in the Munsif's Court by the sale of the houses which was accordingly held in December, 1880, *A* himself becoming the purchaser. *A* having been obstructed in obtaining possession by *B* has brought this suit. One of the pleas in defence was that the sale in *A*'s decree was bad under s. 285, Civil Procedure Code. *Held* that the objection had no force inasmuch as when *A*, the plaintiff, applied for execution on the 5th August, 1880, and the sale was ordered by the Munsif, there was no attachment of the property subsisting under the decree of the Subordinate Judge as that decree had been executed by the sale of the property and the execution proceedings of the decree of the Subordinate Judge had closed. *THE UNCOVENANTED SERVICE BANK v. AJUDHIA NATH AND OTHERS.*

[IV-67]

(2).—*Court of highest grade—Munsif—S. C. Court.* In the North-Western Provinces the Court of a Munsif must, for the purposes of s. 285 of the Code of Civil Procedure, be regarded as of a higher grade than a Court of Small Causes. So held by Edge, C. J., Tyrell, Burkitt, and Aikman, JJ., Knox, J., *dissentiente.*

CIVIL PROCEDURE CODE, s. 285—
(continued.)

Per KNOX, J. The respective functions of a Munsif's Court and of a Court of Small Causes in the North-Western Provinces are such that the Courts do not admit of the comparison implied by the term “grade” being instituted between them for the purposes of section 285 of the Code of Civil Procedure. *BALLU RAM v. RAGHUBAR DIAL AND ANOTHER.*

[XIII-211]

(3).—*Applicability of s. 285 to proceeding under s. 295.* When several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the Court of the highest grade where such Courts are of different grades, or the Court which first effectuated the attachment where such Courts are of the same grade, is, under s. 285 of the Civil Procedure Code, the Court which has the power of deciding objections to the attachment of determining claims made to the property, of ordering the sale thereof and receiving the sale-proceeds, and of providing for their distribution under s. 295. *IN THE MATTER OF THE PETITION OF BADRI PRASAD v. SARAN LAL.*

[II-69]

AGHORE NATH v. SHAMA SUNDARI AND ANOTHER.

[III-167]

(4).—*Court of highest grade—Court first attaching.* The operation of s. 285 of the Code of Civil Procedure is not affected by the fact that prior to the attachment made by the Court of higher grade proceedings subsequent to attachment may have taken place in the Court of lower grade in execution of the decree of that Court. *Badri Prasad v. Saran Lal (I. L. R., 4 All., 359); Aghore Nath v. Shama Sundari (I. L. R., 6 All., 615) and Muttakaruppan Chetti v. Mathura malinga Chetti (I. L. R., 7 Mad., 47)* referred to. *BALKISHEN v. NARAIN DAS AND OTHERS.*

[XVI-93]

(1) **s. 287.—*Proclamation of incumbrance—Effect on purchaser.*** Certain immoveable property was put up for sale, under the provisions of Act X of 1877, in execution of a decree for money and was purchased by *C*, with notice that *L* held a decree enforcing a lien on such property. Subsequently *L* applied for the sale of such property in execution of his decree, and such property was put up for sale in execution of that decree, and was purchased by *S*. *S* sued, by virtue of such purchase, to recover possession of such property from *C*. *Held* that inasmuch as under Act X of 1877 what is sold in execution of a decree purports to be the specific property, and as *C* had purchased the property in suit with notice of the existing lien on it and subject to its re-sale in execution of the decree, in execution of which *S* had purchased it what actually was

CIVIL PROCEDURE CODE, s. 287—
(continued.)

sold in execution of that decree to S was such property and S was entitled to possession of such property under such sale. Sales under Act VIII of 1859 and Act X of 1877 distinguished. *SHEO RATAN LAL v. CHOTEY LAL. (Obsolete).*

[I-43]

(2).—*Appeal.* This appeal relates to a question arising under s. 287 of the Civil Procedure Code. In course of execution of respondent's decree against the appellants it became necessary for the Court to ascertain the incumbrances to which the property of the judgment-debtor ordered to be sold was liable. The Court held those to amount to Rs. 4,600 and entered that in the sale proclamation. The judgment-debtor appealed to the Judge on this question. *Held* that the appeal was maintainable. *MOHAN LAL v. IBN HASAN.*

[VI-167]

(1). s. 291.—*Deposit by vendee.*

See s. 244 No. (47).

(2).—*_____.* An order under s. 291 of the Civil Procedure Code adjourning a sale in execution of a decree is not appealable either as a "decree" within the meaning of ss. 2 and 244 of the Code, or otherwise. *RAHIMAN AND ANOTHER v. MUHAMMAD HUSAIN AND ANOTHER.*

[VIII-71]

(3).—*Application of section to Act IV of 1882, s. 89.* *Held* that s. 291 of the Code of Civil Procedure must be taken to have modified s. 89 of Act No. IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale. *Raja Ram Singhji v. Chunni Lal (I. L. R., 19 All., 205)* followed. *HARJAS RAI AND ANOTHER v. RAMESHAR.*

[XVIII-70]

(1). s. 293.—*Suit to set aside order under section.* *Held* that a suit will lie to set aside an order passed under s. 293 of the Code of Civil Procedure. *Held* also that the fact that the certificate provided for by s. 293 of the Code has not been granted will not prevent the decree-holder or the judgment-debtor, as the case may be, from recovering from the defaulter the deficiency arising on a re-sale of property sold in execution of a decree but not paid for. *TAPESRI LAL AND OTHERS v. DEOKI NANDAN RAI AND ANOTHER.*

[XVI-168]

(2).—*Appeal.* No appeal lies from an order under s. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by this default. *Ram Dial v. Ram Dass (I. L. R., 1*

CIVIL PROCEDURE CODE, s. 293—
(continued.)

All., 181) and *Baij Nath Sahai v. Moheep Narayan Singh (I. L. R., 16 Calc., 535)* dissented from; *Soudagar Mal v. Abdul Rahman Khan (W. N., 1890, p. 85)*; *Rahim Bakhsh v. Dhuri (I. L. R., 12 All., 397)* (*S. C., W. N., 1890, p. 135*) followed. *DEOKI NANDAN RAI AND ANOTHER v. TAPESRI LAL AND OTHERS.*

[XII-74]

ILAH BAKHSH AND ANOTHER v. BAIJ NATH.

[XI-156]

(1.) s. 294.—*Purchase without permission—Voidable—(Act X of 1877).* Section 294 of Act X of 1877 did not make a purchase by a decree-holder, without the permission of the Court absolutely void, but only voidable on the application of the judgment-debtor or any other person interested in the sale. *Held* therefore that a suit for possession, by such decree-holder against the judgment-debtor, who had made no application as mentioned above, was maintainable. *SURAJ MAN v. DEBI CHARAN. (Obsolete).*

[II-26]

(2).—*Applicability of section to proceedings before Collector.* A, in execution of his decree against B, brought B's property to sale and by the permission of the Collector (to whom the decree had been transferred) bought it himself but failed to deposit the purchase money; consequently the property was resold and bought by C (A's mother.) One D who had also a decree against the same judgment-debtor, applied to the Collector to get the sale cancelled on the ground that the purchase by C was really by A, and as A had not this time obtained the permission of the Collector the sale was illegal under s. 294, Civil Procedure Code. The Collector set aside the sale. *Held* (in a suit brought by A impeaching the Collector's order) that the Collector was right. That s. 294 applied also to cases transferred to the Collector for execution. *RAKMINI v. MUNNI LAL AND OTHERS.*

[VII-214]

(3).—*Appeal.* *Held* that an order allowing a decree-holder to bid at a sale held in execution of his decree was not appealable. The order under s. 294, Civil Procedure Code, which is made appealable by s. 588 (16) is the order setting aside the sale. *BACHNI KUAR v. CHARU CHANDER AND ANOTHER.*

[III-104]

(1.) s. 295.—*"Otherwise."*—*Payment by judgment-debtor in Court.* *Held* that where a judgment-debtor pays into Court a sum on account of the decree of one of the decree-holders the sum cannot be held as "assets" realized by sale or otherwise, in execution of a decree, so as to be rateably divisible under s. 295, Civil Procedure Code. *GOPAL DAI v. CHUNNI LAL.*

[VI-1]

CIVIL PROCEDURE CODE, s. 295—
(continued.)

(2) ————— *Money paid in Court by receiver—Applicability of proviso (c) to such case.*] A decree declared that the plaintiffs were entitled to have a former decree satisfied out of the rents and profits of certain property; and the Collector of the district was appointed receiver, and, having received the rents and profits as such, paid them into Court. Prior to the Collector's receipt of the rents and profits, an application was made by the holder of another decree for execution against the same judgment-debtor. *Held* that the case did not fall within the proviso to section 295 of the Code of Civil Procedure, as that proviso related solely to cases of sale, and here there was no sale; that the first paragraph of the section was applicable, there being nothing in that paragraph to limit the decree therein mentioned to any particular kind of decree, and that the rents and profits were rateably divisible under the section. **BHOLA NATH AND OTHERS v. GANESHI LAL.**

[X-194

(3.) ————— *Same judgment-debtor—Decree for money.*] *U* held a money decree against *B*, *P* and *R*, in execution whereof he caused to be attached and sold certain property belonging to *B*. *D* held a decree against *B*, *P*, *R* and *S*, which so far as *P*, *R*, and *S* were concerned, was a decree for enforcement of hypothecation by sale of the judgment-debtor's property, but which did not direct the sale of specific property belonging to *B*. An application by *D*, under s. 295, Civil Procedure Code, for an order enabling him to share rateably in the proceeds of *U*'s execution was rejected. *Held* that there being no question of fraud in the case, *D* was entitled to enforce his decree in the first instance against the property of *B*; that his decree against *B* did not lose the character of a decree for money under s. 295 of the Code because it directed a sale of the property of the other judgment-debtors; and that the fact that there were four judgment-debtors in *D*'s decree and only three in *U*'s would not deprive *D* of the right to share rateably. **Shumbhoo Nath Poddar v. Lucky Nath Dey** (I. L. R., 9 Calc. 920) referred to. **Deboki Nundum Sen v. Hari** (I. L. R., 12 Calc. 298); **Jagat Narain Pal v. Dhundhey Rai** (I. L. R., 5 All., 566) and **Hart v. Tara Prasanna Mukerji** (I. L. R., 11 Calc. 718) distinguished. **THE DELHI AND LONDON BANK v. THE UNCOVENANTED SERVICE BANK, BA-REILLY.**

[VII-262

(4.) ————— *Re-sale (Act X of 1877).*] One *T* held a decree against *R R* for Rs. 63. One *C L* at the same time held a decree against *R R* and *J S* jointly and severally for Rs. 365. *R R* owned 66 *bighas* of land and *J S* 45 *bighas*, and the two owned 318 *bighas* in common. All the above-mentioned property was separately attached and ordered to be

CIVIL PROCEDURE CODE, s. 295—
(continued.)

sold in execution of each decree. The officer conducting the sales first put up *R R*'s interest in the 66 *bighas* and 318 *bighas* and the lot was knocked down for Rs. 435, sufficient to satisfy both decrees. That officer then proceeded to re-sell the property already sold, as well as *J S*'s 45 *bighas* and his interests in the common lands, and the sale was made for Rs. 140. *Held* that the second-sale was illegal and should be set aside. The re-sale of the property already sold in execution of the first decree was not allowable with reference to the provisions of s. 295 of Act X of 1877. *C L* was entitled under that section to share rateably in the assets realised by the first sale, but the property of *R R* could not be again sold in satisfaction of his decree. That decree also could have been fully satisfied out of the assets realised by the first sale. **JUALA SINGH AND ANOTHER v. CHIRANJI LAL AND ANOTHER.** (*Obsolete*).

[I-42

(5) ————— *Court—One and the same Court—Subordinate Judge as such and as S. C. C. Judge.*] The Judge of a Court of Small Causes sitting in the exercise of his powers as such and in the exercise of his powers as a Subordinate Judge is not one and the same Court but two different Courts. *Held*, therefore, that the holder of a decree made by the Judge of Small Cause Court in the capacity of Subordinate Judge, who had applied to such Judge acting in that capacity for execution of his decree, was not thereby entitled to share rateably under s. 295 of Act X of 1877, in assets subsequently realized by sale in execution of a decree made by such Judge in the capacity of Judge of such Small Cause Court. **HIMALAYA BANK v. HURST AND ANOTHER.** (*Obsolete*).

[I-58

(6) ————— *Application of section to sales by private alienations.*]

See. s. 276, No. (15).

(7) s. 295 (c).—*Incumbrance.*] On the 22nd March, 1878, the first mortgagee of certain property obtained a decree enforcing his mortgage. On the 25th March, 1878, the second mortgagee obtained a decree enforcing his mortgage. Both decrees were made by the same Court. On the 20th June, 1878, the property was put up for sale in execution of the second mortgagee's decree. The first mortgagee subsequently brought a suit for a re-sale of the property in satisfaction of his decree. *Held* that this was the only course open to him, and he could not have enforced satisfaction of his decree in accordance with the provisions of s. 295, Civil Procedure Code, inasmuch as the provisions of the first and second provisos to that section refer only to sales in execution of simple money decrees whereas the property in question had been sold in execution of a decree ordering its sale, and the provisions of the third proviso relate

CIVIL PROCEDURE CODE, s. 295 (c)—
(continued.)

to subsequent and not prior incumbrances. **JAGAT NARAIN RAI AND ANOTHER v. DHUNDHEY. RAI.**

[III-150]

(8).—[] *A* mortgaged certain property to *B* in July 1874, to *C* in March 1877, and again to *B* in November 1877. *B* obtained a decree directing the sale of the property in satisfaction of his two mortgages and it was sold accordingly. Subsequent to the sale, *C* obtained a similar decree upon his mortgage, and having unsuccessfully applied in his own suit to have his decree satisfied out of the sale proceeds after payments of *B*'s first mortgage of July 1874, brought a suit under the last paragraph but one of s. 295 of the Civil Procedure Code to recover the amount received by *B* in respect of *B*'s mortgage of November 1877. *Held* that to read the words 'an incumbrance' in s. 295, proviso (c) of the Civil Procedure Code as 'an incumbrance' or 'incumbrances' so as to give priority to *B*'s mortgage of November 1877, over *C*'s earlier mortgage of March 1877, would be to defeat the intention of the Legislature as expressed in that section and also in s. 80 of the Transfer of Property Act (IV of 1882), and that *C* was entitled to maintain the suit. **MITHU LAL AND OTHERS v. KISHAN LALL.**

[X-77]

(9).—*Surplus sale proceeds—Auction purchaser.* *K* and others brought to sale certain property of *P* in execution of a simple money decree which they held against *P* and *K* purchased it. The property was subject to a mortgage at the time it was sold. Subsequently a decree was obtained against *P* enforcing the mortgage of which *G* became the assignee. There being a surplus of the sale held, in *K*'s decree due to the respondent *P*, the appellant *G* sought to obtain the same in execution of the decree held by him. *Held* that the application must be allowed. **GULAB SINGH v. PEMIAN.**

[III-56]

(10).—*Appeal.* No appeal will lie from an order under s. 295 of the Code of Civil Procedure dismissing, on the ground that the decree was barred by limitation, a decree-holder's application to share in the assets realized under another decree against the same judgment-debtor. Such an order as above-mentioned cannot be regarded as a decree under s. 244 read with s. 2 of the said Code. **KASHI RAM v. MANI RAM.**

[XII-56]

s. 305 proviso.]—*Held* that a private sale, by a judgment-debtor who had obtained permission of the Court under s. 305 of the Civil Procedure Code, which had not been confirmed by the Court, did not convey to the ven-

CIVIL PROCEDURE CODE, s. 305—
(continued.)

dor such title in the property as to entitle him to maintain a suit for possession of property against another similar vendee. **SRI LAL v. BALLABH SHANKAR AND ANOTHER.**

[II-243]

s. 306.—*"Immediately after such declaration."* The person declared to be the purchaser of property put up for sale in execution of a decree did not, as required by s. 306 of the Civil Procedure Code, pay the deposit immediately but paid the same on a subsequent date. *Held* that there was no sale at all of the property. **INTIZAM ALI AND ANOTHER v. NARAIN SINGH.**

[III-38]

(1). s. 310.—*Advance the same sum at any bidding at such sale.* The requirements of s. 310 of Act X of 1877 are not satisfied by the co-sharer preferring his claim to the right of pre-emption before the property is knocked down and offering to pay a sum equal to that bid by the highest bidder. That section contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. **Tej Singh v. Gobind Singh (L. L. R., 2 All., 830)** followed. **HIRA v. UNAS ALI. (Obsolete).**

[I-86]

SRI KISHEN v. DEBI RAM AND OTHERS.

[VIII-208]

(2).—*Appeal* A share of undivided immoveable property was put up for sale in execution of a decree, and was knocked down to *M*. Before it was knocked down to him *A*, the decree-holder, who had obtained permission to bid for and purchase such share, and who was a co-sharer of such share, bid the same sum as that for which it was knocked down to *M*, claiming the right of pre-emption. The Court executing such decree subsequently made an order confirming the sale of such share in favor of *A*. *M* appealed, impugning the propriety of the confirmation of the sale in favor of *A*. *Held* that such appeal would not lie. **MUNIRUDDIN KHAN v. ABDUL RAHIM.**

[I-45]

(1). s. 310 (A).—*Payment of 5 per centum where purchaser is the decree-holder.* Where a person whose property has been sold off in execution of a decree applies under s. 310 A of the Code of Civil Procedure to have the sale set aside, the fact that the auction purchaser is also the decree-holder will not relieve the applicant from paying the percentage required by clause (a) of the above mentioned section. **MENDAI LAL AND ANOTHER v. BHUJJA SINGH.**

[XV-140]

CIVIL PROCEDURE CODE, s. 311—
(continued).

[XVII-7]

[XVIII-78

1. Person competent to apply.
2. Material irregularity.
3. Necessary parties.

1. Person competent to apply.

[V-124]

See AGHORE NATII v. SHAMA SUNDARI AND ANOTHER.

[III-167]

(2)———“Decree-holder” — Person applying under s. 295.] The term “decree-holder” in s. 311 of the Code of Civil Procedure is not limited to the decree-holder who instituted the execution proceedings, but may include a decree-holder who is entitled to come in and share in the proceeds under s. 295. *Lakshmi v. Kuttunni (I. L. R., to Mad., 57)* approved. *AJUDHIA PRASAD AND ANOTHER v. NAND LAL SINGH AND OTHERS.*

[XIII-119

(3)———“ *Any person...been sold*”—*Co-sharer in undivided property.*] A person claiming to be a co-sharer in certain undivided immovable property, a share of which had been sold in execution of a decree, objected to the confirmation of the sale in favour of the person recorded as the auction purchaser, and prayed that it might be confirmed in his favour with reference to the provisions of s. 310 of the Civil Procedure Code. The Court disallowed the objection and confirmed the sale in favour of the auction purchaser. The objector thereupon applied to the High Court for revision of the order of the lower Court under s. 622 of the Civil Procedure Code. *Held* that

[II-146]

[III-7]

AHMADUDDIN KHAN v. SHEORAI SINGH.

[III-7]

(5.) ----- *Surety.*] Held that an objection made by one whose property was attached and sold in execution of a decree for the payment of money for the performance of which he had become a surety, that he was no party to the decree, and his property was not liable to be attached and sold, and therefore the sale was invalid, was not an objection entertainable under s. 311 of the Civil Procedure Code, and was consequently no ground for setting aside the sale under that section, especially as it was preferred for the first time in appeal, and, moreover, might have been taken under s. 278 at the time of attachment, when the objector would have had his remedy as therein provided. **HUB LAL v. KANHIA LAL AND ANOTHER.**

[V-52]

2. Material irregularity.

(6.)—*Illegality—Sale in contravention of s. 285.*] Three persons *B P, G C* and *A P* severally held decrees of the Court of the Subordinate Judge of Aligarh against one *M L*, which were in course of execution. One *B S* had also obtained a decree against *M L* from the Court of the Munsif of Aligarh. Attachments of the immoveable property of *M L* had been made by both Courts and notifications of sale issued. The property was sold in execution

CIVIL PROCEDURE CODE, s. 311—
(continued.)

of the Munsif's decree. Thereupon *B P* and *A P* applied to the Munsif to set aside the sale on the ground that he was precluded from ordering it by the terms of s. 285, Civil Procedure Code. *Held* that the sale was a bad sale as being held in pursuance of the order of a Court that had no jurisdiction to direct it and that the applicants were entitled to make the application. PETITION OF BADRI PRASAD.

[II-69]

AGHORE NATH *v.* SHAMA SUNDARI AND ANOTHER.

[III-167]

(7.)—Sale in contravention of s. 287.] A sale by public auction in execution of a decree, which is conducted at a time and place other than those properly notified, is not a sale at all within the meaning of the Civil Procedure Code. The time to be notified for a sale by public auction in execution of a decree must be the time of the commencement of the sale in order that all intending purchasers may be enabled to be present during the whole of the proceedings and that all who are interested in the property sold may see that there is a fair competition and a good sale. Where property which was advertized for sale by public auction in execution of a decree at 11 A. M. was sold at 7 A. M.—*held* that the mistake was more than a mere irregularity in conducting the sale, and that the whole of the proceedings were invalid. CHEDAMI LAL *v.* AMIR BEG.

[V-178]

(8.)—The notification of sale, in this case, was put up in the Court-house on the 30th June, 1886. That notification did not state the place of sale; it stated that the sale would take place on the 27th July, but it took place on the 29th July, and before the expiration of the thirty days, required by s. 290, Civil Procedure Code. *Held* that the sale was void *ab initio*. JASODA *v.* MATHURA DAS AND OTHERS.

[VII-145]

(9.)—Sale in contravention of s. 290.] *Held* that the fact of a sale of immoveable property in execution of a decree having taken place before thirty days from the proclamation of sale being made on the property had expired was not a material irregularity in the publication of the sale. RABCHANDAR *v.* KAMTA PRASAD.

[II-43]

(10.)—In this case the sale in execution of a decree was held only 16 days after the date of proclamation, without the consent of the judgment-debtor, which was clearly an irregularity; and as 184

CIVIL PROCEDURE CODE, s. 311—
(continued.)

bighas were sold for only Rs. 500 it must be presumed that the irregularity did cause substantial injury to the judgment-debtor. *Held* that the sale must be set aside on the application of the judgment-debtor. NATHU *v.* HARBHUJ.

[V-304]

(11.)—] An infringement of the rule contained in s. 290 of the Civil Procedure Code is an irregularity vitiating a sale in execution of decree, and is something more than a material irregularity in publishing a sale to which s. 311 refers. BAKHSI NAND KISHORE *v.* MALAK CHAND AND ANOTHER.

[V-42]

(12.)—] Where a sale of immoveable property in execution of a decree took place before the expiration of the thirty days required by s. 290, Civil Procedure Code, and without the consent of the judgment-debtor, *held* by Edge, C.J. (Brodhurst, J., dissenting) that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside on the ground of such illegality, without proving that he had sustained any substantial injury. *Held* by Brodhurst, J., *contra*, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a "material irregularity" within the meaning of s. 311—that expression being wide enough to include illegalities—and that before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury by reason of such irregularity. *Olpherts v. Mahabir Pershad Singh* (L. R., 10 L. A., 25); *Mohunt Megh Lal Pooree v. Shib Pershad Madi* (L. R., 7 Calc., 34); *Kalytara Chowdhraim v. Ram Coommar Goopta* (L. R., 7 Calc., 466); *Tripura Sundari v. Durga Churn Pal* (L. R., 11 Calc., 74); *Bonomali Mozumdar v. Woomesch Chunder Bundopadhyaya* (L. R., 7 Calc., 730); *Bandy Ali v. Madhub Chunder Nag* (L. R., 8 Calc., 932); *Nathu v. Harbhuj* (W. N. 1885, p. 304); *Jasoda v. Mathura Das* (L. R., 9 All., 511); and *Bakshi Nand Kishore v. Malak Chand* (L. R., 7 All., 289) referred to. GANGA PRASAD *v.* JAG LAL RAI AND ANOTHER.

[IX-115]

(13.)—Sale without attachment.] *Held* that a sale in execution of a simple money decree is "de facto" void, where there has been no attachment of the property sold prior to sale. MAHADEO DUBEY *v.* BHOLA NATH DICHIT.

[II-186]

CIVIL PROCEDURE CODE, s. 311—
(continued.)RAM CHAND *v.* PITAM MAL AND ANOTHER.

[VIII-195]

(14.) ———— *Sale after order postponing it.*] The Court executing a decree passed an order postponing a sale in execution, but the order failed to reach the officer conducting the sale and the sale was consequently held. The judgment-debtor applied to have the sale set aside as void. *Held* that the effect of the Court's order for postponement of the sale was to deprive the officer of all legal authority to hold it on the date previously fixed; that his not being aware of the order was not material; that the defect in the sale amounted to an illegality and not merely to an irregularity within the meaning of s. 311, C. P. C.; that consequently it was not necessary to show that the defect had caused substantial loss to the judgment-debtor; and that the Court could not confirm the illegal sale, but must hold it to be void. *Sukhdeo Rai v. Sheo Ghulam* (I. L. R., 4 All., 382); *Ram Dial v. Mahtab Singh* (I. L. R., 3 All., 701), and *Ganga Prasad v. Jag Lal Rai* (I. L. R., 4 All., 333) referred to. SANT LAL AND ANOTHER *v.* UMRAO-UN-NISSA.

[IX-201]

TODI SINGH *v.* MITHU LAL.

[I-19]

(15.) ———— *Sale by Civil Court of ancestral property.*] *Held* that a sale by the Civil Courts of ancestral property within the meaning of the Government Notification No. 571, dated 31st August, 1880, was void. *Ram Chhaibar Misr v. Bechu Bhagat* (W. N. 1885, p. 190) distinguished. BANKE LAL *v.* MUHAMMAD HUSAIN KHAN AND ANOTHER.

[VII-32]

ANWARI BEGAM AND ANOTHER *v.* LACHMIN AND OTHERS.

[V-319]

SUKHDEO RAI *v.* SHEO GHOLAM AND OTHERS.

[II-77]

*Per contra.*SHIRIN BEGAM AND ANOTHER *v.* AGHA ALI KHAN AND OTHERS.

[XVI-9]

(16.) ———— *Intimidating bidders.*] *Held* that an intimidation dissuading or preventing persons from bidding at an auction-sale, proceeding from a person other than the decree-holder or the judgment-debtor and who afterwards became the auction-purchaser, could not have the effect of vitiating the auction-sale. LALMAN *v.* RAPU LAL AND ANOTHER.

[II-138]

CIVIL PROCEDURE CODE, s. 311—
(continued.)

(17.) ————]. Where at a sale of immoveable property in execution of a decree, the decree-holder by threats and intimidation, deterred numerous persons who would have attended and offered bids for the property from coming to the sale, *held* that there was no auction-sale and that the whole proceeding was therefore *de facto* void. *BUL CHAND v. ZINAT-UN-NISSA.*

[I-108]

DAULAT SINGH AN ANOTHER *v.* PHUL CHAND AND ANOTHER.

[II-39]

(18.) ———— *Sale after satisfaction of decree.*] An order for sale and a sale under such order are *ultra vires* and nullities if the decree which is ordered to be executed has been satisfied by payment into Court of the decretal money before the order is made. *CHUNNI v. LALA RAM.*

[XIII-141]

(19.) ———— *Sale by Court not having jurisdiction.*] An order for sale and a sale under such order are *ultra vires* and nullities when in fact there was no jurisdiction in the Court to make the order. *Ram Lal Moitra v. Bama Sundari Dabia* (I. L. R., 12 Cal., 311) referred to. BALWANT RAO *v.* MUHAMMAD HUSAIN.

[XIII-140]

(20.) ———— *Sale adjourned—Fresh publication.*] The date fixed for the sale of certain property was 20th September. The 20th and the 21st September being holidays, the sale took place on the 22nd September, without any fresh publication. The sale fetched a very low price. *Held* that the sale of the property was illegal. There were no such proceedings on the 20th or 21st September as are contemplated by s. 291 of the Civil Procedure Code. BRIJNANDAN DAS AND ANOTHER *v.* DALDAPAT SINGH AND ANOTHER.

[VI-127]

GANESH SINGH *v.* BANNO BIBI AND ANOTHER.

[VII-50]

(21.) ———— *Sale delayed 5 hours—Substantial injury.*] In this case the sale was advertised for 12 o'clock and did not take place until 5 P. M. The property which was estimated at Rs. 5,000, was sold for Rs. 30. *Held* that the delay was an irregularity within the meaning of s. 311, which had caused damage. The sale therefore must be set aside. KALLU AND OTHERS *v.* BUBDAYA.

[VII-129]

(22.) ————]. Where it was found by the lower appellate Court that

CIVIL PROCEDURE CODE, s. 311—
(continued.)

a sale in execution of a decree notified to take place at noon, had, as matter of fact, not been held till sunset, and that in consequence few persons had attended the sale and the price realised by the property sold was much below its proper value. *Held* that these facts disclosed such "material irregularity" and "substantial injury" within the meaning of s. 311 of the Code of Civil Procedure as were sufficient to warrant the setting aside of the sale. **ALI BAKHSI v. SAHIB DIN.**

[XI-156]

(23.)—*Proclamation not specifying share or Government revenue.* *Held* that a notification of sale which does not specify separately the shares to be sold, or does not contain a statement of the Government revenue is irregular, and the irregularity as a material irregularity under s. 311 of the Code of Civil Procedure. **GANESH SINGH v. BANNO BIBI AND ANOTHER.**

[VII-50]

(24.)—*Incumbrance—Substantial injury.* A decree having been obtained against the representatives of one *K*, amongst whom were *M* and *K H*, the decree-holder applied for the sale of certain immoveable property in execution thereof and the property was proclaimed for sale. The proclamation of sale specified that the property was liable to a prior mortgage made by *K H*. The property having been sold, *U* one of the judgment-debtors objected to the sale on the grounds:—(i) That in virtue of a sale deed executed by *K* she (*U*) was the sole proprietress of the property and that *K H* had therefore no right to mortgage it, and it was incumbent upon the Court, before proclaiming the mortgage, to investigate its validity. (ii) That the notification of the sale resulted in the sale of the property for a sum below its value. *Held* that it was not necessary for the Court below to adjudicate upon the validity of the mortgage and as no injury has been proved the order of the Court below is perfectly right. **MAJID-UN-NISSA v. JANKI.**

[VIII-151]

(25.)—*—* In a sale of immoveable property in execution of a decree, the proclamation of sale notified that the decree-holder held two charges on the property, aggregating about Rs. 1,000. There was in fact one charge only, amounting to about Rs. 800. *Held* that the error in the proclamation of sale amounted to such an irregularity in publishing the sale and putting up the property to the biddings of the public as must have materially marred the fairness of the auction and affected the price, and that the sale must therefore be set aside, on the ground of material irregularity in publishing and conducting it. **KANAI MAL AND OTHERS v. BIBI SAILO.**

[VI-33]

CIVIL PROCEDURE CODE, s. 311—
(continued.)

(26.)—*Omission to give notice under s. 248 (X of 1877).* The omission to give the notice required by s. 248 of Act X of 1877 to the judgment-debtor, on application for execution of the decree, affects the regularity of the sale which subsequently takes place in execution of the decree, and the validity of the entire execution proceedings. **Ramessuri Dassee v. Doorgudass Chatterjee (I. L. R., 6 Calc., 103)** followed. *Held* therefore, where execution of a decree was applied for against the legal representative of a deceased judgment-debtor, and the notice required by s. 248 of Act X of 1877 was not given to such legal representative, and certain immoveable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission. *Quare.*—Whether such omission was an irregularity in "publishing or conducting" the sale, within the meaning of s. 311 of that Act. *In re THE PETITION OF IMAM-UN-NISSA v. LIKAT HUSAIN. (Obsolete).*

[I-1]

(27.)—*Salc not proclaimed at the spot.* This was an application by the judgment-debtor to set aside the sale of certain immoveable property. It appeared that the sale had not been proclaimed on the spot where the property was attached and that the judgment-debtor had, 20 years ago, purchased it for double the value it fetched in the sale. *Held* that the irregularity was a very grave one; that the applicant had made out a strong case; that the lower Courts should take evidence as to the present value of the property and whether the irregularity reduced the number of bidders at the auction. **GUR PRASAD v. DEBI PRASAD AND ANOTHER.**

[II-53]

(28.)—*Sale on civil holiday—Death of decree-holder.* *Held* that there was nothing unlawful in holding an auction sale on a civil holiday. **Bisram Mahto v. Sahibunnissa (I. L. R., 3 All., 333)** followed. *Held* further that the death of the decree-holder a day before the sale did not operate to render a sale void. **Dulari v. Mohan Singh (I. L. R., 3 All., 759)** followed. **AMIRULLAH v. KHALILURRAHMAN.**

[II-169]

(29.)—*Death of judgment-debtor after attachment—Representative.* S. 234 of the Code of Civil Procedure applies only to cases where, after the death of the judgment-debtor, the decree-holder seeks to bring to sale property which was of the judgment-debtor in his life time, and which was not at the time of his death under attachment at the suit of the decree-holder. It does not apply to cases where the judgment-debtor dies after attachment but before sale. An attachment would not abate on the death of the judgment-debtor, and his death would not render it necessary for the decree-holder to take any steps to keep in force

CIVIL PROCEDURE CODE, s. 311—
(continued.)

an attachment of property made in the judgment-debtor's life time. Property under attachment must be considered as in the custody of the law. There is no provision in the Civil Procedure Code requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. If the legal representative is damaged by the sale, his remedy is by application under s. 311 of the Code. So held by the Full Bench, Mahmood, J., dissenting. Where subsequent to the attachment of immoveable property in execution of a simple money decree, the judgment-debtor died, and the property was then sold, without making the legal representatives of the judgment-debtor parties to the sale proceedings. Held by the Full Bench (Mahmood, J., dissenting) that the sale was regular and valid notwithstanding such omission. *Ramasami Ayyangar v. Bagirathi Ammal* (I. L. R., 6 Mad., 180) dissented from.

Held by MAHMOOD, J., that on the principle of *audi alteram partem*, and because the rules provided by the Code of Civil Procedure for suits should, under s. 647, be applied to execution proceedings (those proceedings including and terminating in the sale) the omission to make the legal representatives of the judgment-debtor parties to the sale proceedings was an irregularity; but that such irregularity would not invalidate the sale without proof of substantial injury within the meaning of s. 311; and that as in the present case no such substantial injury was either alleged or proved, the sale was valid. Held also by Mahmood, J., that a person claiming by title paramount to or independent of the judgment-debtor is within the meaning of s. 311 of the Code. *Asmitunniisa Begum v. Ashruff Ali* (I. L. R., 15 Calc., 488) dissented from *Abdul Haq Mozoomdar v. Mohani Mohun Shaha* (I. L. R., 14 Calc., 240) followed. SHEO PRASAD v. HIRA LAL.

[X-103]

(30) ——— *Proclamation by beat of drum—Substantial injury.* The peon who proclaimed a sale in the execution of a decree did not do so by beat of drum, as a drum could not be found, but by mouth, loudly. The Court observed that the irregularity might be admitted; but it was impossible to suppose that it had caused any substantial injury or materially affected the result of the sale; and there was therefore no sufficient ground for interference with the order confirming the sale. *Jiwa Ram v. Makhan Lal*.

[I-16]

(31) ——— *Fixing proclamation in another patti.* Held that the irregularity of fixing up the notice of the intended execution sale of one "patti" of a "mahal" at the "chawal" of a different "patti" of the same "mahal" was not a material irregularity in the terms of s. 311 of

CIVIL PROCEDURE CODE, s. 311—
(continued)

the Civil Procedure Code. *MAWASHI KHAN v. RUP RAM AND ANOTHER.*

[I-166]

(32) ——— *Sale of occupancy holding.* Held that, although the title of an auction purchaser who had purchased occupancy holding might be challengeable by the *zemindar* or co-shares in the holding, it was impossible to hold that the officer conducting the sale was guilty of an irregularity in accepting his bid. Nor could it be contended that the sale should not have been held at all having regard to s. 9 of Act XVIII of 1873. *KUNDAN AND ANOTHER v. GULAB.*

[I-40]

NIHAL SINGH v. CHANDER SEN.

[I-60]

RAMCHHAIBAR MISR v. BECHU BHAGAT AND ANOTHER.

[V-190]

(33.) ——— *Proceedings after sale.*

See s. 244, No. (46).

(34) ——— *(X of 1877). Rumour that sale was, adjourned.* Held that a sale could not be set aside under s. 311 of Act X of 1877 on the ground that there was an impression abroad that the sale had been postponed and consequently very few persons assembled at the sale and the property fetched an inadequate price if there was no irregularity in the publication or conduct of the sale. *SHEO SAHAI v. BHAGWAN PRASAD.* (*Obsolete*).

[I-104]

(35) ——— *One sale in execution of two decrees.* Certain immoveable property was notified for sale in execution of two decrees which were under execution in the Court of a Munsif. Separate notifications were issued in the case of each. The property was put up for sale by the officer conducting the sale once for all in execution of both the decrees. The Munsif held that the sale was irregular as the property should have been put up for sale in the case of each decree; and set aside the sale. Held (in revision) that the Munsif was wrong and that there was no irregularity in the sale-officer's proceedings. *PETITION OF BHAWANI DAS v. RUP RAM AND OTHERS.*

[I-89]

(36) ——— *Sale set aside—Re-attachment.* Certain immoveable property of A (the judgment-debtor) was attached and sold in execution of a decree held by B. The execution sales were confirmed and the execution proceedings struck off, but the attachment was expressly maintained. On appeal by A, the sales were

CIVIL PROCEDURE CODE, s. 311—
(continued.)

set aside. *B* then applied for a re-sale of the properties and fresh proclamations were issued and the properties were re-sold. *Held* that this second sale could not be attacked on the ground that the properties had not been re-attached as the former attachment had been expressly maintained by the Court and was subsisting. *ATA HUSAIN v. THE BANK OF UPPER INDIA.*

[I-5]

(37).—*Substantial injury—Onus.* *Held* that the burden of proving irregularity and consequential damage lies on the person who assails the sale under s. 311. *JODHA SINGH v. BHUP SINGH AND ANOTHER.*

[VII-117]

(38).—*_____.* *It* is not sufficient for an applicant under s. 311 of the Code of Civil Procedure to show that there has been material irregularity in publishing or conducting a sale and that a price below the market value has been realized but he must go on to connect the one with the other, that is, the loss with the irregularity as effect and cause by means of direct evidence. *Tassaduk Rasul Khan v. Ahmad Husain (L. R., 20 I. A., 176)* referred to. *JAGAN NATH v. MAKUND PRASAD.*

[XV-154]

(39).—*_____Cause and effect.* *Held* that in an application under s. 311 of the Code of Civil Procedure to set aside a sale in execution of a decree it is necessary for the applicant to show, not only that there has been a material irregularity in publishing or conducting the sale but also that substantial injury had been sustained in consequence of such material irregularity. *Arunachellam v. Arunachellam (L. R., 15 I. A., 171)* and *Tasadduk Rasul v. Ahmad Hasan (I. L. R., 21 Calc., 66).* *Held* also that in such an application it is not competent to the applicant to raise, nor to the Court to entertain, any plea to the jurisdiction of the Court executing the decree, as, for example, a plea that the property sold, or part of it, was ancestral and ought to have been sold in accordance with the provisions of s. 320 of the Code. *SHIRIN BEGAM AND ANOTHER v. AGHA ALI KHAN AND OTHERS.*

[XVI-9]

3. Necessary parties.

(40).—*Auction purchaser.* Where a judgment-debtor applied under s. 311 of the Code of Civil Procedure to set aside a sale, but omitted, until after the expiration of thirty days from the date of the sale, to join the auction purchaser as a party; *held* that the joinder of the auction purchaser being essential, the application to set aside the sale was barred by limitation. *KARAMAT KHAN AND ANOTHER v. MIR ALI AHMED.*

[XI-121]

CIVIL PROCEDURE CODE, s. 311—
(continued.)

(41).—*Decree-holder.* The decree holder is a necessary party to an application under s. 311 of the Code of Civil Procedure. Hence where a judgment-debtor applied under the abovementioned section to have a sale in execution of a decree against him set aside and made no attempt to implead the decree-holder until long after limitation had expired. *Held* that the application must be dismissed. *Karamat Khan v. Mir Ali Ahmed (W. N. 1891, p. 121)* referred to. *ALI GAUHAH KHAN v. BANSI-DHAR.*

[XIII-173]

(42).—*Jurisdiction.* *Held* by the Full Bench that an application to set aside on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code a sale held by the Collector in execution of a decree transferred to him for execution under s. 320 cannot be entertained by a Civil Court. *Madho Prasad v. Hansa Kuar (I. L. R., 5 All., 314)* followed. *Nathu Mal v. Lachmi Narain (I. L. R., 9 All., 43)* distinguished.

Per EDGE, C. J.—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in s. 322 B, 322 C, or 322 D. *KESHABDEO v. RADHE PRASAD.*

[IX-10]

(1) s. 312.—*Power of Court to set aside sale without motion.* *Held* that the Court could not set aside a sale which had taken place in execution of a decree of the same Court without being moved so to do either by the decree-holder or judgment-debtor by application made under s. 311, Civil Procedure Code. *RAM NARAIN v. BISHAMBER NATH.*

[II-1]

(2).—*Appeal.* *Per* Petheram, C. J., and Oldfield, Brodhurst, and Duthoit, JJ., an order passed under the first clause of s. 312 of the Civil Procedure Code after an objection made under the provisions of s. 311 has been disallowed, is appealable under art. (16) of s. 588.

Per MAHMOOD, J., an application made under s. 311 can be disposed of only under s. 312, and if the Court rejects the objection to the sale, the order must be regarded as an order "refusing to set aside a sale of immoveable property" under the first paragraph of s. 312, and therefore appealable as falling under the purview of art. (16) of s. 588.

CIVIL PROCEDURE CODE, s. 312—
(continued.)

Lalman v. Rassu Lal (W. N. 1882, p. 117) and *Rajan Kuari v. Lalla Prasad* (W. N. 1883, p. 178) dissented from by Mahmood, J. TOTA RAM v. BALDEO PRASAD AND ANOTHER.

[V-17

(3).———.] In execution of a decree against *B* (a minor) his property was put up to sale, and sold on the 20th September, 1885. Objections under s. 311 were filed on behalf of the minor through his mother as guardian but the application was rejected on the ground that she did not legally represent the minor. The order was made on 11th January, 1886. On the 12th January, 1886, objections were filed on behalf of the minor by one *B*. On the 2nd of August, 1886, this application was also rejected on the ground that the sale having been confirmed on the 11th January, 1886, the Court was precluded from entertaining the application. Held that an appeal lay to the High Court under s. 312, Civil Procedure Code. BALDEO SINGH v. KISHEN LAL AND ANOTHER.

[VII-58

(4).———*Suit to set aside sale—For fraud and want of jurisdiction.* (Act VIII of 1859).] A suit was instituted in the Court of the Subordinate Judge of Benares for money secured by the mortgage of immoveable property situate within the limits of the district of Benares and of immoveable property situate within the limits of the Family Domains of the Maharaja of Benares. The Subordinate Judge had not jurisdiction to proceed with this suit in so far as it related to the latter property; and he was authorized to proceed with it under the provisions of s. 13 of Act VIII of 1859 by the High Court in concurrence with the Board of Revenue. He accordingly proceeded with the suit and on the 18th November, 1874, gave the plaintiffs a decree for the recovery of the money claimed by the sale of the mortgaged property. With a view to bring the mortgaged property situate within the limits of the Family Domains of the Maharaja of Benares to sale, this decree was sent for execution to the Subordinate Judge at Konda within whose jurisdiction such property was situate; and such property was sold in the execution of this decree on the 29th August and the 4th September, 1877. Subsequently the defendants in the present suit who held decrees for money *H*, one of the plaintiffs in the suit above mentioned, applied to the Subordinate Judge of Benares for the attachment and sale of *H*'s interest in the decree above mentioned, falsely representing that the sales in execution of that decree of the 29th August and 4th September, 1877, had been set aside. Such interest was accordingly put up for sale on the 29th May, 1878, at Benares by the Subordinate Judge of Benares and was purchased by the plaintiffs in the present suit who were induced to purchase by such false representation. The plaintiffs in the present suit claim the avoidance of the sale of the 29th May, 1878,

CIVIL PROCEDURE CODE, s. 312—
(continued.)

and the refund of the purchase money on the ground that they were induced to purchase by such false representation and on the ground that the sale of the interest of *H* in the decree of the 18th November, 1874, being of the nature of immoveable property situate within the limits of the Family Domains of the Maharaja of Benares could not legally be sold at Benares by the Benares Court. Held that such false representation must be held to constitute in law such fraud as vitiated the sale of the 29th May, 1878. Also that the Benares Court acted *ultra vires* in selling at Benares an interest in immoveable property situate within the Family Domains of the Maharaja of Benares. Also that (following S. A. No. 969 of 1877 decided the 14th December 1877) the provisions of s. 13 of Act VIII of 1859 were not applicable in a case in which a portion of the immoveable property was situate within the limits of the Family Domains of the Maharaja of Benares, those domains not constituting a district within the meaning of that section. RAGHUNATH DAS AND ANOTHER v. KAKHAN MAL AND OTHERS.

[I-35

(5).———*For fraud.*] Held that a suit to set aside an auction sale held in execution of a decree was maintainable. RAM PRASAD v. NAFAILI KUARI.

[II-5

(6).———*For irregularity.*] Held that a suit to set aside a sale on the ground of irregularity in the publication of the sale was not maintainable. *Ram Pershad v. Nafaili Kuari* (W. N. 1882, p. 5) distinguished. ALIM-UDDIN HUSAIN v. NAUBAT RAI AND OTHERS.

[III-264

RAM SARUP v. RAGHUNANDAN AND OTHERS.

[I-38

(7).———*On ground that property was not saleable.*] In execution of a decree on a mortgage bond, for the sale of the mortgage property, and for the costs of the suit, amounting to Rs. 1,000, certain houses were attached, on the 30th September, 1881, which were not part of the mortgaged property. On an objection raised by the judgment-debtors, that the decree was by its terms executable only against the mortgaged property, the High Court in appeal decided on the 16th September 1882, that the houses were not liable to attachment and sale under the decree. In the meantime on the 15th June, 1882, the houses had been put up for sale and purchased for Rs. 500 and the sale had been confirmed on the 16th August, 1882. The judgment-debtors brought a suit against the purchaser to set aside the sale, on the ground that the houses were not saleable under the decree. Held that the decree in regard to costs was a decree made personal against the judgment-debtor, and conferred a right upon

CIVIL PROCEDURE CODE, s. 312—
(continued.)

the decree-holder to take out execution for the recovery of those costs, not only against the property mortgaged in the bond, but also against the person and other property of the judgment-debtor.

Per OLDFIELD, J., (MAHMOOD, J., doubting) that the attachment and sale in execution of the decree were valid, inasmuch as they were made in respect of the costs as well of the principal and interest decreed.

Per MAHMOOD, J., that the suit was maintainable, and was not barred by any plea *in limine*. *Abdul Haya v. Nawab Raj* (B. L. R. Sup. V. 911) referred to.

Also *per* MAHMOOD, J., that inasmuch as the adjudication of the 6th September, 1882, was one between the judgment-debtors on the one hand and the decree-holder on the other, and subsequent not only to the sale but to the confirmation of the sale, and inasmuch as the Court was not then called upon to decide any thing in relation to the nature of the decree as to costs the order then passed could not be used against the purchaser.

Also *per* MAHMOOD, J., that it was doubtful whether, the attachment having been made for the whole amount of the decree and not for costs, and no separate proceedings having taken place in respect of the personal decree against the judgment-debtor, the attachment, the notification of sale, and the sale itself, were valid; but that everything that was said against those proceedings constituted matters falling under s. 312 of the Civil Procedure Code, which enables parties to object to confirmation of sale; and that therefore, even assuming that the sale and confirmation of sale were subject to the objection of "material irregularity in publishing or conducting" the sale within the meaning of s. 311, a suit like the present, upon that ground, alone was prohibited by the last part of s. 312. *RAGHUBER DAYAL v. ILAHI BAKSH AND ANOTHER*.

[V-65]

(8.)—*Suit to avoid order setting aside sale (Act VIII of 1859).* Certain property was sold in execution of a decree. On the application of the judgment-debtor the sale was set aside in part, the Subordinate Judge stating that there was no material irregularity in publishing or conducting the sale, and no consequent substantial injury. This suit was instituted to have the sale so set aside confirmed. *Held* that as there was no irregularity in conducting the sale, the same could not have been legally set aside under s. 257, Act VIII of 1859. The suit therefore was properly instituted. *DAULAT BIBI AND OTHERS v. QUTUB HUSAIN AND OTHERS. (Obsolete).*

[I-85]

(9.)—*(Act VIII of 1859).* On the 21st August, 1876, certain immoveable

CIVIL PROCEDURE CODE, s. 312—
(continued.)

property belonging to *M* was put up for sale and was purchased by *R*. On the 20th April, 1877, such sale was set aside under s. 256 of Act VIII of 1859, on the ground that the order attaching such property and the notifications of sale had not, as required by s. 222, been signed by the Court executing the decree but by the Munsarim of the Court. On the 27th June, 1877, *M* conveyed such property to *H*, who purchased it *bona fide*, and for value, and satisfied the incumbrances existing thereon. On the 15th April, 1878, *R* sued *H* and *M* to have the order setting aside such sale set aside, and to have such sale confirmed in his favour, on the ground that it had been improperly set aside under s. 256 of Act VIII of 1859, the judgment-debtor not having been prejudiced by the irregularities in respect whereof such sale had been set aside. *Held* by Oldfield, J., that although such sale might have been improperly set aside, yet inasmuch as the order of attachment and the notifications of sale could have no legal effect, having been signed by the Munsarim of the Court executing the decree, and not by the Court as required by s. 222 of Act VIII of 1859, and inasmuch as it would be inequitable, after the incumbrances on such property had been satisfied and the state of things changed, to allow *R*, after standing by for a year, and permitting dealings with the property, to come in and take advantage of the change of circumstances and obtain a property become much more valuable at the price he originally offered, *R* ought not to obtain the relief which he sought. *Held* by Straight, J. that the fact that the Court executing the decree had not signed the order of attachment and the notifications of sale vitiated the proceedings in execution *ab initio*, and rendered the sale which *R* desired to have confirmed void, and *R*'s suit therefore failed, and had properly been dismissed. *RAM DIAL v. MAHTAB SINGH AND OTHERS. (Obsolete).*

[I-62]

(10.)—*_____*. *Held* that persons other than the decree-holders or the persons whose property was sold in execution of decree were not competent to apply to the Court under s. 311 of the Civil Procedure Code, to set aside the sale. *M* in whose name property had been purchased at an execution sale which was improperly set aside, brought a suit to have the order setting aside the sale reversed, and the sale confirmed in her favour, and for a declaration that the property was not liable to be sold in execution of a decree of the defendants against third persons, under which it had been attached and advertised for sale. *Held* that such a suit could only be maintained under s. 42 of the Specific Relief Act (I of 1877) but that, s. 244 of the Civil Procedure Code indicated the intention of the Legislature that such questions should be determined in the execution department, and reading together the provisions of ss. 244, 278 and 283 of the Code, the

CIVIL PROCEDURE CODE, s. 312—
(continued.)

suit was premature and therefore not maintainable. *MAN KUAR v. TARA SINGH AND OTHERS.*

[V-124]

(11.) ———— (Act X of 1877).] *Held* (Oldfield, J. dissenting) that a suit by the purchaser at a sale of immoveable property in execution of a decree, which has been set aside under ss. 311 and 312 of Act X of 1877 to have such sale confirmed, on the ground that there was no irregularity in the publication or conduct thereof is not barred by the last clause of s. 312 or by the last clause of s. 588, but is maintainable. *AZIM-UD-DIN v. BALDEO.* (Obsolete.)

[I-31]

(12.) ———— Execution transferred to Collector.] A decree was transferred to the Collector for execution. A sale was held by the Collector under that decree. Subsequently that sale was set aside by the Collector by an order under s. 312, Civil Procedure Code. A person who had been an auction purchaser at the sale so set aside brought a suit in a Civil Court to have the sale restored and confirmed. *Held* that such a suit would not lie. *Azimuddin v. Baldeo* (I. L. R., 3 All., 554) and *Bandi Bibi v. Kalka* (I. L. R., 9 All., 602) referred to and *held* to be no longer applicable by reason of the changes effected in the law by Act No. VII of 1888, but the judgment of Oldfield, J., in the former case approved. *Madho Prasad v. Hansa Kuar* (I. L. R., 5 All., 314) referred to. *SHIB SINGH v. MUKAT SINGH AND OTHERS.*

[XVI-135]

Pre contra.

BANDI BIBI v. KALKA.

[VII-110]

BANNO BIBI v. JASODA KUAR.

[VIII-248]

AZIM-UD-DIN v. BALDEO.

[I-31]

UGAR NATH TIWARI v. BHONATH TIWARI.

[XI-41]

(13.) ————.] At a sale of ancestral property by a Collector executing a decree transferred to him under s. 320 of the Code of Civil Procedure plaintiffs, decree-holders, were the auction purchasers. On the application of the defendants, judgment-debtors, the sale was set aside by the Collector. Thereupon the plaintiffs, decree-holders, auction purchasers, filed a suit for a declaration that this auction-sale was a valid one and that the order of the Collector setting it aside was ineffectual. *Held* that such a suit was maintainable. *Shib Singh v. Mukat Singh* (I. L. R., 18 All., 437)

CIVIL PROCEDURE CODE, s. 312—
(continued.)

overruled. *Ugar Nath Tiwari v. Bhonath Tiwari* (W. N., 1891, p. 41); *Divan Singh v. Bharat Singh* (I. L. R., 3 All., 206) referred to. *SHIAM BIHARI LAL AND ANOTHER v. RUP KISHORE AND OTHERS.*

[XVIII-81]

(1) s. 313.—*Saleable interest.*] The fact that property sold in execution of a decree is incumbered even when the incumbrance covers the probable value of the property, is not sufficient to sustain a plea that the person whose property is sold had no saleable interest therein. S. 313 of the Civil Procedure Code contemplates that either the judgment-debtor had no interest at all, or that the interest was not one he could sell; and the fact that the property may fetch little or nothing if sold does affect the question. *Naharmul v. Sadut Ali*, (8 C. L. R., 468); distinguished. *Pratop Chunder Chuckerbutty v. Panioty* (I. L. R., 9 Cal., 506) referred to. *SANT LAL AND ANOTHER v. RAMJI DAS AND OTHERS.*

[VII-6]

(2.) ————.] On the 20th January, 1883, a decree for foreclosure in respect of certain property was passed. This decree allowed the mortgagor time up to the 20th July to redeem. On the 30th June, 1883, the property was put up for sale in execution of another decree and purchased by A. Before the date on which the sale could be confirmed (regard being had to the provisions of s. 312 of the Code of Civil Procedure and art. 166, Limitation Act), the time allowed for redemption expired without the mortgage money being deposited. A subsequently objected to the confirmation of the sale on the ground that the judgment-debtor had no saleable interest in the property and asked for a refund of the purchase money under section 313 of the Code of Civil Procedure. *Held* that on the date the sale took place the judgment-debtor had a saleable interest in the property and A's case does not fall within section 313 of the Code of Civil Procedure. *JANKI DAS v. MAYA RAM.*

[IV-318]

(3.) ———— Knowledge (Act X of 1877).] A person who purchases immoveable property at a sale in execution of a decree, knowing that the judgment-debtor has no saleable interest therein, is not entitled to the benefit of the provisions of s. 313 of Act X of 1877, which were designed for the protection of persons who innocently and ignorantly purchase valueless property. *MAHABIR PRASAD v. DHUMMAN DAS AND ANOTHER.* (Obsolete.)

[I-19]

(4.) ———— Application under section—Proceedings transferred to Collector.] *Held* that an application under s. 313 of the Civil Procedure Code by the purchaser at a sale in

CIVIL PROCEDURE CODE, s. 313—
(continued.)

execution of a decree which had been transferred for execution to the Collector in accordance with the rules prescribed by the Local Government was entertainable by the Civil Courts, and the Collector had no jurisdiction under the Code or under Notification No. 671 of 1880 to entertain it. *Madho Prasad v. Hansa Kuar* (I. L. R., 5 All., 314) referred to. *NATHU MAL v. LACHMI NARAIN.*

[VI-289]

(1). s. 314.—*Confirmation—Sale subverted on appeal.* Held that an application, to the lower Court, for the confirmation of a sale, held in execution of a decree, which has been, subsequently to the sale, but prior to the application for confirmation, subverted by the appellate Court, can not be granted after such subversal. *MUL CHAND v. MUKTA PRASAD.*

[VII-287]

(2).—*Appeal.* Certain immoveable property was sold in execution of a decree. The decree-holder objected to the sale which were disallowed on the 23rd January, 1882; but his objections were in the following terms "that the objections be rejected." On the 23rd February, 1882, the Court executing the decree made an order confirming the sale. The decree-holder appealed to the High Court from the order of the 23rd January, 1882. Held that the order of the 23rd January, 1882, was not passed in accordance with the terms of s. 312, Civil Procedure Code, so as to be appealable under s. 538. The order passed on the 23rd February, 1882, was the order which should have been appealed from under s. 538 (16), Civil Procedure Code. *LALMAN v. RASSU LAL AND OTHERS.*

[II-117]

(1). s. 315.—*Suit for purchase-money.* Held that having regard to ss. 313 and 315, an auction-purchaser at a sale in execution of a decree can maintain a suit against a decree-holder for recovery of his purchase money when it turns out that the judgment-debtor had no saleable interest in the property sold and that he is not limited to the special procedure in the execution department mentioned in s. 315, Civil Procedure Code, i. e., he has a double remedy. *LALLU SINGH AND OTHERS v. GAJADHAR SINGH.*

[III-130]

(2).—*Suit for purchase-money distributed under s. 295.* Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under s. 295 of the Code of Civil Procedure. He is not limited

CIVIL PROCEDURE CODE, s. 315—
(continued.)

to the procedure in the execution department mentioned in s. 315 of the said Code. *Munna Singh v. Gajadhar Singh* (I. L. R., 5 All., 577) followed. *KISHUN LAL v. MUHAMMAD SAFDAR ALI KHAN AND OTHERS.*

[XI-138]

(3).—*Suit for interest and expenses of sale.* A judgment-debtor, whose property had been sold in execution of the decree, under Act VIII of 1859, appealed from the order, disallowing his application to set aside the sale, after Act X of 1877, Civil Procedure Code, came into force. The appellate Court set aside the sale. The purchaser sued the decree-holder for interest on the purchase-money and the expenses of the sale, the purchase-money having been returned to him, under the order of the Court executing the decree, without interest and less such expenses. Held by the Full Bench that the provisions of Act X of 1877, and not of Act VIII of 1859 were applicable to the determination of the matter in dispute in the suit. Held, by the Divisional Bench (Straight and Tyrrell, JJ.) that, with reference to the ruling of the Full Bench, the suit was maintainable. Held also by the Divisional Bench that, under the circumstances of the case, the plaintiff ought not to be granted the relief sought. *RAGHUBAR DIAL v. THE BANK OF UPPER INDIA. (Obsolete.)*

[III-51]

(4).—*Appeal.* A sale in execution of a decree having been set aside on the ground that the judgment-debtor had no interest in the property sold, the purchaser applied for a refund of the purchase money under s. 315 of Act X of 1877. This application was refused by the Court executing the decree (Munsif). The purchaser appealed to the District Judge with the same effect. In appeal to the High Court, held that the order of the Munsif, not falling under s. 244 of the Code of Civil Procedure, was not appealable as a decree, nor was it appealable under s. 538 of the Code of Civil Procedure. *DEBI DAS v. SUJAN SINGH AND OTHERS. (Obsolete.)*

[IV-178]

(5).—*—* No appeal lies from an order refusing a refund of price to a purchaser the sale to whom has been set aside, under s. 315 of the Code of Civil Procedure. *Soudagar Mal v. Abdul Rahman Khan* (ante, p. 85); *Tapesri Lal v. Deokinandan Rai* (ante, p. 89) and *Ram Dial v. Ram Das* (I. L. R., 1 All., 181) referred to. *Baijnath Sahai v. Mohcep Narain Singh* (I. L. R., 16 Calc., 535) dissented from. *RAHIM BAKHSH AND ANOTHER v. DHURI AND ANOTHER.*

[X-135]

(1). s. 316.—*Sale certificate—Evidence of title.* One S L in a suit upon a mortgage obtained a decree for sale of two houses. K L objected that one half of one of the said houses was his and should not be made liable to sale

CIVIL PROCEDURE CODE, s. 316.—
(continued.)

in the suit of *S L*. That objection was granted, but nevertheless the decree was prepared as for the sale of the two houses without any exception. Under this decree the two houses were sold, and were purchased by *C R*, who duly obtained a certificate of sale. Subsequently *K L*, having obtained amendment of the decree under which the sale had taken place, brought a suit against *S L*, the decree-holder, and *C R*, the auction purchaser, to recover one-half of one of the houses sold. Held that the title of the auction purchaser was good, and that the suit would not lie. *Kushal Pana Chand v. Bhima Bai* (I. L. R., 12 Bom., 589) referred to. *KUNDAN LAL v. CHET RAM AND OTHER.*

[XVI-36]

(2). —————.] A purchaser at an auction-sale held by a Court which sale has been duly confirmed is not precluded from suing to recover the property so purchased merely because he has neglected to obtain a sale-certificate. *Jagan Nath v. Baldeo* (I. L. R., 5 All., 305) and *Dagdu v. Pancham Singh Gangaram* (I. L. R., 17 Bom., 375) followed. *HET RAM v. BALDEO AND OTHERS.*

[XIV-54]

JAGANNATH v. BALDEO.

[III-48]

Per contra.

CHIRANJI LAL v. NATHU AND OTHERS.

[II-106]

(3). —————.] "From the date of such certificate." The plaintiffs, in execution of their own decree, purchased certain immoveable property of the judgment-debtor. The judgment-debtor took objections to the sale which were allowed by the Court executing the decree, but were ultimately disallowed by the High Court and a certificate of sale was granted to the plaintiffs. The plaintiffs brought this suit for damages by way of mesne profits, from the date of the sale up to the date of confirmation as the defendants being in possession, had, by his act (taking objections to the sale), prevented the plaintiffs from obtaining possession of the property. Held that, in the absence of malice, &c., on the part of the defendant, the plaintiffs were not entitled to such damages for they had no right to the property before the sale was confirmed. *GOBIND RAM v. TULSI RAM.*

[VII-217]

(4). —————.] Although the auction purchaser at a sale held in execution of a decree may not obtain a full title until a certificate has been granted this must not be considered as necessarily destroying any lesser interest which arises by reason of general equitable principles. *Dagdu v. Pancham Singh Ganga Ram* (I. L. R., 17 Bom.,

CIVIL PROCEDURE CODE, s. 316.—
(continued.)

375) and *Het Ram v. Baldeo* (W. N. 1894, p. 54) approved. *CHIDDO v. PIARI LAL AND ANOTHER.*

[XVII-14]

(5). —————.] Application for confirmation—Limitation.] Held following *Kylasa Goundan v. Ramasami Ayyan* (I. L. R., 4 Mad., 172) and *Vithal Fanardan v. Vitko Jirav Puttaji-rav* (I. L. R., 6 Bom., 586) that the law of limitation is not applicable to applications for the grant of a sale-certificate under s. 316 of the Civil Procedure Code. PETITION OF KISHEN SINGH.

[III-262]

(1). s. 317.—Bar of suit between certified purchaser and beneficial owner—(Act VIII of 1859)—(Act X of 1877.)] A sued *K*, the purchaser of certain immoveable property sold in execution of a decree under Act VIII of 1859, for a declaration that *K* had purchased such property on her behalf. The suit was instituted after Act VIII of 1859 was repealed and Act X of 1877 came into force. When the suit was instituted *K* did not hold a sale-certificate. After it was instituted he applied for and obtained a sale-certificate under s. 317 of Act X of 1877. Held that when the suit was instituted, it was maintainable, as, the defendant not being a certified purchaser under s. 260 of Act VIII of 1859, that section did not apply; and that when the defendant obtained a certificate under s. 317 of Act X of 1877, he became a certified purchaser, and the suit would only be maintainable if the plaintiff made out a case falling within the provisions of the last part of s. 317. *ALDWELL v. ELAHI BAKHSI AND ANOTHER. (Ob-solète).*

[III-125]

(2). —————.] Third party.] The provisions of s. 317 of the Code of Civil Procedure contemplate suits between the certified purchaser and the beneficial owner, and will not operate so as to bar a suit in which a third party asserts that the certified purchaser is not the beneficial owner. *Sohnu Lall v. Lala Gya Pershad* (N.-W. P. H. C. Rep., 1874, 265); *Puran Mal v. Ali Khan* (I. L. R., 1 All., 235) and *Subha Bibi v. Hara Lal Das* (I. L. R. 21 Calc., 519) referred to. THE UNCOVENANTED SERVICE BANK, LD., v. ABDUL BARI AND ANOTHER.

[XVI-151]

(3). s. 317 (Proviso).—Fraud.] A brought this suit against *B* on the allegations that *B* had fraudulently and without his consent got his name recorded in the sale certificate while he was the real purchaser and had in fact paid the purchase money. The lower Courts have found in favour of the objections made by the plaintiff. Held that on these findings the

CIVIL PROCEDURE CODE, s. 317
(Proviso)—(continued.)

plaintiff's suit must be decreed, it being covered by the proviso to s. 317. *LAKHPAT RAI v. MURLI DHAR*.

[VII-220]

s. 318.—*Appeal.*] *Held* that an order under s. 318, Civil procedure Code, putting an auction purchaser in possession of the property purchased, was not open to appeal as an order under s. 588, nor as a decree as it is not so within the meaning of s. 2, Civil Procedure Code. *NARAIN SINGH v. PARGASH AND ANOTHER*.

[VI-45]

ss. 318 & 319.—*Appeal.*] No appeal will lie from an order made under s. 318 or s. 319 of the Code of Civil Procedure. *DHUNDA AND ANOTHER v. DURGA*.

[XIII-122]

s. 319.—Proceedings after sale.

See s. 244, No. (48.)

(1.) s. 320.—*Transmission of decree to Collector—jurisdiction of Civil Courts.*]

See s. 311, No. (42).

See s. 312, No. (12).

See s. 313, No. (4).

(2.)—[Certain land was sold by the Collector under the operation of the Rules for the sale of ancestral estates made by the Local Government in its Notification No. 671, dated 30th August, 1880. Objection to the legality of the sale was taken by the judgment-debtor under Rule 12 of the above Rules which purports to be a reproduction of s. 311, C. P. C. The Collector disposed of the application by recording that "On inspection of the records of the case, the objections of the judgment-debtor appeared to be weak." *Held* that the Collector should apply to such applications the practice and procedure that have always been applied by the Civil Courts in such cases. They are expected to hear evidence on issues duly framed out of the objections preferred to them and to determine the questions before them judicially. *CHANDAN KUAR v. BHIMA SINGH*.

[II.61]

(3.)—[Order passed by a Collector in the exercise of the powers conferred on him under s. 320 and the following sections of the C. P. Code, relating to the execution of a decree of a Civil Court after transfer of the decree to him under s. 320, are not appealable to the High Court. *Held* therefore, that the order of a Collector disallowing an application by the judgment-debtor that the amount of the decree might be satisfied by temporary transfer of his immovable property, and ordering the sale of such property, and the order of a Collector confirming a sale,

CIVIL PROCEDURE CODE, s. 320
(continued.)

were not appealable to the High Court. *MADHO PRASAD v. HANSA KUAR AND OTHERS*.

[III-59]

KISHUN RAM v. SARJU PRASAD.

[VI-168]

(4.)—[The authority conferred upon the Local Government by s. 320 of the Code of Civil Procedure, prior to the amendment of that section by s. 30 of the Code of Civil Procedure Amendment Act (VII of 1888), to make rules for regulating the procedure of the Collector in executing decrees transmitted to him, included power to make a rule providing for an appeal from the Collector's orders. Clause XIX of rule 17 which was added to the rules (No. 671 of 30th August, 1880) published in the *N.-W. P. and Oudh Gazette* of the 4th September, 1880, by a notification in the *Gazette* of the 17th November, 1883, and which made the order of a Collector confirming a sale appealable to the Commissioner of the Division, was therefore not *ultra vires* of the Local Government. *Madho Prasad v. Hansa Kuar* (I. L. R., 5 All., 314) referred to. S. 243 of the N.-W. P. Land Revenue Act (XIX of 1873) does not apply to such orders passed by a Collector. *TAKADDUS FATIMA AND ANOTHER v. BALDEO DAS AND OTHERS*.

[X-185]

(5.)—[A decree passed by a Subordinate Judge upon a bond, in which certain immovable property was mortgaged, was, in accordance with the rules made by the Local Government under s. 320 of the Civil Procedure Code, transferred to the Collector for execution. A sale in execution took place, and the Collector gave the purchaser a certificate of the sale. Upon this certificate the purchaser applied to the Subordinate Judge to give him possession of a larger amount of property than that specified in the certificate, and, upon the refusal of the Court to do so, applied to the Collector to amend the certificate. The amendment having been made as desired, the purchaser again applied to the Subordinate Judge for possession of the amount claimed by him, and the Subordinate Judge again rejected the application, holding that only the lesser amount had been sold in execution of the decree. *Held* that, with reference to the second paragraph of rule 19 of the rules framed by the Local Government under s. 320 of the Civil Procedure Code regarding the transmission, execution and re-transmission of decrees, and published in the *N.-W. P. and Oudh Gazette* of the 4th September, 1880, the matter of delivery to the purchaser was within the jurisdiction of the Subordinate Judge, notwithstanding the terms of s. 320 and notwithstanding the ruling of the Full Bench in *Madho Prasad v. Hansa Kuar* (I. L. R., 5 All., 314.) *Held* also that, inasmuch as the Subordinate Judge had jurisdiction to decide the question,

CIVIL PROCEDURE CODE, s. 320—
(continued.)

and inasmuch as, even if his decision were wrong, the purchaser had a remedy by bringing a regular suit, the matter did not fall within s. 622 of the Civil Procedure Code, so as to call for the interference of the High Court in revision. *Shivanathaji v. Joma Kashinath* (1. L. R., 7 Bom., 341) and *Amir Hasan Khan v. Sheo Baksh Singh* (1. L. R., 11 Calc., p. 6) referred to. **SUNDER DASS v. MANSA RAM AND OTHERS.**

[V-87]

(6.) —————.] The execution of three decrees obtained by different persons against the same person was transferred to the Collector under s. 320, Civil Procedure Code. The same ancestral property was thrice sold the same day under the above decrees and purchased by different persons. The Deputy Collector conducting the sales confirmed the last sale on the ground that the lien upon which the last decree was obtained was prior to the other two. On appeal the Commissioner set aside this order and confirmed the first sale on the ground that after the first sale no other sale could be held. The purchaser under the last sale brought this suit to set aside the Commissioner's order. *Held* that a suit of this nature lay in the Civil Courts. But the Commissioner's order was correct. **GAURI SAHAI v. SEWA RAM AND OTHERS.**

[VII-267]

(7.) —————.] *A* and *B* held a decree against *C*. *A* died and *B* applied for execution of the decree on his own behalf and as heir to *A*. The Court transferred the decree to the Collector under s. 320, Civil Procedure Code. The widows of *A* subsequently applied to the Court, objecting to the execution of the decree by *B*, as he was not heir to *A*. *Held* that the decree having been transferred for execution to the Collector the Court had no jurisdiction to entertain the application. **KESHO SARAN v. JANKI AND ANOTHER.**

[III-164]

(8.) —————.] Where a decree has been sent to the Collector for execution under s. 320 of the Code of Civil Procedure he holds any money which may be realised in execution of such decree at the disposal of the Civil Court by which the decree has been sent to him for execution, and he is not competent to distribute such money in contravention of an order from the Civil Court. **TAPESRI LAL AND OTHERS v. DEOKINANDAN RAI AND OTHERS.**

[XIII-180]

(9.) ———— *Power of Collector—Ministerial.*] The functions which devolve upon a Collector to whom a decree has been transferred for execution under s. 320, Civil Procedure Code, are functions of a purely ministerial and not of a judicial character. Hence where a Collector to

CIVIL PROCEDURE CODE, s. 320—
(continued.)

whom a decree had been transferred for execution under the provisions of s. 320, Civil Procedure Code, passed an order for postponement of sale in the following terms:—"It is ordered that the sale be postponed and by means of a copy of this order the papers which have arrived from the Court should be returned and the record of the case should be deposited in the office;" and such order was followed by an order of the Court which passed the decree striking off the execution proceedings. *Held* that these orders did not operate as a bar to further execution proceedings within the meaning of s. 373, Civil Procedure Code. **REAIT-UN-NISSA AND ANOTHER v. HAJI MUHAMMAD ISMAIL KHAN AND OTHERS.**

[XI-189]

(10.) ———— *To override owner's acts.*] *Held* that a Collector, who has obtained control of an estate under ss. 320 and 327 of the Civil Procedure Code, cannot set aside acts of the owner of the estate (in this case the acts were grants of leases), because he thinks such acts were unwise. There is no reason why he should be in a different position from the owner himself with reference to the acts of the owner before the estate passed out of his control. **THE COLLECTOR OF GHAZIPUR v. CHITBAHAL BHAGAT.**

[V-335]

(11.) ———— *Order for sale before the rules came in force.*] *Held*, following *Hafizunnissa Bibi v. Mahadeo Prasad* (W. N. 1881, p. 178) that as the order for sale in this case had been passed on the 11th September, 1880, the rules prescribed by the Local Government did not apply. **GUR CHARAN AND OTHERS v. GOBIND PRASAD AND ANOTHER.**

[II-12]

(12.) ———— *"Decree for money" within the meaning of the rules.*] *Held* that a decree for the sale of ancestral land, or of an interest in such land, in enforcement of an hypothecation on such land, is a "decree for the recovery of money" within the meaning of the rules prescribed by the Local Government under s. 320 of Act X, 1877. **BIRCH v. RATI RAM. (Obsolete).**

[I-146]

s. 322 (B).—List of creditors.] *Held* that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under s. 326 of Act No. X of 1877, whilst such property was under the management of the Collector were not entitled to be placed on the list of creditors prepared by the Collector under s. 322 of Act No. XIV of 1882; and that in any case application to be placed on the said list of creditors should have been made to the Collector and not to the District Judge. **MURARI DAS AND OTHERS v. THE COLLECTOR OF GHAZIPUR AND ANOTHER.**

[XVI-77]

CIVIL PROCEDURE CODE, s. 322—
(continued.)

(1) s. 322 (B) & s. 322 (D).—*List of creditors.*] A dispute arising under s. 322 B of the Code of Civil Procedure was referred to the District Judge. The District Judge instead of acting as provided by s. 322 B sent the matter back to the Collector, who passed orders disallowing the petition of the creditors before him that they might be put on the list of creditors to be satisfied from the judgment-debtor's property under the management of the Collector on the ground that execution of their decree was time-barred. The creditors did not appeal from the Judge's order, as they were empowered to do under s. 322 D, but filed a suit against the Collector as manager of the judgment-debtor's property, praying for a declaration that their decree was not time-barred and was liable to be satisfied out of the property in the hands of the Collector. *Held* that, having regard to s. 244 and s. 322 of the Code of Civil Procedure, the suit in question would not lie. **GIRDHAR DAS AND ANOTHER v. THE COLLECTOR OF GHAZIPORE.**

[XVI-69]

(2) —————.] The plaintiffs obtained in 1874 a decree for money against the defendant. In 1879, by an order under s. 326 of the Code of Civil Procedure, the immoveable property of the judgment-debtor was placed under the management of the Collector. Before this order was made and during the period when the judgment-debtor's property was in charge of the Collector, various applications for execution were made by the decree-holder. Finally in 1896, about ten years after the last preceding application, the decree-holders applied for execution of their decree shortly after the property had been released by the Collector. *Held* that as regards the immoveable property of the judgment-debtors against which execution was sought, the application was not barred by limitation inasmuch as the decree-holders had no remedy by execution against that property until the Collector's management had ceased. **GIRDHAR DAS AND OTHERS v. HAR SHANKAR PRASAD.**

[XVIII-82]

s. 323.—*Appeal.*] *Held* that no appeal would lie from an order of the Collector under s. 323, Civil Procedure Code. *Madho Prasad v. Hansa Kuar* (I. L. R., 5 All., 314 W. N., 1883, p. 164) followed. **KISHUN RAM v. SARJU PRASAD.**

[VI-168]

s. 328.—“*Within one month.*”] The period of limitation provided for in s. 328 of the Code of Civil Procedure is a limitation which governs a cause of action arising out of a particular resistance or obstruction. So far as that resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings under s. 328 must do so within one month from the time of such resistance or obstruction. But

CIVIL PROCEDURE CODE, s. 328—
(continued.)

the bar created by the limitation imposed by this section does not extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. *Rama Sekara v. Dharmarya* (I. L. R., 5 Mad., 113) followed. *Balvant v. Babaji* (I. L. R., 8 Bom., 102) and *Vinayak Rao Amrit v. Devrao Gobind* (I. L. R., 11 Bom., 473) distinguished. **NARAIN DAS v. HAZARI LAL AND ANOTHER.**

[XVI-84]

(1) s. 331.—*Order allowing claim—Fresh suit* (Act VIII of 1859.)] The holder of a decree for land, having been resisted in obtaining possession thereof by a person other than the defendant, claiming to be in possession of such land on his own account complained under Act VIII of 1859 of such resistance to the Court executing the decree. The Court rejected such application on the ground that it had been made after the time limited by law. *Held* that the order rejecting such application could not be regarded as one under s. 229 of Act VIII of 1859, which would under s. 231 preclude such decree-holder from instituting a suit against such person for such land. **BENI PRASAD v. LACHMAN PRASAD.** (*Obsolete*).

[I-145]

(2) —————*Order refusing adjudication—Appeal—Revision.*] *A* sued for partition of a house and obtained a decree. In execution however he was resisted by one *B*. *A* thereupon complained to the Court praying for delivery of possession. The Court fixed a day for the investigation of the complaint and summoned *B* to answer the complainant. It decided that *B* was in possession on his own account and was not in collusion with the judgment-debtor as alleged by *A*. But the Court refused to proceed under s. 331, Civil Procedure Code. It simply dismissed *A*'s application referring him to a regular suit. *Held* that the Court should have proceeded under s. 331 and treated the question between the decree-holder and the *bona fide* independent claimant as a suit. His refusing to do so was equivalent to the rejection of a plaint, and is a decree, and as such appealable to the District Court and the High Court, and cannot be made the subject of revision. **PETITION OF JAGANNATH AND ANOTHER v. PARBATI.**

[II-125]

(3) —————*Court taking action under wrong section.*]

See s. 335, No. (1).

(1) s. 335.—*Court taking action under wrong section.*] Where a Court executing a decree no complaint made by the decree-holder took

CIVIL PROCEDURE CODE, s. 335—
(continued.)

action under s. 331 of the Code of Civil Procedure instead of under s. 335, which was the section applicable to the facts of the case, it was *held* that the action of the Court would not be covered by s. 578 of the Code. **JHAMMAN LAL v. HAIDAR BAKSH AND OTHERS.**

[XVIII-79]

(2). ————. In September, 1871, the rights and interests of one *G* in certain houses were put up for sale in execution of decree and were purchased by the appellant who did not seek delivery of possession till July, 1880. When he did so, he was met by an application, purporting to be under s. 331, Act X of 1877, made by the respondent asserting that one of the houses of which the appellant wished to take possession had not belonged to *G*, but had belonged to the respondent's father. The Court directed the application to be registered under s. 332 of Act X of 1877, and after a summary inquiry decided in the respondent's favor. The appellant appealed to the High Court, contending that the application had been wrongly preferred and decided as one under s. 331, and that it ought to have been preferred and entertained under s. 335. *Held* that s. 335 clearly applied to the facts and procedure before the lower Court, and consequently the order of the lower Court was not appealable. **MANAWAR ALI v. MADHO. (Obsolete.)**

[I-98]

(3). ———— *Appeal—Revision.* In a suit for sale upon a mortgage the plaintiff having obtained a decree assigned the same, and the assignee brought the property decreed to be sold to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favour the decree was, in so far that it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon the assignee auction purchaser, applied in revision to have the order restoring the usufructuary mortgagee to possession set aside. *Held* that the order in question was an order which could properly be made under s. 335, C. P. C., and being unappealable an application for revision thereof might lie. The auction purchaser was not a representative of a party to the suit within the meaning of s. 244, nor was the usufructuary mortgagee a judgment-debtor within the meaning of s. 334 or 335, but he was a person other than a judgment-debtor within the meaning of s. 335. **SABHAJIT v. SRI GOPAL.**

[XV-64]

(4). ———— *(Act X of 1877).* *A* was the purchaser of certain immoveable property sold in execution of decree held by him against *X*. He was resisted in obtaining possession by

CIVIL PROCEDURE CODE, s. 335—
(continued.)

B who claimed to be in possession as mortgagee. *A* complained to the Court executing the decree, alleging that *B* was not in possession, but claimed to be so in collusion with *X*. The Court held that the complaint was barred by art. 167 of Act XV of 1877. *Held* that the order was not appealable. **MAKUND RAM v. THAN SINGH AND ANOTHER. (Obsolete.)**

[II-16]

(1.) **s. 338.—Surety—Appeal—Revision.**

See s. 244, No. (9).

(2). ———— *Revision.* An order under s. 336 of the Code of Civil Procedure is subject to revision by the High Court under s. 622 of that Code. **Shiva Nathaji v. Joma Kashinath (I. L. R., 7 Bom., 341)** followed. **SHEORAJ SINGH v. BANWARI DAS.**

[IV-16]

(3). ———— *Security bond.* Where in a bond under s. 336 of the Code of Civil Procedure, besides the usual covenant to produce the judgment-debtor before the Court, further stipulations were contained as to what should happen if the judgment-debtor's application to be declared insolvent were refused, it was *held* that the latter stipulations were not such as were contemplated by s. 336 and could not be enforced under that section. **JANKI DAS v. RAM PARTAB AND ANOTHER.**

[XIII-203]

(4). ———— *Release of surety.* A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtors applying to be declared insolvent is released from his obligation under the bond when the judgment-debtor files his petition under s. 344 to be declared insolvent. **Koylash Chandra Shaha v. Christo Phoridi (I. L. R., 15 Calc., 171)** approved. **RAMZAN v. GERARD.**

[XI-5]

BANNA MAL v. JAMNA DAS AND OTHERS.

[XIII-68]

s. 343—Warrant of arrest—Delegation of authority. Where a warrant issued by a subordinate Court directing the *Nazir* to arrest a judgment-debtor in execution of a decree was entrusted by the *Nazir* to a subordinate for execution by endorsing his name upon it. *Held* that there is nothing in the Code of Civil Procedure to prohibit a *Nazir* from authorising a Deputy to execute a warrant of arrest for him, and that his endorsement must be regarded as *prima facie* evidence of the authority of the person to whom the warrant is delivered to execute it. *Held* that it is most desirable, when the *Nazirs* of the subordinate Courts delegate

CIVIL PROCEDURE CODE, s. 343—
(continued.)

the duty of executing warrants of arrest, that they should confer the authority in more clear and explicit terms than are expressed by a mere endorsement, and that they should be careful in selecting proper person to discharge that duty, bearing in mind, as far as circumstances permit the position and caste of the party to be arrested, so as to avoid through the medium of Court process, subjecting any such party to personal indignity or offence. Further that it is important the person chosen should be made acquainted with the contents of the warrant, in order that he may be able to inform the judgment-debtor at whose suit and for what amount he is being taken into custody. Where a warrant for the arrest of the judgment-debtor had been executed, and an endorsement thereon, professedly under section 343 of the Code of Civil Procedure, was irregularly made by the *Naib Nazir*, he not having been "the officer entrusted with the execution of the warrant," held that such irregularity did not invalidate the arrest. **ABDUL KARIM v. BULLEN.**

[IV-133]

(1.) **s. 344—"Arrested, imprisoned—Order of attachment, &c."**—Attachment after application.] When an application to be declared an insolvent, under s. 344 of the Code of Civil Procedure was preferred, the requirements of that section had not been fulfilled as the applicant had not been arrested or imprisoned in execution of a decree for money, nor had his property been attached in execution of such a decree. Eleven days after the application had been preferred the applicant's property was attached in execution of such a decree. One of the creditors subsequently objected to the application on the ground that when it was preferred the requirements of s. 344 had not been fulfilled. *Held* that the application should not on that ground have been dismissed. **MAKHAN LAL v. GULZARI MAL AND OTHERS.**

[IV-86]

(2.) ————Termination of execution before application.] The plaintiff against whom processes referred to in s. 344 were taken applied, under Chapter XX of the Civil Procedure Code, to be declared an insolvent. At the date the application was taken, the execution proceedings against the applicant had terminated. The Judge on this ground struck the case off. *Held* that this was no ground for striking off the case. **KISHEN LAL v. PIRBHU LAL AND OTHERS.**

[VI-137]

(3.) ————Appeal—Parties.] Where an application to be declared insolvent is dismissed and the applicant appeals, all the creditors are necessary parties to the appeal and if some are not made parties the whole appeal must fail. **MUNSHI LAL v. CHIMMAN RAM AND OTHERS.**

[XVII-102]

CIVIL PROCEDURE CODE, s. 344—
(continued.)

s. 345. (b).—"Property."] *Held* that the mere fact that the applicant has a chance of obtaining from his father, by an action at law, whatever share at some future time he may succeed in proving to be partible in his favour from the family estate, now exclusively held by the father, does not disentitle him to be declared an insolvent, such chance not being property. **SUKIT NARAIN LAL v. RAGHUNATH SAHU.**

[VI-45]

(1) **S. 351.**—"If the Court is satisfied"—Enquiry.] This is an appeal from an order rejecting the application of the appellant for declaration of insolvency under Chapter XX of the Civil Procedure Code, on the mere unsupported allegations on oath of one of the opposing creditors. *Held* that, there being no tangible material upon the record upon which the correctness or otherwise of the order may be judged, it must be set aside. **SYED MUHAMMAD YAKUB v. JADO RAI AND OTHERS.**

[V-275]

(2) ————(Act X of 1877).] This was an appeal from an order allowing an application to be declared an insolvent. Observed in the case that the District Judge had failed to carry out the provisions of Chapter XX of the Civil Procedure Code. It was necessary for him to regard the case as one in which he had original jurisdiction, and to have taken the evidence and observed other rules of procedure applicable to original cases. We find no notes of evidence in the handwriting of the Judge, and his judgment does not dispose of the various points raised by the objections of the judgment-creditor, which have not even been reduced in the form of issues. The Judge should have considered every one of the objections urged before him, and should have disposed of each point separately and clearly on the evidence. **BENI PRASAD v. MUHAMMAD KHAN. (Obsolete).**

[II-184]

(3) ————(Act X of 1877).] The appellant in this case applied to the District Court, under s. 344 of Act X of 1877, to be declared an insolvent. The District Court refused the application, observing:—"The other side does not wish to put in proof; the Court is by no means satisfied under the first clause of (c) s. 351, Civil Procedure Code." *Held* that there had not been a sufficient inquiry into the application. The order is therefore reversed and the case remanded for fresh disposal. **SHEOMANGAL SINGH v. GANGA PRASAD AND OTHERS. (Obsolete).**

[II-55]

(4) ————(Act X of 1877).] This application was made under s. 344, Civil Procedure Code, to be declared an insolvent on the ground that the applicant had

CIVIL PROCEDURE CODE, s. 345—
(continued.)

no property. It was opposed by the creditors who alleged that the applicant had a fourth share in a certain shop. The District Judge allowed the application observing as follows:—
“The only evidence tendered for the opposing creditors is that of a man who is or lately was connected with the shop in which the petitioner has been employed. He admits that he has had a quarrel with the petitioner, that the petitioner put no capital into the concern, and that he has never shared in the audit, or been entered in the books of the firm as a partner. This is tantamount to a full corroboration of the petitioner's case. He is accordingly to be declared an insolvent in the usual course.” *Held* that although the Judge's order was not so full or satisfactory as could be wished he must be considered to have been satisfied that the allegations in the application were substantially true and that the creditors had failed to make out their assertion. The appeal must be dismissed. **RAM PRASAD AND OTHERS v. GOBARDHAN DAS.** (*Obsolete*).

[II-117]

(5) s. 351 (a).—“*Substantially true*”—*Unintentional inaccuracies.*] Before rejecting an application by a judgment-debtor for a declaration of insolvency with reference to the provisions of s. 351 (a) of the Civil Procedure Code it is necessary that the Court should be satisfied that the applicant has wilfully made false statements. Unintentional inaccuracies are not sufficient grounds for rejection. **KARIM BAKHS V. MISRI LAL AND OTHERS.**

[V-50]

(6) s. 351 (b).—“*Active concealment*”—*Omission.*] S. 351 (b) of the Civil Procedure Code contemplates a case of active concealment, transfer, or removal of substantive property since the institution of the suit in which was passed the decree in execution of which the judgment-debtor was arrested or imprisoned, with intent to deprive the creditor or creditors of available assets for division, and it does not cover an omission by the judgment-debtor, in his application for declaration of insolvency of a statement as to his right to demand partition of ancestral estate in which he is a sharer, especially where there is no evidence of any intent to defraud. **SUKRIT NARAIN SINGH v. RAGHUNATH SAHAI.**

[V-108]

(7) s. 351 (c).—“*Unfair preference to one creditor* (*Act X of 1877*).”] *7* in pursuance of a previous agreement with *B*, and on being pressed by *B*, who had a pecuniary claim against him, which nearly equalled half the amount of all the pecuniary claims against him, assigned to *B* the whole of his property by way of sale, in consideration in part of *B*'s pecuniary claim against him. *Held* that by such assignment *7* did not give *B* an

CIVIL PROCEDURE CODE, s. 351 (d)—
(continued.)

“undue preference” to his other creditors within the meaning of s. 351 of Act X of 1877. **JOAKIM V. KALLU MAL AND OTHERS.**

[I-21]

(8).—“(Act X 1877).” *Held* with reference to the meaning of the expression “unfair preference,” in s. 351 (c) of Act X of 1877 that it could not be inferred from the mere fact that the judgment-debtor had paid a creditor that he had given him “an unfair preference.” **NATHMAL DASS v. HIRA LAL AND OTHERS.**

[II-18]

(9) s. 351 (d).—“*Any other act of bad faith.*”] The expression, “any other act of bad faith,” as used in s. 351, cl. (d) of the Code of Civil Procedure, means any act of bad faith not before mentioned in s. 351 which bears directly upon the conduct of the debtor in the matters leading up to his application for insolvency, and will not exclude any act of bad faith by which he has incurred a then still subsisting liability to any of his creditors, whether the particular creditor is or is not the creditor whose decree is in execution and whether or not the bad faith is connected with the liability which has resulted in that decree. **Bavachi Packi v. Pierce Leslie & Co.** (1 L. R., 2 Mad., 219) approved. **Salamat Ali v. Minahan** (1 L. R., 4 All., 337) distinguished. **GOPAL DAS v. BIHARI LAL.**

[XV-33]

(10).—“*May declare*”—*Discretion.*] A judgment-debtor applied to be declared an insolvent. Certain of the claims against him were claims under decrees. The Court of first instance refused the application, notwithstanding the statements in the application were substantially true, and the applicant had not committed any act of bad faith mentioned in s. 351 of the Civil Procedure Code on the ground that the applicant had contracted the debts for which such decree had been made dishonestly, and that section gave the Court in such a case a discretionary power to refuse the application. *Held* that the Court of first instance had taken an erroneous view of s. 351, and had assumed a wider discretion than the law conferred on it. If a person making an application to be declared an insolvent has not brought himself within clauses (a), (b), (c) or (d) of that section, then the Court has no discretion on other grounds to refuse the application. The bad faith, the reckless contracting of debts, the unfair preference of creditors, the transfer, removal or concealment of property, the making false statements in the application are all dealt within s. 351, and are intended to confine the category of acts of misconduct that will debar the applicant from obtaining the relief and protection he asks. **SALAMAT ALI v. RYAN AND OTHERS.**

[II-68]

CIVIL PROCEDURE CODE, s. 351 (d)—
(continued.)

(11.) —————.] *Held* that the power conferred on the Court under s. 351 is a discretionary one and unless that power has been wrongly or perversely exercised the High Court would not interfere. *MATTA MAL AND ANOTHER v. RADHE LAL AND OTHERS.*

[VII-23

(12.) ————— *When is a person to be declared insolvent.*] It does not follow that because a man has assets of a nominal value in excess of his liabilities he is not entitled to be declared an insolvent. But where a man applies to be declared an insolvent and shows in his statement that his assets exceed his liabilities he must show also that by the sale of his interests or other realization of his assets a sum would not be secured which would enable him to pay his debts in full. *Fowalla Nath v. Parbatty Bibi (I. L. R., 14 Calc., 691)* discussed. *BALDEO DAS v. SUKHDEO DAS.*

[XVI-197

(13.) ————— *Onus.*] *Held* that when an application is made under s. 351, Civil Procedure Code, to be declared an insolvent the burden of proving that his case falls within the section lies on the applicant. *BAIJ NATH v. ELLIS.*

[III-187

(1.) s. 352.—*Scheduling decree—Effect.*] A suit to establish a right to bring to sale certain moveable property in execution of a decree for enforcement of hypothecation, was brought against persons who were not parties to that decree, and had purchased in execution of a prior decree. Pending the suit, one of the judgment-debtors under the hypothecation decree was declared an insolvent and the plaintiff scheduled his decree as a claim under s. 352 of the Civil Procedure Code. *Held* that the scheduling of the decree had not the effect of superseding it or creating another decretal right in addition to and independent of it, and did not make the suit, which was found on a new and different cause of action against persons who were not parties to the decree unmaintainable. *ABDUL RAHMAN AND ANOTHER v. BIHARI PURI.*

[VIII-53

(2.) —————.] A decree-holder whose judgment-debtor has applied to be declared insolvent and whose decree has been placed on the list of the judgment-debtor's scheduled debts, cannot *pari passu* with the proceedings in insolvency go on executing his decree in the ordinary way. *Badal Singha v. Birch (I. L. R., 15 Calc., 762)* and *Abdul Rahman v. Bihari Puri (I. L. R., 10 All., 194)* distinguished. *GAURI DATT v. SHANKAR LAL.*

[XII-36

CIVIL PROCEDURE CODE, s. 352—
(continued.)

(3.) s. 352 (para 3).—*"To prove incompetition...firm"—Receiver.*] Upon the death of a Muhammadan, the creditors of a firm of which he had been a member, brought suit upon certain *kundis* in respect of debts incurred by the firm during his life-time and obtained decrees. Subsequently, the judgment-debtors, who were the brother, widow, and sons of the deceased, were declared insolvents under s. 351 of the Code of Civil Procedure, and a receiver was appointed, who sold certain houses as the property of the insolvents. Afterwards, the daughters of the deceased who were not parties to the suits, but were, when the suits were brought and the order in insolvency passed, minors, sued the purchaser to establish their right in the houses as heirs of the deceased. *Held* that the receiver could convey no better title than he had as receiver; that the title which he had was the title which the insolvents had to the property which vested in them at the time of the insolvency; that at that time the interest claimed by the present plaintiffs was vested in them and not in the insolvents; and that the defendant, whose sole title was through the receiver had no title in the property in suit as against the plaintiffs. *Held* also that the suit was not barred by the last paragraph of s. 352 of the Civil Procedure Code. *RAHIMA BIBI AND ANOTHER v. ABDURRAHMAN.*

[X-101

(4.) s. 352.—*Appeal—Revision.*] An order rejecting an application to prepare a schedule of creditors under s. 352 of the Code of Civil Procedure is appealable under s. 588, cl. (17) of the Code and therefore cannot be made the subject of an application for revision under s. 622. *NONNIDH RAM v. HIRA LAL AND OTHERS.*

[XIII-64

s. 353.—*Unscheduled creditor.*] A judgment-debtor was declared an insolvent, and a receiver of his property appointed, under s. 351 of the Civil Procedure Code, and his creditors were ordered to come forward and prove their claims within a certain time. No creditor came forward for that purpose within such time, and in consequence the case was struck off the file, and the order appointing a receiver cancelled, and no schedule was framed under s. 352. Subsequently a creditor applied to have his name entered in such schedule. *Held* that the applicant notwithstanding no schedule had been framed, was an "unscheduled" creditor and was therefore entitled, under s. 353 of the Civil Procedure Code, to make the application. *MADHO DAS v. BHOLA NATH.*

[III-15

s. 354.—*Receiver—Transfer.*]

See s. 352, No. (3).

CIVIL PROCEDURE CODE.—*(continued.)*

s. 356 (d)—Dower-debt.] This was an application for revision of an order relating to the distribution of the assets of *A*, an insolvent. Among the creditors were (i) mother of *A* who had obtained a decree against *A* for her dower. (ii) The applicant who held a mortgage decree against the insolvent. The lower Court holding that the dower-debt being a charge on the estate had a priority over other debts and gave the assets to the widow. *Held* that it is not the case that a claim for dower is simply as such a charge on the estate. The debt of the applicant being secured by a mortgage had priority under s. 356 (d) of the Code of Civil Procedure. *Bazayet Husain v. Dooli Chand* (I. L. R., 4 Calc., 402) followed. *NARAIN DAS v. ALLADEHI AND ANOTHER.*

[IV-33]

(1). s. 357.—“Discharged under s. 351 or 355.” The provisions of s. 357 of the Code of Civil Procedure are not applicable until the insolvent has been discharged under s. 351 or s. 355 of the Code. Hence where some of the scheduled creditors of a judgment-debtor, who had been declared an insolvent and in respect of whose property a receiver had been appointed, but who had not been discharged, presented an application to the Court, purporting to be made under s. 357 of the Code of Civil Procedure, praying for the sale of certain property which had come by inheritance to the judgment-debtor, and the Court, also purporting to act under s. 357 of the Code, made an order on such application allowing the property in question to be released from attachment on deposit by the insolvent of one-third of the scheduled debts; it was *held* that although the Court might have acted under s. 356 of the Code, yet as its order purported to be under s. 357 it was *ultra vires* and must be set aside. *Held* also that the above-mentioned order was appealable as an order under s. 357 by virtue of s. 588, cl. (17) of the Code of Civil Procedure. *GANESHI LAL AND OTHERS v. MUSARRAT ALI. GIRVAR LAL AND OTHERS v. MUSARRAT ALI.*

[XIV-71]

(2).—Failure to discharge or appoint receiver.] *Held* that where a person has been declared an insolvent under the Civil Procedure Code but no receiver of his property has been appointed nor has he been discharged by the Court he remains unprotected from arrest and imprisonment and can alienate his property. *KISHEN SAHAI v. RIAZ-UD-DIN.*

[III-174]

(3).—Property subsequently acquired by insolvent.] *Held* that property which comes into an insolvent's possession, after he has been declared an insolvent, is available to liquidate debts contracted before the insolvency, until the several creditors have been satisfied to the extent of one-third of their debts,

CIVIL PROCEDURE CODE, s. 357—*(continued.)*

or until twelve years have elapsed from the date of the order of discharge. Observations as to the mode in which provisions of Chapter XX of the Code should be worked. *SALIG RAM AND ANOTHER v. CHUNI LAL.*

[III-21]

(4).—Applicability of Act XV of 1877.] S. 357, Civil Procedure Code, provides a limitation of its own and in supersession of the rules prescribed by Act No. XV of 1877 in respect of the execution of decrees. *LALMAN v. GOPI NATH.*

[XVII-18]

s. 358.—Discharge.] An insolvent, who had procured, and taken, and acted on an insolvency order, which had been granted to him, because of the withdrawal of the opposition of his creditors, by reason solely of his engagement to pay a certain sum monthly until the whole of his debts should be discharged, after his scheduled debts had been satisfied to the extent of one-third, applied under s. 358 of the Civil Procedure Code, to be declared discharged from further liability in respect of his debts. *Held* that, under the circumstances, his application had been properly refused. *DOWNES v. RICHMOND AND OTHERS.*

[III-11]

(1). s. 359.—“At the hearing under s. 350—Enquiry—Discretion.” An application under s. 359 of the Code of Civil Procedure by a creditor of an applicant for a declaration of insolvency for the punishment of the judgment-debtor in the manner provided in that section should be made contemporaneously with or as soon as possible after the hearing under s. 350; but the fact that it is made some months afterwards will not render such application unentertainable. On such an application being made the Court is not to re-try the questions of fact already decided by it at the hearing under s. 350 but may pass orders on the facts as found by it at that hearing. In so acting it has no discretion, but, the conditions prescribed by s. 359 being fulfilled, is bound to act in one or other of the two ways mentioned in that section. In construing a statute it is not competent to a Court to refer to proceedings of the Legislature in connection with that statute antecedent to its becoming law, such as reports of select committees or debates on the bill. *KADIR BAKHSH AND ANOTHER v. BHAWANI PRASAD.*

[XII-6]

(2).—“At the instance of...creditors.” A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion send the applicant to be dealt with by a Magistrate; but it cannot unless moved by a

CIVIL PROCEDURE CODE, s. 359—
(continued.)

creditor, pass an order of imprisonment under that section; and if on the motion of a creditor it has ordered the imprisonment of the applicant it cannot subsequently act under the last clause of s. 359. *Kadir Baksh v. Bhawani Prasad* (I. L. R., 14 All., 145) referred to. Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i. e.*, without permission to renew the application it was held that the Court could not make the payment by the applicant of the opposing creditors' costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal. *HAFIZ SYED HAIDAR SHAH v. JANNA DAS AND OTHERS.*

[XV-43]

(1) s. 361.—*Survival of right to sue.*] In a suit for the recovery of a share of ancestral family property which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather, the plaintiff obtained a decree, in the lower appellate Court, from which the defendant appealed to the High Court. While the appeal was pending the plaintiff died, and, on her application, his widow was made respondent in his place. At the hearing of the appeal, the appellant contended that, upon the plaintiff's death, the right to sue did not survive and the appeal should therefore be decreed by the suit being dismissed. Held by the Full Bench that judgment having been obtained before the plaintiff's death the benefit of the judgment, or the right to sue, would survive to his legal representative though whether the deceased plaintiff's representative could enforce the whole of the judgment in this case was a different matter. *Phillips v. Homfray*, (L. R., 24 Ch. D., 439) and *Padarath Singh v. Raja Ram* (I. L. R., 4 All., 235) referred to. When a person desires to be added as such representative upon the death of a plaintiff after judgment, he must satisfy the Court that he is the proper person to be so added. *MUHAMMAD HUSAIN AND OTHERS v. DIPCHAND.*

[VI-322]

(2) ————— (Act X of 1877.)] Where a Hindu minor, governed by the law of the Mitakshara, on whose behalf a suit to set aside his father's alienation of an ancestral property had been instituted, died. Held that no right to sue survived in favour of his mother, but the suit abated. *PADARATHI SINGH v. RAJA RAM (MINOR) UNDER THE GUARDIANSHIP OF AKUTI, AND AFTER HIS DEATH AKUTI.*

[II-29]

(3) —————.] Except possibly in the case of an assignment by the

CIVIL PROCEDURE CODE, s. 361—
(continued.)

other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. *Dular Chand v. Balram Das* (I. L. R., 1 All., 453); *Gobind Prasad v. Chandar Sekhar* (I. L. R., 9 All., 486) referred to. *IMAM-UD-DIN AND ANOTHER v. LILADHAR.*

[XII-104]

(4) —————.] *K* a Mahant, brought a suit against his disciple *N* to have a deed of gift executed by him in favour of *N* declared null and void. Before the defendant filed his reply, *K* died and *B* applied to be substituted for the deceased. The lower Court held that the cause of action had not survived and struck off the case. Held that the cause of action did survive to *B* if he proved himself to be the legal representative of *K* and the Court must proceed under s. 367 of the Civil Procedure Code. *BALLABH DAS v. NARIAN DAS.*

[V-7]

s. 363.—*Onus.*] *H* and *G*, plaintiffs in the suit, preferred this second appeal. After the appeal had been filed, *H* died, and an application was made on behalf of his sons to have their names substituted for their deceased father, in which it was stated that he died "on or about the 15th June last." Held that it was for the petitioners to prove that the application was made within the period of limitation provided in art. 171; that they having failed to do so the application must be refused and the appeal as regards *H* must abate. *HARNANDAN AND ANOTHER v. DURGA AND OTHERS.*

[VII-60]

(1) s. 365.—*Representative of Hindu widow.*] A reversioner succeeding to the estate of a deceased person after the death of the widow of that person would, be bound by a decree obtained against the widow provided that there was a fair trial of the suit in which the decree was passed. Consequently the widow's right to sue survives to, and devolves on, the heir of her husband entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of s. 365 of the Code of Civil Procedure. *Katama Natchier v. The Raja of Sivagunga* (9 Moo. I. A. 539); *Hari Nath Chatterjee v. Mothur Mohan Goswami* (I. L. R., 21 Calc., 8) and *Premmoyi Chaudhrani v. Preonath Dhar* (I. L. R., 23 Calc., 636) referred to. *TRIBHUWAN SUNDAR KUAR v. SRI NARAIN SINGH.*

[XVIII-65]

(2) ————— *Application for substitution—No express order granting the same.*] An appellant in a pre-emption suit having died during the pendency of the appeal, application was made by his son to have his name placed on the record as representative of the deceased

CIVIL PROCEDURE CODE, s. 365—
(continued.)

appellant. On this application the Court made no order whatsoever, but nevertheless when the appeal came on for hearing allowed the applicant to be represented and ultimately decreed the appeal. On appeal by the respondents the High Court declined to allow the appellant's plea that the person in whose favor the appeal in the Court below had been decreed had not properly been made a party to the appeal. **NAMDAR CHAND AND OTHERS v. BANSI-DHAR.**

[XIII-181]

(3) ———— *Appeal tantamount to (Act X of 1877).*] One D brought a suit, which was dismissed on the 21st March, 1881. He died on the 4th April, and his widow and legal representative preferred an appeal on the 21st April following. The lower appellate Court ordered the appeal to be shelved on the ground that the widow was not competent to prefer it until she had obtained a certificate under Act XXVII of 1860, and the time for appeal had expired. *Held* that the appeal was within time and the appellant in preferring it substantially, if not in set terms, made the application required by s. 365, Civil Procedure Code. **RADHA RANI v. SARU AND ANOTHER.**

[II-73]

ss. 365 and 366.—*Applicability of sections to execution proceedings—(Act X of 1877).*] A judgment-debtor applied that an execution sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and the purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for settling it aside and disallowed such application, and made an order confirming such sale. *Held* per Pearson, J., that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside. *Per* Spankie, J., that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of ss. 365 and 366 of Act X of 1877, as the Court executing the decree should have proceeded under those sections. *Per* Oldfield J., and Straight, J., that the death of the decree-holder prior to such sale did not render it void. The provisions of ss. 365 and 366 of Act X of 1877 could not be adapted to execution proceedings, as such sale had been pub-

CIVIL PROCEDURE CODE, ss. 365 & 366.—(continued.)

lished and conducted according to law, it had properly been confirmed. **DULARI v. MOHAN SINGH.**

[I-57]

(1.) s. 366.—*Application for substitution—By one only of several representatives.*] Where a sole appellant died during the pendency of his appeal leaving three legal representatives, and only one of such legal representatives was brought upon the record in the place of the deceased appellant within the prescribed period of limitation. *Held* that the appeal must abate. Either all the legal representatives of the deceased appellant should have been brought upon the record as appellants, or, if any had refused to be joined as appellants, they should have been brought on as respondents. **GHAMANDI LAL v. AMIR BEGAM.**

[XIV-22]

(2). ———— *Power of Court.*] If a sole appellant dies while his appeal is pending the appellate Court cannot proceed to judgment in the appeal without the representative of the deceased appellant being made a party to the record. **LALJI SAHAI AND ANOTHER v. SUKHI LAL AND OTHERS.**

[XVI-91]

(3). ———— *Abatement.*] On the 15th April, 1886, at the adjourned hearing of this appeal, the counsel for the appellant stated that he had been informed that his client was dead, and had been dead since the beginning of 1885. *Held* that under these circumstances the first paragraph of s. 366, Civil Procedure Code, applies, and as no application has been made by any one claiming to be the appellant's legal representative, to be brought upon the record under s. 365, the appeal abates. **GREGOR GRANT v. THE OUDH AND ROHILKHAND RAILWAY COMPANY.**

[VI-90]

(4). ———— *Appeal.*] No appeal will lie from an order under the first paragraph of s. 366 of the Civil Procedure Code, such order not amounting to a decree nor being specifically appealable under s. 588. *Bhikaji v. Panshotam* (I. L. R., 10 Bom., 220) dissented from. **HAMIDA BIBI v. ALI HUSEN KHAN.**

[XV-42]

KHWAJA AHMAD v. MATABADAL.

[I-92]

(5). ———— *—*] *Held* that an order rejecting an application that a suit might be declared to have abated by reason of the death of the plaintiff and the invalidity of an application to the Court to bring his legal representative on to the record was not one of the orders contemplated by s. 366 of the Civil Procedure Code

CIVIL PROCEDURE CODE, s. 366—
(continued.)

and that no appeal would lie therefrom. **BHAGWANT DAS v. THE MAHARAJA OF BHARTPUR AND OTHERS.**

[XV-78]

s. 367.—Determination as to who is representative—How far binding.] Before judgment in appeal two persons applied to be brought upon the record as representatives of deceased litigants. The claim of the one was disallowed, but the other was placed upon the record as an appellant and a decree was given against him. *Held* that the decree-holders could not go behind the decree and execute it for costs against the person whose claim had been disallowed on the ground that she was in fact the rightful representative of the appellant. **SON-KALI v. BHAIRO N BAKSH RAM AND ANOTHER.**

[XI-153]

s. 368.—Hearing of appeal before limitation.] *Held* by the Full Bench that inasmuch as art. 178 and not art. 171 B of the second schedule of the Limitation Act applied to the case of a deceased respondent whether plaintiff or defendant in the suit, an application by a defendant-appellant to have his appeal heard in the absence of any representative of the deceased respondent, could not be allowed until the period prescribed by art. 178 had expired without the legal representatives of the deceased applying to be brought on the record in his place. **RAM SARUP v. RAM SAHAI AND ANOTHER.**

[VIII-114]

s. 371.—Sufficient cause.] An order having been made under s. 366 of the Civil Procedure Code for the abatement of a suit, an application was made to set aside the abatement and to substitute the applicant in the place of the deceased plaintiff. The application was made several months after the period of sixty days allowed by art. 171 of sch. ii of the Limitation Act; and the only cause alleged by the applicant for not continuing the suit related to a period of thirteen days only. The Court set aside the abatement, brought the applicant on the record and decreed the claim. The defendants appealed, and in their memorandum of appeal objected to the order setting aside the abatement as illegal. *Held* that the Court of first instance had committed an error in law in making the order setting aside the abatement, inasmuch as that order was time-barred and without sufficient cause being shown within the meaning of s. 371 of the Code; that the error was one which affected the decision of the case within the meaning of s. 591; and that the defendants were therefore entitled to set it forth in their memorandum of appeal in the lower appellate Court. **DUDHRAJ v. PARBATI AND ANOTHER.**

[X-70]

(1.) s. 372.—“Assignment of interest”—Compromise (Act X of 1877).] The “cases of assign-

CIVIL PROCEDURE CODE, s. 372—
(continued.)

ment, creation or devolution” of any interest pending a suit contemplated by s. 372 of the Civil Procedure Code or those in which “the person to whom such interest has come” is arrayed on the same side in the suit as “the person from whom it has passed.” *Held* therefore that a compromise in a suit for land, between the plaintiff and one of the defendants whereby the latter consented to a decree being given to the former for half the land, was not a “case of assignment” of an interest in such land within the meaning of that section. **MAHARAJA RADHA PRASAD SINGH BAHADUR v. MAHARAJA INDAR KISHORE SINGH BAHADUR AND ANOTHER.**

[II-220]

(2.)—Creditor of decree-holder.] *Held* that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent to the appeal under ss. 372 and 582 of the Code of Civil Procedure. **CHAIL BEHARI LAL v. RAHMAL DAS AND ANOTHER.**

[XVII-194]

(3.)—Leave of Court.] The original plaintiffs in this case were *HL, JA* and *MA*, the two latter claiming as the assignees of a moiety of *HL*'s share. Subsequently *LA* and *UA* were substituted for *JA* and *MA* on the ground that the latter had transferred their interest in the property sued for to the former. *Held* that in order to maintain the suit *JA* and *MA* should have proved the purchase and the payment of the consideration. That no proceedings having been taken under s. 372, Civil Procedure Code, in respect of the substitution of *LA* and *MA* there was no assignment within the meaning of the statute which could enable them to go on with the action. **RAMJI MAL AND OTHERS v. HAZARI LAL AND OTHERS.**

[V-242]

(4.)—“Pending the suit.”] Where an application being made by an appellant to substitute for that of the person originally named as respondent to the appeal the name of a person to whom the decree had been assigned before the filing of the appeal, such application having been made more than two years after notice of the assignment had reached the appellant, the person whose name was so sought to be substituted as respondent objected to being placed upon the record of the appeal, the High Court declined to place such person on the record. *Semble* that s. 372 of the Code of Civil Procedure does not apply to a case where the devolution of interest occurs between the time of the passing of a decree and the time of the filing of an appeal from that decree. *Semble* also that in s. 372 the word “suit” does not include an appeal. **THE COLLECTOR OF MUZAFFARNAGAR v. HUSAINI BEGAM.**

[XV-232]

CIVIL PROCEDURE CODE, s. 372—
(continued.)

(5). —————.] *Held* that s. 372 of the Code of Civil Procedure applies as well to the case of a devolution of interest pending an appeal as to the case of a devolution of interest pending a suit. *Held* also that a person may, under s. 372, be added or substituted as a party either on his own application or on the application of one of the parties already on the record. IN THE MATTER OF THE PETITION OF KUAR SARAT CHANDRA SINGH.

[XVI-45]

(6). —————.] *Held* that the Court executing a decree is not competent to bring in any person who by assignment, creation or devolution of any interest pending the suit, has become interested in the subject matter. The contention that s. 647 read with s. 372 allows the Court to do on the execution side what a Court may do on the original side under s. 372 is wrong because the words "pending the suit" debar any such construction. *GOODALL v. THE MUSSOORIE BANK, LIMITED, AND ANOTHER.*

[VII-288]

(7). ———— *Treatment of application under s. 368 as one under s. 372.*] *Held* that an application made under s. 368 of the Code of Civil Procedure to bring upon the record the legal representatives of a deceased defendant, which was made after the expiration of the sixty days allowed by art. 171 B of the Limitation Act (prior to its amendment by Act VII of 1888) could not be treated as an application under s. 372. *Benode Mohini Chowdhra v. Sharat Chunder Dey Chowdhry* (I. L. R., 8 Calc., 837) dissented from on this point. Nor could it be regarded as an application under s. 32. *Athiappa v. Ayanna*, (I. L. R., 8 Mad., 300) dissented from. *OJAGAR MAL AND ANOTHER v. NIAMAT BIBI AND OTHERS.*

[X-21]

(8). ———— *Appeal.*] An appeal will lie from an order dismissing an application under s. 372, Civil Procedure Code, to be brought upon a record as a representative of a deceased party, such an order being a decree within the meaning of s. 2, Civil Procedure Code. *INDO MATI v. GANGA PRASAD AND ANOTHER.*

[XVII-7]

(1) s. 373.—*Dismissal bahaisiyat maujuda—Implied permission.*] *Per* Mahmood, J.,—That the dismissal of a suit *bahaisiyat maujuda* must be taken as amounting to a permission to the plaintiff to bring a fresh suit within the meaning of s. 373, Civil Procedure Code, and could only mean that the judge using those words in his decree had no intention to decide the case finally, so as to bar the adjudication upon the merits of the rights of the parties in a future litigation between them. The procedure provided by Chapter XXII of the Code is not the only

CIVIL PROCEDURE CODE, s. 373—
(continued.)

manner in which a plaintiff can come into Court for the second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defect which proved fatal to the former suit. *Ganesh Rai v. Kalka Prasad* (I. L. R., 5 All., 595) dissented from. *Watson v. The Collector of Rajshahye* (13 Moo. I. A. 160) and *Salig Ram v. Tirbhawan* (W. N. 1885, p. 171) referred to. *MUHAMMAD SALIM v. NABIAN BIBI AND OTHERS.*

[VI-119]

See. also

MUHAMMAD ZAHIA KHAN v. MIRDAD KHAN AND OTHERS.

[VII-246]

GANESH RAI v. KALKA PRASAD.

[III-140]

KUDRAT AND OTHERS v. DINU AND OTHERS.

[VII-5]

(2). ———— *Application to (1) withdraw, (2) with liberty to bring fresh suit—Power of Court to (1) grant and (2) refuse* (Act X of 1877).] *Held* that a Court was not competent on an application made under s. 373, Civil Procedure Code, while refusing permission to bring the suit afresh, to order that the appeal should be struck off the file in accordance with the first part of the prayer. The application, if it could not be granted in its entirety, should have been refused and the suit decided on its merits. *NAGPAL AND ANOTHER v. CHINTAMAN AND OTHERS.*

[II-69]

(3). ————.] The rejection of an application under s. 373 of the Civil Procedure Code can result only in the suit proceeding in its usual course. Where upon an application under s. 373 for permission to withdraw from the suit with liberty to bring a fresh suit, the Court not only rejected the application but dismissed the suit in *toto*—*held* that it had no power to do so, and that the proper course would have been to let the suit proceed in its natural course. *HARNAND MISR AND OTHERS v. DINA SINGH AND OTHERS.*

[VIII-132]

(4). ———— *Power to withdraw.*] The plaintiff in a civil suit has an absolute right to withdraw from or abandon his suit either in whole or in part without the consent of the Court. Where both parties to a suit notified to the Court that they were agreed on the subject of litigation and did not wish to continue the suit but did not inform the Court of the nature of the compromise arrived at:—*Held* that such notification was to be treated as a withdrawal or abandonment of the suit within the meaning of s. 373 of the Code of Civil Procedure. *ALLAH BAKHSH v. NIAMAT ALI AND ANOTHER.*

[XII-53]

CIVIL PROCEDURE CODE, s. 373—
(continued.)

(5)——Reference to arbitration—*Permission to withdraw.*] Held that the Court has no power to revoke a submission to arbitration except under s. 510, Civil Procedure Code, which can only be done after the award has been returned; and that a plaintiff who withdraws from the suit with liberty to bring a fresh suit under s. 373 of the Civil Procedure Code after an order of reference, with the consent of the parties has been made, refuses to perform a contract within the meaning of sec. 21 of the Specific Relief Act and is therefore barred from bringing a fresh action. *SHEOAMBAR AND OTHERS v. DEODAT.*

[VII-13]

(6)——*Withdrawal of suit—Effect of.*] Where a suit is withdrawn with permission under the first paragraph of s. 373 of the Code of Civil Procedure the effect is to have the parties in the same position as that in which they would have been if the suit had never been brought. A plaintiff, therefore, who has obtained an order under s. 373 of the Code will not be debarred by s. 43 from claiming in a subsequent suit a relief which he might have included, but did not, in the suit which he was permitted to withdraw. *Venkata Shetti v. Ranga Nayab (I. L. R., 10 Mad., 160)* followed. *BEHARI LAL PAL v. SRIMATI BARAN MAI DAS.*

[XIV-201]

(7)——*Notice.*] When the plaintiff in a suit applies for permission to withdraw it with liberty to bring a fresh one, such permission should not be granted without the defendant being served with notice to show cause why such permission should not be granted. *L.*, claiming as heir to *H.*, a deceased Hindu, sued *K.*, his widow, and *G.* a minor represented by his mother and guardian *B.*, to have the adoption by *K.* of *G.* set aside and for certain other reliefs. The matters in difference in the suit were referred to arbitration, and an award was made in favor of the defendants. The plaintiff preferred objections to the award. Before these were disposed of *K.* died. The Court of first instance subsequently allowed the objections and set aside the award. The minor defendant then applied to the High Court for revision of the order setting aside the award. The application was rejected on the ground that the order might be impugned on appeal from the decree in the suit. The plaintiff subsequently applied for permission to withdraw the suit with liberty to bring a fresh one on the ground that *K.* having died, he was entitled to possession of the immoveable property left by *H.* This permission was granted. The minor defendant applied to the High Court for revision. Held that it might have been a very good ground for allowing the plaintiff to withdraw the suit that *K.*, the adoptive mother of the minor defendant, had died *pendente lite* had no arbitration proceedings taken place in the course of the suit; but when

CIVIL PROCEDURE CODE, s. 373—
(continued.)

the parties had referred their differences to arbitration, and an award had been made in favor of the defendant, and had been set aside, and an application for revision of the order setting it aside had been refused on the ground that the matter could be made subject of appeal from the final decree in the suit, permission to withdraw the suit and bring a fresh one should not have been granted. The minor defendant might be seriously prejudiced by such a course, and the suit had not abated against him by the death of *K.*, while, on the other hand, a decree in the suit, if in his favor, would decide the litigation, and if in favor of the plaintiff, would not prevent his bringing a suit for possession on the separate cause of action which had arisen. *Stahlschmidt v. Walford (L. R., 4 Q. B. D., 217)* referred to. The High Court refused to allow the plaintiff in the suit to be amended by the addition of a claim for possession of property left by *H.* *KALIAN SINGH, GUARDIAN OF GANGA SAHAI, MINOR, v. LEKHRAJ SINGH.*

[IV-28]

(8)——*Order allowing application—Finality.*] The plaintiffs in this suit applied for leave to withdraw from their suit with liberty to bring a fresh suit under s. 373, Civil Procedure Code. The application was granted and no appeal was preferred from this order of the Court. Subsequently the plaintiff brought the present suit. On behalf of the defendant it was contended that the suit having been allowed to be withdrawn on insufficient grounds it could not be brought again. Held that the order (on the application for withdrawal) having become final cannot be considered on the merits in this litigation neither can that order have the effect of *res judicata* on the point in issue because nothing was then decided. *ABDUL RAHMAN AND ANOTHER v. LAL BEHARI AND ANOTHER.*

[V-151]

(9)——*Permission to withdraw—Appeal.*] An order under s. 373 of the Code of Civil Procedure allowing a plaintiff to withdraw his suit with leave to bring another suit on the same cause of action is not appealable, being neither one of the order specified in s. 588, nor a decree within the meaning of s. 2 of the said Code. *Kalian Singh v. Lekhraj Singh (I. L. R., 6 All., 211)* and *Jogodindro Nath v. Sarut Sundari Debi (I. L. R., 18 Calc., 322)* followed. *Ganga Ram v. Data Ram (I. L. R., 8 All., 82)* dissented from. *JAGDESH CHAUDHRI AND OTHERS v. TULSHI CHAUDHRI AND OTHERS.*

[XIII-189]

ZAHURI AND OTHERS v. DINA NATH AND OTHERS.

[XIII-204]

GENDA MAL AND ANOTHER v. PIRBHU LAL.

[XV-17]

CIVIL PROCEDURE CODE, s. 373—
(continued.)SAYA MAL *v.* LAIK SINGH AND ANOTHER.

[XVI-21]

(10.)—*Revision—Costs.* A Subordinate Judge made an order as to costs in favour of some defendants in the following terms. "As the case has not been contested to the bitter end, half the pleader's fees are allowed and the process expenses, etc., incurred in the case, except those already refused to the defendants. For travelling and incidental expenses defendants to put in a bill in one week, this to be subject to the decision of the Court after hearing both parties. The application under s. 373 of the Code of Civil Procedure is granted with leave to the plaintiff to bring a fresh suit for the same matter. Costs allowed to defendants as above." Before taxation was completed the Judge who had made the above order was transferred. *Held* that it was competent to the successor at taxation and before granting payment of the pleader's fees to consider whether the certificate given by a pleader as to the fee paid to him in the case was according to rule and to disallow payment of any fee not duly certified as paid. *Held* also that the order under s. 373 of the Code of Civil Procedure was an order liable to revision. *Kalian Singh v. Lekhraj Singh* (W. N. 1884, p. 28) referred to. MARY DICK AND OTHERS *v.* LOUISA DICK.

[XIII-78]

(11.)—*Applicability of section to execution proceedings.* *Held* that, s. 647, Civil Procedure Code, makes s. 373 applicable to proceedings in execution of decree. *Kifayat Ali v. Ram Singh* (I. L. R., 7 All., 359); *Pirjade v. Pirjade* (I. L. R., 6 Bom., 681) followed; *Tara-chand Megraj v. Kashinath Trimbak* (I. L. R., 10 Bom., 62); and *Ramanandan Chetty v. Periatambi Shervai* (I. L. R., 6 Mad., 250) dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. *Held* that the decree-holder was precluded from again applying for execution. SARJU PRASAD AND ANOTHER *v.* SITA RAM.

[VIII-1]

RADHA CHARAN AND OTHERS *v.* MAN SINGH

[X-119]

KUAR SEN *v.* CHATTAR SINGH.

[XI-92]

SHAH SIFAT ALAM AND ANOTHER *v.* DUNIA PRASAD SINGH.

[XI-98]

KABUL SINGH AND ANOTHER *v.* SAWAL DAS AND ANOTHER.

[XI-124]

CIVIL PROCEDURE CODE, s. 373—
(continued.)FAKIRULLAH AND ANOTHER *v.* THAKUR PRASAD.

[X-53]

MAHTAB KUAR *v.* SHAM SUNDER LAL AND ANOTHER.

[VIII-272]

(12.)—*Execution.* The mere fact of an application for execution of a decree being struck off for default of prosecution will not bar a second application by reason of s. 373 read with s. 647 of the Civil Procedure Code. *Sarju Prasad v. Sita Ram* (I. L. R., 10 All., 71), *Mahtab Kuar v. Sham Sunder Lal* (W. N. 1888, p. 272) and *Ramrup v. Lalji* (W. N. 1888, p. 253) referred to. HIRA SINGH *v.* JOTI PRASAD.

[IX-204]

(13.)—*Execution.* *Held* that the ruling in *Sarju Prasad v. Sita Ram* (I. L. R., 10 All., 71) is limited to cases where the decree-holder himself withdraws the application for executing the decree, and cannot be applied to cases such as those where no such withdrawal of the execution application by the decree-holder has been made. RAM RUP *v.* LALJI AND OTHERS.

[VIII-253]

(14.)—*Execution.* The ruling in *Sarju Prasad v. Sita Ram* (I. L. R., 10 All., 71) only decided that where the circumstances in regard to an application for execution of decree show that it was withdrawn at the instance of the pleader of the decree-holder, and that no sanction was given to its withdrawal with liberty to present a fresh application, any subsequent application made by that decree-holder for execution is prohibited by s. 373 read with s. 647 of the Code of Civil Procedure. But where a Court of its own motion and without being moved either by the decree-holder or by his pleader takes upon itself to strike off an application for execution for the mere purpose of clearing its file, that is not a proceeding under any provision of the Code which could bar a decree-holder from making a fresh application for execution. A first application for execution of a decree was ordered by the Court to be struck off for want of prosecution and upon the statement of the decree-holder's pleader "that at present the case may be struck off." No permission was given to the decree-holder to withdraw the application with leave to take fresh proceedings. *Held* that a subsequent application for execution of the decree was barred by s. 373 read with s. 647 of the Code of Civil Procedure. *Sarju Prasad v. Sita Ram* (I. L. R., 10 All., 71) explained and followed. *Ram Rup v. Lalji* (W. N. 1888, p. 253); *Mahtab Kuar v. Sham Sunder Lal* (W. N. 1888, p. 272) and *Hera Singh v. Joti Prasad* (W. N. 1889, p. 204) distinguished. Observations as to the

CIVIL PROCEDURE CODES, s. 373—
(continued.)

necessity of conducting the proceedings in execution of decree with as much care and regularity as proceedings in suits under s. 647 of the Code of Civil Procedure. The provisions relating to proceedings in suits are to be followed and adopted in execution proceedings so far as they may be fairly and properly applicable thereto. **FAKIRULLAH AND ANOTHER v. THAKUR PRASAD.**

[X-53]

(15.) —————.] Upon application made in October, 1887, for execution of a decree for enforcement of hypothecation, sale in execution was fixed to take place on the 15th December. On the 14th December, the decree-holder applied that the proceedings might be struck off, as an immediate sale of the attached property was not required, but that the attachment might be maintained. The Court passed an order granting this application. In March 1888, the decree-holder made another application for execution which was granted and the property was brought to sale. The sale however, was set aside for irregularity. Upon further notifications for sale being directed the judgment-debtor objected that, with reference to the proceedings of the 14th December, 1887, further execution of the decree was barred by s. 373 read with s. 647 of the Code, under the rule in *Sarju Prasad v. Sita Ram* (I. L. R., 10 All., 71.) Held that this contention was erroneous as the decree-holder's application and the order of the 14th December, 1887, thereon, showed, that there had been no withdrawal by the decree-holder within the meaning of s. 373, but only a temporary postponement of the execution proceedings, with permission to maintain the attachment and that the rule in *Sarju Prasad v. Sita Ram* did not apply. The permission contemplated by s. 373 is not necessarily an express permission, whether the proceedings taken subsequent to the order of the 14th December, 1887, had become final so as to bar the judgment-debtor's objections with reference to *Mungul Prasad Dicit v. Grijakant Lahiri* (I. L. R., 8 Cal., 51); *Ram Kirpal v. Rup Kuari* (I. L. R., 6 All., 269); and *Beni Ram v. Nanhu Mal* (I. L. R., 7 All., 102); *quære*. **BADRI NATH MISR AND OTHERS v. RAM RUP SINGH.**

[X-9]

Per contra.

QABUL SINGH AND ANOTHER v. SANWAL DAS AND ANOTHER.

[XI-124]

(16.) —————.] Where a judgment-debtor, being entitled and having an opportunity to plead s. 373 of the Code of Civil Procedure as a bar to execution of decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the

CIVIL PROCEDURE CODE, s. 373—
(continued.)

Court and orders passed thereon, the principles of *res-judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution-proceedings object that such previous application for execution ought in fact to have been held to be barred by the operation of s. 373 abovementioned. **SHER SINGH AND OTHERS v. DAYA RAM AND OTHERS.**

[XI-164]

s. 374. — Applicability of section to execution proceedings.] Held that s. 647, Civil Procedure Code, makes s. 374 applicable to proceedings in execution of decree. **SARJU PRASAD AND ANOTHER v. SITA RAM.**

[VIII-1]

(1.) **s. 375. — "Compromise."** An agreement between parties to a suit that if a certain witness produced a certain document and certain specified words were found therein the judgment should be given for the plaintiff, while if such words were not found therein judgment should be given for the defendant is not an adjustment or compromise of the suit within the meaning of s. 375 of the Code of Civil Procedure such as will determine the jurisdiction of the Court and necessitate its passing a decree according to the agreement. Such an agreement, though conclusive on the parties to it in respect of the matter of the evidence given thereunder is not conclusive on the Court so as to oblige it to accept the evidence so given as conclusive upon it. *Vasudeva Shanbog v. Naraina Rai* (I. L. R., 2 Mad., 356) referred to. **MUHAMMAD ZAHUR v. CHEDA LAL.**

[XII-3]

(2.) — **"Lawful agreement."** Held that a compromise entered into by the parties to a suit with the object of escaping from liability to be prosecuted for forgery and perjury of which one or the other was threatened by the Court of first instance was not a lawful one. **GANGA PRASAD v. HANUMAN.**

[III-145]

(3.) — **Authority of counsel.]** A counsel unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client. *Strauss v. Francis* (L. R., 1 Q. B., 379); *Matthews v. Munster* (L. R., 20 Q. B. D., 141) and *In re West Devon Great Consols Mine* (L. R., 38 Ch. D., 51) referred to. **JANG BAHADUR SINGH AND ANOTHER v. SHANKAR RAE AND ANOTHER.**

[XI-61]

CIVIL PROCEDURE CODE, s. 375—
(continued.)

(4) ————“*Shall be recorded.*” This suit for foreclosure was resisted by one *C L* on the ground that a part of the share in dispute did not belong to the mortgagor and he was therefore not competent to mortgage it to the plaintiff. The first Court decreed the claim. The defendant *C L* appealed to the District Judge who dismissed the appeal observing as follows:—“The plaintiffs stated that if the mortgage money were paid they would give up the whole share mortgaged and defendant-appellant accepted these terms. If there is any dispute between *C L* and the heirs of the deceased mortgagor that cannot be decided in this case. Appeal is dismissed with costs.” *C L* appealed to the High Court on the ground that there had been no compromise as referred to by the lower Court. *Held* that as there was nothing on the record to show the precise terms of the alleged compromise, or how it was entered into or how the parties were represented and as in these cases the terms of the compromise should be put in writing and filed in the Court the appeal must be allowed and the case remanded for trial on the merits. **CHEDI LAL v SURAJMAN AND OTHERS.**

[V-42]

s. 375 A—Applicability of section to execution proceedings.]

See s. 257 (a), No. (4).

s. 381.—Appeal.] *Held* that an order dismissing a suit for failure by the plaintiff to find security for costs as ordered was a *decree* within the meaning of s. 2, Civil Procedure Code, from which an appeal would lie and not a revision. **WILLIAMS v. BROWN AND OTHERS.**

[VI-30]

ss. 392 & 393.—Determination of case before return of commission.] The intention of the Code of Civil Procedure is that when a Court deems it necessary on the application of a party or otherwise that a commission for local investigation should be issued, the return to that commission should be before the Court before it should proceed to hear and determine the case. **MADHO SINGH v. KASHI SINGH AND OTHERS.**

[XIV-112]

s. 398.—Power of Court.] *Held* that a Court has no power under s. 396, Civil Procedure Code, to order its *amin* to cause a wall to be built separating portions of property of which partition has been decreed. **SOHAN LAL v. HARDEO SAHAI.**

[XVII-16]

s. 401.—(Explanation)—Pauper.] Money which may be borrowed on the strength of his claim in a suit which a person is seeking permission to institute *in forma pauperis* cannot be

CIVIL PROCEDURE CODE, s. 401—
(continued.)

regarded as property in the possession of such person so as to disentitle him to sue *in forma pauperis*. **AZMAT ALI v. KIFAYAT ULLAH KHAN AND OTHERS.**

[XIII-11]

(1) **s. 407 (c)—“Right to sue”—Jurisdiction.]** The terms of s. 407 (c), C. P. C. must not be read as limiting the Court's discretion to merely ascertaining whether “the right to sue” arose within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action capable of enforcement in Court, and calling for an answer and not barred by the law of limitation or any other law. **CHATTAR PAL SINGH v. RAJA RAM.**

[V-156]

(2) ————.] Clause (c) of s. 407, Civil Procedure Code, does not refer solely to a question of jurisdiction but the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. *Chattar Pal Singh v. Raja Ram* (I. L. R., 7 All., 661); *Dulari v. Vallabdas Pragji* (I. L. R., 13 Bom., 126) and *Vijendra Tirtha Swami v. Subhindra Tirtha Swami* (I. L. R., 19 Mad., 197) referred to. *Koka Rangunayaka Ammal v. Koka Venkatachellapati Nayudu* (I. L. R., 4 Mad., 323) dissented from. *Venkubai v. Lakhsman Venkoba Khot* (I. L. R., 12 Bom., 617) distinguished. **KAMRAKH NATH v. SUN-DAR NATH.**

[XVIII-36]

CHATTARPAL SINGH v. RAJA RAM.

[V-156]

(3) ———— *Probable result of suit.]* This is an application under s. 622, Civil Procedure Code, for the revision of an order rejecting the applicant's application to sue as a pauper, for possession of an *imambara* and lands appertaining thereto. The lower Court found the applicant to be a pauper, but rejected the application on the ground that “the plaintiff had not made out a *prima facie* case entitling him to permission to sue as a pauper.” The plaintiff alleged himself to be entitled not only as a *mutwalli* to worship in the *imambara*, but also as descended from a *mutwalli* of the mosque and as such he claims to have a *locus standi* to maintain the action. *Held* that this was a proper case for revision under s. 622 and the plaintiff had made out a *prima facie* case. The application is allowed and the Court below is directed to register the case as a pauper suit under s. 410 and to try it upon the merits. *Chattarpal Singh v. Raja Ram* (I. L. R., 7 All. 661) referred to and distinguished. **ALI HAMZA v. AHSAN ALI.**

[VIII-150]

CIVIL PROCEDURE CODE, s. 407(c)—
(continued.)

(4.) —————.] A Court is not competent in an inquiry into the pauperism of an applicant for leave to sue *in forma pauperis* to go into the question of the probable result of the applicant's suit if leave were to be granted that suit not being *prima facie* barred by any rule of law. Where a Court having found the applicant to be a pauper acted as above described and rejected the application for leave to sue as a pauper. *Held* that the applicant could apply for revision of the order rejecting his application. *Chattarpal Singh v. Raja Ram (I. L. R., 7 All., 661)* distinguished. *FAIZ MUHAMMAD KHAN v. AZIZ-UN-NISSA AND OTHERS*.

[XIII-218

(5.) ————— *Rejection of application on ground that suit is extravagant*] On an application to sue *in forma pauperis* the Court is required to deal with the question of the applicant's pauperism with reference to the definition of that word as given in the explanation to s. 401 of the Code of Civil Procedure and in deciding it to ascertain the exact property, its market value, and the title thereto and then to deal with the case under s. 407 of the Code, irrespective of any surmises as to the reason why the applicant has valued his claim at a high figure. All orders passed under s. 407 of the Civil Procedure Code, are not excluded from the exercise of revisional powers of the High Court under s. 622 of the Code, *Chattarpal Singh v. Raja Ram (I. L. R., 7 All., 661)* notwithstanding. In the exercise of revisional powers it is not the duty of the High Court to enter into the merits of the evidence; it has only to see whether the requirements of the law have been duly and properly obeyed by the Court whose order is the subject of revision, and whether the irregularity as to failure or exercise of jurisdiction is such as to justify interference with the order. *MUHAMMAD HUSAIN v. AJUDHIA PRASAD AND OTHERS*.

[VIII-179

(6.) ————— *Appeal.*] *Held* that an order rejecting an application for permission to sue as a pauper, and striking the case off the Court's file, on the ground that the applicant had previously withdrawn the application and entered into a new contract with defendants, was a "decree" within the meaning of s. 2 of the Civil Procedure Code, and appealable as such. *BALDEO AND OTHERS v. GULA KUAR*.

[VI-321

(7.) ————— *Revision.*] An order rejecting an application for permission to sue *in forma pauperis* is not a decree and being unappealable may form the subject of an application for revision. *AZMAT ALI v. KIFAYAT ULLAH KHAN AND OTHERS*.

[XIII-11

s. 410—*Application for review—Court-fee.*] *Held* that when an application for review is presented in a suit *in forma pauperis*, that

CIVIL PROCEDURE CODE, s. 410—
(continued.)

application, like the plaint in the suit, is not liable to any court-fee. *UMDA BIBI AND OTHERS v. NAIMA BIBI*.

[XVIII-95

(1). s. 411—"First charge".] A plaintiff suing *in forma pauperis* to recover property valued at Rs. 60,000 obtained a decree for Rs. 1,439. The Court, with reference to the provisions of s. 411 of the Civil Procedure Code directed that the plaintiff should pay Rs. 1,196 as the amount of court-fees which would have been paid by him if he had not been permitted to sue as a pauper. The Collector having applied under s. 411 to recover this amount by attachment of the Rs. 1,439 payable to the plaintiff, the defendant objected that (i) certain costs payable to her by the plaintiff under the same decree, and (ii) a sum of money payable to her by the plaintiff under a decree which she had obtained in a cross suit in the same Court, should be set off against the Rs. 1,439 payable by her to him, with reference to ss. 246 and 249 of the Code, and that thus nothing would remain due by her which the Government could recover. No application for execution was made by the plaintiff for his Rs. 1,439, or by the defendant for her costs. In appeal from an order allowing the Collector's application, it was contended that the "subject matter of the suit" in s. 411 of the Code meant the sum which the successful pauper plaintiff is entitled to get as a result of his success in his suit; but that in the suit and the cross suit taken together, the plaintiff ultimately stood to lose a small sum, the defendant being the holder of the larger sum awarded altogether. *Held* that the contention had no force, as execution had not been taken out by the plaintiff or the defendant or both, and it could not be said that the Government had been trying to execute the plaintiff's decree or was a representative of the plaintiff as holder of the decretal order in his favour for Rs. 1,439, so as to bring into operation the special rules of ss. 246 and 247 of the Code, between him and the defendant. *Held* also that the plaintiff was one who, in the sense of s. 411, had succeeded in respect of part of the "subject matter" of his suit, and on that part, therefore a first charge was by law reserved and secured to the Government, which was justified in recovering it in these proceedings from the defendant who was ordered by the decree to pay it, in the same way as costs are ordinarily recoverable under the Code. *Held* that the decrees in the suit and the cross suit not having reached a stage in which the provisions of ss. 246 and 247 of the Code would come into play no question of set off and consequent reduction or other modification of the "subject matter" of the suit decreed against the defendant as payable by her to the plaintiff had arisen or could be entertained. *JANKI v. THE COLLECTOR OF ALLAHABAD*.

[VI-300

CIVIL PROCEDURE CODE, s. 411—
(continued.)

(2) ————“*Shall be recoverable.....as costs.*”] In a suit brought *in forma pauperis* the plaintiff was successful, and the decree directed that the court-fee which would have been payable had the suit not been *in forma pauperis* should be the first charge on the property, the subject matter of the suit, and should be recoverable from the defendant in the same manner as the costs of the suit. *Held* that it was not necessary for Government to bring a separate suit to recover the court-fee but that the same might be realized from the property, the subject of the suit, by proceedings in execution. *RAM DAS v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

[XVI-121]

s. 412.—*Appeal by Government.*] In a suit *in forma pauperis* the District Judge decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion which was dismissed. The Secretary of State, not having been a party to the litigation in the Court below, then preferred an appeal in respect of the court-fee on that portion of the plaintiff's claim which had been dismissed. *Held* that such an appeal would lie; but *semble* the proper course would have been for the Government to have applied, through the Collector to the Court of first instance to review its judgment and to repair the omission in its decree. *Janki v. The Collector of Allahabad (I. L. R., 9 All., 46)* referred to. *SECRETARY OF STATE FOR INDIA IN COUNCIL v. BHAGWANTI BIBI AND OTHERS.*

[XI-97]

(1). s. 413.—*Suit on full stamp—Limitation.*] When an application for leave to sue as a pauper is refused and the applicant subsequently brings a suit in the same matter on a full court-fee, such suit dates, for the purposes of limitation, from the time of filing the plaint and not from the date of the application for leave, to sue as a pauper. *Aliter* when, leave to sue as a pauper having been granted, the applicant is dispaupered. *NARAINI KUAR v. MAKKHAN LAL AND OTHERS.*

[XV-106]

(2) ————*Appeal on full stamp—Limitation.*] Where, an application for leave to appeal *in forma pauperis* having been presented and rejected, a regular appeal was subsequently filed, but after the period of limitation had expired. *Held* that the payment of the court-fee on the regular appeal could not be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper so as to convert that memorandum of appeal into an appeal within time. Until the regular appeal was filed there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal. *BISHNATH PRASAD v. JAGARNATH PRASAD AND OTHERS.*

[XI-99]

CIVIL PROCEDURE CODE,—
(continued.)

(1). s. 424.—*Notice.*] The Municipal Committee of Umballa in the Punjab, the holders of a decree obtained in an Umballa Court, brought to sale, in execution of that decree, a house situate at Saharanpore in N.-W. P., and purchased it on behalf of Government. The present suit was brought by the plaintiff at Saharanpore against the Secretary of State to have the sale set aside. *Held* that the notice mentioned in s. 424 of the Code of Civil Procedure, should have been given either to a Secretary to the Government of the N.-W. P. or to the Collector of Saharanpore and not to the Secretary to the Government of Punjab. *KHWAJA HUSAIN AHMAD v. SECRETARY OF STATE FOR INDIA.*

[IV-58]

(2). ————.] Where a plaintiff in a suit brought under Act No. XV of 1873 against a Municipal Committee not having made the Local Government a party defendant to the suit as originally filed, subsequently applied to have the Local Government made a party, it was *held* that such application to add the Local Government as a party should state that the notice required by s. 424 of the Code Civil of Procedure had been served as provided by that section. *RAM DIAL AND ANOTHER v. THE PRESIDENT OF THE MUNICIPALITY OF KALPI.*

[XVI-22]

(3). ————(*Act X of 1877.*)] The plaintiffs in this suit alleged that on the 27th May, 1878, the defendant *H D*, by his agent, the defendant *N S*, in consideration of the advance of a certain sum of money, contracted with them to sow twenty *bighas* of *sir* land belonging to him with indigo by a certain date, and in default to pay the plaintiffs damages at the rate of Rs. 30 *per bigha* together with the sum advanced to him and interest thereon at one *percent per mensem*; and that the defendant had broken such contract; and they claimed damages in accordance with the terms of such contract. It appeared that subsequently to the date of the alleged contract the Court of Wards had taken charge of the estate of the defendant *H D*, and at the time of suit the Collector of Jaunpore was acting in respect of such estate as the agent of the Court of Wards under s. 204 of Act XIX of 1873. The plaintiffs made the Collector of Jaunpore a defendant in the suit, but they did not serve on him the notice mentioned in s. 424 of Act X of 1877. The lower Courts dismissed the suit on the ground that such notice should have been served on the Collector before the suit was instituted. In second appeal the plaintiffs contended that s. 424 of Act X of 1877 was not applicable in this case, as the Collector was not sued in respect of anything done by him in his official capacity. *Held* by the High Court that under the provisions of s. 424, Act X of 1877 as amended by Act XII of 1879, notice was not necessary to the Collector, the act in

CIVIL PROCEDURE CODE, s. 424—
(continued.)

question not having purported to be done by him in his official capacity. *MADHO DAS AND OTHERS v. THE COLLECTOR OF JAUNPORE AND OTHERS.*

[I-175]

s. 432.—*Recognized agent—Sovereign.*

See s. 37 (1).

(2.)—*Suit by a chief in his own name.* In this case the Chief of Indore sued in his own name one Sipahi Singh. It was contended for the defendant-appellant that the Chief could not sue in his own name under s. 432, Civil Procedure Code. *Held* that the section was an enabling provision and not prohibitory. *SIPAH SINGH AND OTHERS v. THE CHIEF OF INDORE.*

[VI-133]

(1.) s. 435.—*Corporation—Unregistered and unincorporated society.* The corporation contemplated by the Code of Civil Procedure is a corporation as known in English law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed. In a suit by an unregistered and unincorporated society the names of the members of the company must be disclosed. If this is not done, and if the society is neither a corporation nor a company authorized to sue or be sued in the name of an officer or of a trustee, so as to make the provisions of the Code of Civil Procedure, s. 435 applicable, the plaint is a bad one. *Koylash Chandra Roy v. Ellis* (8 W. R., 45); *the Muhammadan Association of Meerut v. Bakshi Ram* (1 L. R., 6 All., 284); and *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York* (1 L. R., 16 All., 420) referred to. *PANCHAITA AKHARA KALAN UDASI SRI SAT GUR NANAK NIRWAN PANCH PARMESHWAR IN KYDGANJ, CITY ALLAHABAD, THROUGH MAHANT MOTI RAM, MOKAMI HARI DAS, MAHANT NARAIN DAS, MAHANT SOTI PRAKAS, MAHANT GOKUL DAS, MAHANTS GANGA RAM AND ISWAR DAS, LOCAL AGENTS AND MANAGERS OF THE SAID AKHARA v. GAURI KUAR AND ANOTHER.*

[XVIII-7]

(2.)—*Board of Foreign Missions, New York.* A suit in ejectment as against a trespasser was brought by a person signing the plaint as "for and as superintendent and principal officer of the estate of the Board of Foreign Missions of the Presbyterian Church of New York." *Held* that the Board of Foreign Missions of the Presbyterian Church of New York was not a corporation or company authorised to sue and be sued in the name of an officer or trustee within the meaning of s. 435 of the Code of Civil Procedure and also that the person signing the plaint in the manner above described could not sue on his own possessory title to the land in respect of which ejectment was claimed. *Jaigopal v. Kauleshar*

CIVIL PROCEDURE CODE, s. 435—
(continued.)

Rai (W. N. 1882, p. 132); *Muhammad Yusuf v. Sukhnath* (W. N. 1887, p. 55) and *Ashera v. Whitlock* (L. R., 1 Q. B., 1) distinguished. *YUSUF BEG v. THE BOARD OF FOREIGN MISSION OF THE PRESBYTERIAN CHURCH OF NEW YORK IN AMERICA THROUGH THE REV. W. F. JOHNSON, PRINCIPAL OFFICER.*

[XIV-154]

(1) s. 440.—*Suit by uncertificated guardian—Leave of Court—(Act XL of 1858).* The mother of a minor, who had not obtained a certificate under Act XL of 1858, instituted a suit on behalf of the minor for some property of small value. She did not ask the Court in which she instituted the suit for permission to institute it, as required by s. 3 of that Act, but the Court entertained it, the defendant not raising the objection that it had been instituted without permission, and it was decided on the merits in favor of the minor. *Held* that, under these circumstances, it must be taken, notwithstanding there was no order allowing the matter to sue, that the suit was instituted with the Court's permission. *KEDAR NATH AND ANOTHER v. DEBI DIN.*

[I-173]

(2.)—*(Act XL of 1858).*—*Deodat* was a minor under the guardianship of his mother. In a suit to recover money on a bond in which the above minor was a plaintiff, the Court of first instance gave the plaintiffs a decree but the lower appellate Court held that in the absence of a certificate of guardianship the mother could not sue without the permission of the Court below. *Held* by two Division Benches that looking at the form of the suit and the incidental circumstances that the mother was permitted by the Court to represent and institute the suit on behalf of her minor son. *Kedar Nath v. Debi Din* (W. N., 1881, p. 210); *Janki v. Dharam Chand* (W. N. 1881, p. 214) followed. *DEODAT AND OTHERS v. DEODAT.*

[II-23]

(3.)—*(Act XL of 1858).*—*Held* that the absence of a certificate of guardianship was not a fatal matter and that the very fact of the Court allowing a suit to proceed must be taken to imply that the necessary permission was given; moreover even if no such permission was given the irregularity was such as was covered by s. 578 of the Civil Procedure Code, that is to say, it did not affect the merits of the case or the jurisdiction of the Court. *PARMESHWAR DAS AND OTHERS v. BELA AND ANOTHER.*

[VII-189]

(4.)—*(Act XL of 1858).*—One A styling himself guardian of a minor brought this suit on behalf of the minor to set aside a mortgage of the minor's property made by his mother to one B. The suit was resisted

CIVIL PROCEDURE CODE, s. 440—
(continued.)

on the ground amongst others that *A* was not competent to sue, not being his guardian and not being even related to the minor. The first Court held that *A* was competent to sue under ss. 440 and 445, Civil Procedure Code, and gave the plaintiff a decree. The lower appellate Court dismissed the suit on the simple ground that *A* was not competent to sue as he was not related to the minor. *Held* that under the circumstances the suit should not have been dismissed on this ground alone, but ought to have been tried on the merits. *JAI-SRI SINGH v. PAL SINGH*.

[III-193]

(5)———(*Act XL of 1858*.)] The uncle of a minor instituted a suit on his behalf without obtaining the formal permission of the Court in which such suit was instituted to sue on his behalf. The uncle's right to sue was denied by the defendant; and the first of the issues framed was whether he had such right. The Court decided that he had such right. *Held*, in second appeal, that although permission to sue or defend a suit on behalf of a minor should be formally granted, to be of effect, such decision might fairly be accepted as in this case a sufficient and effective permission to the uncle to sue, and he was competent to maintain such suit. *Mrinamoyi Dabia v. Jogodishuri Dabia* (I.L.R., 5 Calc., 450) referred to. *PIRTHI SINGH v. SOBHAN SINGH*.

[I-90]

(6)———*Objection by uncertificated guardian—Leave of Court—(Act XL of 1858.)*] Certain immoveable property was attached in execution of a decree as the property of *A*. *A*'s father as the next friend of *A*'s sons objected to the attachment, claiming that the property belonged to the minors. The Court executing the decree refused to entertain the objection on the ground that with reference to s. 3 of Act XL of 1858, the grandfather was not competent to prefer the objection until he had obtained a certificate under the Act. *Held* that the lower Court was wrong in refusing to entertain the objection. The case was remitted for trial on the merits. *MUHAMMAD GULKHAN, NEXT FRIEND OF SAIR GULKHAN AND OTHERS, MINORS v. MUHAMMAD MUNIR*.

[III-168]

(7)———*Suit without next friend—Defect not fatal.*] *Held* that the mere fact that one of the plaintiffs was a minor on whose behalf the suit had not been instituted by a next friend was no ground for reversing the decree of the Court of first instance in favor of all the plaintiffs. The decree of the lower Court must therefore be set aside and the suit must be restored to the file of the Court of first instance for retrial after appointment of a next friend for the minor. *WAZIR ALI AND OTHERS v. SHEO-BART RAI AND OTHERS*.

[I-150]

CIVIL PROCEDURE CODE, s. 440—
(continued.)

(8)———“*May be ordered.*”] A decree was sought to be executed (so far as costs were concerned) against the next friend of a minor. He objected to the execution on the ground that no order under s. 440 enjoining him to pay costs of the unsuccessful suit had been made. The Subordinate Judge disallowed the objection on the ground that s. 440 enjoins every next friend to pay in every case the costs of an unsuccessful litigation. *Held* (1) That the Subordinate Judge was wrong in extending the scope of s. 440. (2) That this Court can, in the exercise of its reversional powers cancel the order of the Subordinate Judge. *LACHMAN PRASAD v. RAM NARAIN AND ANOTHER*.

[VII-129]

(9.)———*Certificated guardian.*] Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was *held* that the suit was wrongly brought, having regard to s. 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members. *Beni Ram Bhutt v. Ram Lal Dhukri* (I.L.R., 13 Calc., 189) referred to. *SHAM KRISHNA AND OTHERS v. RAM DAS AND OTHERS*.

[XVIII-9]

(1.) s. 443.—*Guardian not duly appointed but allowed to defend—(Act XL of 1858.)*] The mother of a minor, who did not hold a certificate under Act XL of 1858, was sued on behalf of the minor. She did not obtain permission to defend the suit on behalf of the minor, but the Court allowed her to answer to the suit on behalf of the minor. *Held* that, under these circumstances, it must be inferred that the Court had given her permission to defend the suit as required by s. 3 of Act XL of 1858, and therefore the decree made against her in the suit as representing the minor was binding on the latter. *JANKI v. DHARAM CHAND AND OTHERS*.

[I-175]

(2)———*Certificated guardian—Appeal.*] An order made by a Subordinate Judge appointing a guardian *ad litem* to a minor, where the litigation affects the property of the minor and there exists a duly constituted guardian of the property, is an appealable order; but a guardian *ad litem*, where the litigation concerns the property of the minor, cannot be appointed so long as there exists a certificated guardian in respect of the property who is capable of acting in that behalf. *HAR BILAS AND OTHERS v. LACHMAN DAS AND OTHERS*.

[XI-42]

CIVIL PROCEDURE CODE, s. 443—
(continued.)

(3) ———— *Revision—(Act XL of 1858).]*
Under s. 3 of the Bengal Minors (Act XL of 1858) the Civil Court has no power to refuse to admit a person who has obtained a certificate of administration under the Act, to defend a suit on the minor's behalf, as guardian of such minor. Where a Subordinate Judge had so acted *held* that the High Court had no power to revise his order under s. 622 of the Civil Procedure Code. **BALDEO DAS v. GOBIND SHANKAR.**

[V-294]

(4) ———— *Appointment enures for the whole lis.]* When a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made unless, and until it is revoked by the Court; but if the person to whom such guardian is appointed prays for his removal and for the substitution of a guardian named by the applicant; the Court will appoint the guardian so named in the absence of any special and valid objection to such person. **JWALA DEI v. PIRBHU.**

[XI-192]

s. 444.—Discharge of order—Fresh trial.]
One G filed a suit against M B in her own capacity and as guardian of three minors and obtained a decree against all the defendants. It was found that M B's interests were adverse to those of the minors, and that she had not been appointed guardian with her consent, and she did not in fact defend the suit on behalf of the minors. M B alone appealed. The appellate Court upheld the decree as against M B personally but also made an order striking her name off the record as guardian of the minors. The plaintiff G then appealed to the High Court making M B a respondent both in her own capacity and as guardian of the minors but subsequently one Makhdum was after notice to all the parties, appointed guardian of the minors. *Held* that under the above circumstances the Court should act under the analogy of s. 444 of the Code of Civil Procedure and remand the suit so far as the minors were concerned, for re-trial *ab initio*. **GAJJU v. MANNI BIBI AND OTHERS.**

[XIII-104]

s. 457.—Guardian ad litem—Married woman.] *Held* that the appointment of a married lady as guardian *ad litem* of a lunatic was illegal under s. 457, Civil Procedure Code, and a decree passed against a lunatic thus represented was null and must be set aside. **ZAMATAN BEGAM v. NIHAL CHAND AND ANOTHER.**

[III-90]

(1) *s. 462.—Compromise—Leave of Court.]*
A certificated guardian has no power to bind

CIVIL PROCEDURE CODE, s. 462—
(continued.)

his minor ward by a compromise which involves an assignment of immoveable property belonging to the minor without having first obtained the sanction of the Civil Court to the compromise; nor does the fact that the guardian has subsequently joined the minor as a party in suits in which the compromise was practically adopted estop the minor from questioning the validity of the compromise. **BRIJMOHAN LAL v. GHASI RAM.**

[XI-46]

(2) ———— *Implied leave.]*
In order to make an agreement or compromise to which s. 462 of the Code of Civil Procedure applies a lawful agreement or compromise it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and before making the agreement or entering into the compromise should obtain permission from the Court to enter into the agreement or compromise proposed. The Court should record the fact that such application was made to it, that the terms of the proposed agreement or compromise were considered by the Court, and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise. From the mere fact that the Court passed the decree in accordance with the compromise it cannot be inferred that any of those steps preliminary and necessary to the making of the decree has been taken by the Court. **KALAVATI v. CHHEDI LAL AND OTHERS**

[XV-126]

(3) ———— *Where a compromise is sought to be effected in a suit in which one of the parties is a minor it is incumbent on the Court to consider carefully the nature and terms of the compromise and whether it is for the benefit of the minor, and if the proposed compromise be accepted by the Court and judgment passed in the terms thereof, such judgment should show clearly the reasons which led the Court to accept and act upon the compromise. Kalavati v. Chhedi Lal (W. N. 1895, p. 126) and Raja Gopal Takkaya Naiker v. Muttrapalem Chetti (1. L. R., 3 Mad., 103) followed. HIRA SINGH v. KALIAN SINGH.*

[XVI-127]

(4.) ———— *Where the guardian ad litem of certain minors assented on their behalf to a compromise, which compromise was accepted by the Court, and a decree passed thereon, and was found not to be prejudicial to the interests of the minor; it was held that the minors could not after the decree based upon the compromise had become final, succeed in a suit to set it aside on the sole ground that the Court had not previously given*

CIVIL PROCEDURE CODE, s. 462—
(continued.)

leave to the guardian to enter into the compromise. *Kalavati v. Chhedi Lal* (I.L.R., 17 All., 531) distinguished. **AMAN SINGH AND ANOTHER v. NARAIN SINGH AND OTHERS.**

[XVII-205]

(1.) s. 463. *Guardian ad litem—Married woman.*

Sec s. 457.

(2.) ——— *Provisions of Ch. XXXI not exhaustive.* The provisions Chapter XXXI of the Code of Civil Procedure are not exhaustive, and where a person is admitted or has been found to be of unsound mind, although he has not been adjudged to be so under Act No. XXXV of 1858, or by any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is a defendant. *Porter v. Porter* (L.R., 37 Ch.D. 420); *Venkatramana Rambhat v. Timappa Devappa* (I.L.R., 16 Bom., 132); *Tuka Ram Anant Joshi v. Vithal Joshi* (I.L.R., 13 Bom., 656); *Uma Sundari Dasi v. Ramji Haidar* (I.L.R., 7 Cal., 242) and *Jonna Gadla Subbaya v. Thatipathri Senadala Buthaya* (I.L. 6 Mad., 380) referred to. **NABBU KHAN v. SITA.**

[XVII-155]

(1.) s. 483.—“*Property—Moveable—Immoveable—Attachment of unhypothecated property.*” S. 483 of the Code of Civil Procedure does not refer exclusively to moveable property. Where in a suit on an hypothecation bond the plaintiff sought to attach before judgment immoveable property of the defendant other than that hypothecated. *Held* that it was not necessary, in order that the Court might be satisfied that the proceeds of the sale of the hypothecated property were likely to prove insufficient to meet the decree which the plaintiff might obtain in his suit, that such property should be actually brought to sale. **BISHAMBAR SAHAI v. SUKHDEVI.**

See also

CHHEDI LAL v. KUARJI DICHIT.

[XIV-20]

[XV-14]

(2.) ——— *Appeal.* No appeal lies under s. 588, Civil Procedure Code, from an order dismissing an application under s. 483 of the Code for an order for the attachment of some property to meet any decree which the applicant might obtain under s. 90 of Act IV of 1882. **AMBA PRASAD v. NARAIN DAS AND ANOTHER.**

[XVIII-18]

ss. 483 and 484.—“*Property—Moveable—Immoveable—Notice.*” The term “property” as used in ss. 483 and 484 of Civil Procedure

CIVIL PROCEDURE CODE, s. 483 & 484—(continued.)

Code is wide enough to include property of every description, moveable and immoveable, whether in the actual possession of the defendant or of some other person on his behalf and the words “the Court may require him...to produce and place at the disposal of the Court” only refer to such property as is capable of being produced in Court. Where property ordered to be attached is deposited in the Court which made the order for attachment, that order is sufficient notice to itself that the property ordered to be attached is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up. **CHHEDI LAL AND OTHERS v. KUARJI DICHIT.**

See also

BISHAMBAR SAHAI v. SUKHDEVI.

[XV-14]

[XIV-20]

s. 487—*Revision.* The High Court will not exercise its revisional jurisdiction so long as there is any other remedy open to the applicant. Where a Subordinate Judge disallowed an application for the release of certain property which had been attached before judgment. *Held* that there being a remedy by suit under s. 283 of the Code of Civil Procedure the High Court should not interfere with such order in revision. *Ittiachan v. Velappan* (I.L.R., 8 Mad., 484); *Sheo Prasad Singh v. Kastura Koor* (I.L.R., 10 All., 119) and *Gopal Das v. Alaf Khan* (I.L.R., 11 All., 383) referred to. **J. J. GUISE AND OTHERS v. JAISRAJ AND ANOTHER.**

[XIII-172]

(1.) s. 492—*Court in which application should be made.* *Held* that an application under s. 492 should be made (in the first instance) in the Court in which the suit is pending. **HANSRAJ v. NAND RAM.**

[VII-197]

(2.) ——— “*Wasted, damaged...wrongfully sold—Sale in execution.*” A judgment-debtor applied under s. 492 of the Code of Civil Procedure for the postponement of a sale, on the ground, that the suit having been brought by his wife for a declaration of her right to the village under sale, the sale if conducted would not fetch the proper price. *Held* that the waste or damage referred to in s. 492 of the Code of Civil Procedure is waste or damage of a totally different kind. It cannot be said that the property is wrongfully sold. **MUHAMMAD ISMAIL KHAN v. KISHEN SAHAI AND OTHERS.**

[VII-42]

(3.) ——— “*Wrongfully sold.*” A, claiming to be the manager of certain trust property, brought a suit to have it declared that a mortgage of the trust property by the trustee in excess of

CIVIL PROCEDURE CODE, s. 492—
(continued.)

his power to the defendant No. 1 and the decree obtained upon such mortgage was null and void. During the pendency of this suit in the High Court, A made the present application under s. 492 of the Code of Civil Procedure supported by affidavit, for grant of a temporary injunction to restrain the defendant from selling certain trust property in execution of his decree on the ground that it is in danger of being wrongfully sold in execution of a decree, inasmuch as the judgment-debtor is only the manager of the property which is trust property and the question of title in it is the subject of suit now pending in appeal before the High Court. *Held* that the circumstance justified the grant of the injunction sought for. **GANGA NAND AND ANOTHER v. BALGOBIND DAS AND ANOTHER.**

[IV-349]

(4). ————— Notice.]

Where a Court made an order granting a temporary injunction under s. 492 of the Civil Procedure Code, without directing notice of the application for injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed *ex-parte*, without the other side being given an opportunity to show cause, *held* that the order was irregular. Where ancestral property was attached in execution of a decree and a son of the judgment-debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, *held* that, inasmuch as what was advertised to be sold was the rights and interests of the plaintiff's father in the property, and it could not be said that the property was being "wrongfully sold in execution of a decree" and the application on the face of it disclosed no sufficient ground to warrant an order under s. 492 of the Civil Procedure Code, being made as prayed, the temporary injunction ought not to have been granted. **AMOLAK RAM AND ANOTHER v. KORI SAHIB SINGH.**

[V-128]

(5). ————— Grounds for granting injunction—Security.] An objection made under s. 278 of the Civil Procedure Code to the attachment in execution of a decree of a mortgage bond of which the objector claimed to be the assignee from the judgment-debtors under an instrument dated prior to the attachment was disallowed; and the objector then brought two suits against the decree-holder and the judgment-debtors, in which he claimed (a) a declaration of his right to the bond, and (b) to recover a sum of money from the judgment-debtors on the basis of the assignment. The first Court dismissed both suits, on the ground that the alleged assignment was a collusive transaction entered into after the attachment between the objector and the judgment-debtors for the

CIVIL PROCEDURE CODE, s. 492—
(continued.)

purpose of defeating the attachment. Pending an appeal to the High Court the objector applied to that Court for a temporary injunction under s. 492 of the Code, restraining the decree-holder from bringing the bond to sale in execution of the decree. *Held* that although in such cases the provisions of s. 492 should be applied with the greatest care, one of the objects of the Legislature in passing that section was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation were likely to arise if the decree-holder were allowed to proceed with the execution sale, and no practical injury to any one would be caused by restraining her from so doing until the decision of the appeal, a temporary injunction should be granted, subject to security being given by the applicant. **KIRPA DAYAL v. RANI KISHORI AND OTHERS.**

[VIII-7]

(6). —————]

Case in which pending an appeal by the plaintiffs in a suit to have certain immoveable property exempted from sale in execution of a decree, Straight, J., upon their application, issued a temporary injunction under s. 492 of the Civil Procedure Code, restraining the Court in which execution of such decree was pending from bringing the property to sale in such execution. **JANKI PRASAD AND OTHERS v. JUGUL KISHORE AND OTHERS.**

[VIII-46]

(7). ————— Injunction—"Till further order."] *Held* that a temporary injunction under s. 492 "till further order" came to an end on passing of a decree. It could not be kept alive even after the decree simply because no further order was made by the Court. **CHUNNI KUAR v. DWARKA PRASAD.**

[VII-297]

(8). ————— "Decree"—Revenue Court decree.] The term "decree" as used in the Code of Civil Procedure does not include the decree of a Court of Revenue. *Held* therefore that an application under s. 492 of the Civil Procedure Code for stay of sale in execution of a decree of a Court of Revenue in a suit under s. 93 of Act XII of 1881 cannot be entertained by a Civil Court. **ONKAR SINGH AND ANOTHER v. BHUP SINGH.**

[XIV-180]

(9). ————— Injunction falling within section—Appeal.] Where a judgment-debtor had filed an application for leave to bring a suit for maintenance *in forma pauperis* against the decree-holder, and, before any order was passed on that application, applied for an injunction to restrain the decree-holder from executing his decree until the suit for maintenance had been

CIVIL PROCEDURE CODE, s. 492—
(continued.)

decided, which injunction was granted. *Held* that such an injunction fell within the provisions of sections 492 and 493 of the Code of Civil Procedure and was therefore appealable. **BENI PRASAD v. GOMTA KUAR.**

[X-167]

s. 494.—Notice.]

See s. 492, No. (4).

s. 496.—Appeal.] An appeal will lie under s. 538, cl. (24) of the Code of Civil Procedure from an order under s. 496 of the Code refusing to set aside an injunction. *Nubbi Buksh v. Chasni (I. L. R., 6 Cal., 168)* referred to. **ZABADA JAN v. MUHAMMAD TAIAB AND ANOTHER.**

[XII-140]

(1). **s. 503.—Discretion of Court.]** This was a suit brought by the two sons of a deceased Hindu who had three days prior to his death executed a will whereby defendant No. 1 (wife of the testator) had been appointed executrix of the will and manager of certain property devoted to religious purposes, and was also declared to be entitled to possession of the residuary estate for her life. Plaintiffs applied under s. 503, Civil Procedure Code, for the appointment of a receiver pending the suit. The application was supported by an affidavit. The defendant put in a counter affidavit in which she denied the allegations of malversation charged by the plaintiff. The lower Court granted the application. This is an appeal from this order. *Held* that an order under s. 503 should not be made as a matter of course. The discretion should be exercised with great care and caution. As the defendant is in lawful possession of the property and has put in an affidavit contradicting the allegation made by the plaintiff the order should not have been passed. **BENI MADHAB AND ANOTHER v. SRIMATI PROSONO MOYI DEVI AND ANOTHER.**

[III-136]

(2).———**Appointment of receiver.]** *Held* that a Court executing a simple money decree obtained against a soulless separated Hindu was not competent to appoint a receiver of the rents accruing since his decree of the judgment-debtor's immoveable property, then in the hands of his widow as her widows estate, such rents not being assets of the deceased, but the personal moveable property of the widow, and the decree-holder having agreed for consideration not to execute his decree against the moveable property of the widow. **RANI RANNO DAI v. B. J. LACY.**

[XVII-38]

s. 505.—Pass such order as it thinks fit.] The concluding words of s. 505, Civil Procedure

CIVIL PROCEDURE CODE, s. 505—
(continued.)

Code—"or pass such order as it thinks fit"—must be read as controlled by the words preceding them, and do not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court. **AMAR NATH v. RAJ NATH.**

[XVI-141]

(1). **s. 506.—Reference by Court not having jurisdiction to entertain suit—Validity of award.]** A suit for dissolution of a partnership, taking the accounts of the firm, and a declaration of the plaintiff's right to a certain share in the debts due to the firm, was, with reference to the value of the subject matter of the suit, instituted in the Court of a Munsif. The matters in difference in the suit were eventually referred to arbitration under Chapter XXXVII of the Code of Civil Procedure, and an award was made declaring the plaintiff entitled to recover a certain sum from the defendant. Judgment and a decree were given in accordance with the award. *Held* that, the award notwithstanding, the question whether the suit was cognizable in the Munsif's Court was entertainable. *Bhagirath v. Ram Gulam (I. L. R., 4 All., 283)* referred to. **KALLAN DAS v. GUNGA SAHAI.**

[III-100]

(2).———**Reference by Court acting under s. 566, Civil Procedure Code.]** A Court of first instance to which issues have been remitted under s. 566, Civil Procedure Code, by the appellate Court has only jurisdiction to try the issues remitted and is *functus officio* in other respects and cannot make a reference of the case to arbitration which is only within the jurisdiction of the appellate Court. *Gossain Doulat Gcer v. Bissessur Gir (22 W. R., 207)* referred to. **NAND RAM AND ANOTHER v. FAKIR CHAND.**

[V-139]

(3).———**"All the parties."] Held** that a submission to arbitration by some of the parties only does not bind the others and the reference is invalid. **DEO NANDAN v. BHIRGU RAI AND OTHERS.**

[VII-215]

(1). **s. 508.—Reference—Revocation.]** An award cannot be set aside by the Court on the mere surmise that the arbitration has been partial. After the parties to a suit have agreed to refer to arbitration, and the order of reference has been made by the Court under s. 508 of the Civil Procedure Code, neither of them can arbitrarily and on no sufficient ground withdraw from the agreement. *Pestonjee Nassurwanjee v. Manockjee and Co., (12 M. I. A. 130)* followed. **NAINSUKH RAI v. UMADAI.**

[V-12]

CIVIL PROCEDURE CODE, s. 508—
(continued.)

(2).—*Failure to fix time—Effect on award.*] The provision contained in s. 508, Civil Procedure Code, requiring the Court to fix a reasonable time for the delivery of the award is not imperative but directory, and non-compliance with it does not make the order of reference abortive and any subsequent arbitration proceedings ineffectual and bad. **HAR NARAIN SINGH v. BHAGWANT KUAR AND OTHERS.**

[VIII-28]

(3).—*Dismissal of suit on ground of limitation after reference and award.*] After a suit had been referred for decision to arbitrators with the consent of parties and of the Court and an award has been delivered it is not competent to the Court to dismiss the suit on a point of limitation. **Beharce Lall v. Unooop Singh (S. D. A., N.-W. P., 1864, p. 472)** referred to. **RAMJATAN RAI AND OTHERS v. SHEO-BALAK RAI AND ANOTHER.**

[XVII-162]

(1). s. 509.—*Award by two of three arbitrators—Validity (Act X of 1877).*] An appeal was referred to the arbitration of three persons declaring the decision to rest with the majority. There was a difference of opinion among the arbitrators two of them agreeing. The award of these two was remitted to the three to reconsider "with the option of refusal to do so allowed." The same two arbitrators "repeated their former decision, and declared their inability to come to any other conclusion." The third again differed "but did not record an amended award or a refusal to reconsider." *Held* that the award was valid. **LALTI DAI v. BALDEO SAHAI.**

[I-25]

(2).—*Appeal from the decree of the first Court, the parties to this suit agreed to refer the matters in difference to three arbitrators. The order of reference did not, as required by s. 509 of the Code of Civil Procedure, provide for difference of opinion among the arbitrators. The arbitrators at first declined to act for want of leisure. But the case was returned for their decision. Two of the arbitrators now made an award the third merely signifying his dissent. Held* that the award was invalid as it was made by only two of the three arbitrators and also because they were forced to act. **DUKHU AND OTHERS v. BHINAK.**

[IV-209]

(3).—*When a case has been referred to arbitration, the presence of all the arbitrators at all meetings, and above all at the last meeting when the final act of arbitration is done, is essential to the validity of the award. Where a case was referred by a Court to the arbitration of three persons, and the parties to the reference agreed to be bound*

CIVIL PROCEDURE CODE, s. 509—
(continued.)

as to the matters in dispute by the decision of a majority of the arbitrators, and one of the arbitrators subsequently refused to act, and withdrew from the arbitration, *held* that the Court could not pass a decree on the award of the remaining arbitrators and could only, under s. 510 of the Civil Procedure Code, appoint a new arbitrator or supersede the arbitration and proceed with the suit. **Kazee Syud Naser Ali v. Musammatt Tinoo Dossia (W. R. 95)** and **Rohilkhand and Kumaon Bank v. Row (I. L. R., 6 All., 468)** referred to. **NAND RAM AND ANOTHER v. FAKIR CHAND.**

[V-139]

(4).—*Held* that an award made by two only of the three arbitrators appointed was invalid and the Court in case an arbitrator refuses to act should proceed under s. 510 of the Civil Procedure Code. **SAT KUMAR v. ATMA RAM AND OTHERS.**

[V-60]

(1) s. 510.—*Award by two of the three arbitrators.*

See s. 509, Nos. (3) and (4).

(2).—*Arbitrator forced to act—Validity of award.*] It is an essential principle of the law of arbitration that the adjudication of disputes by arbitration should be the result of the free consent of the arbitrators to act, and the finality of the award is based entirely upon the principle that the arbitrators are Judges chosen by the parties themselves, and that such Judges are willing to settle the disputes referred to them. Where certain matters were referred to arbitrators who refused to act and the Court of first instance passed an order directing them to proceed and to make an award, and they, on the passing of such order, made an award. *Held* that all proceedings taken by the arbitrators in obedience to the order of the Court directing them to arbitrate against their will were null and void. **SHIBCHARAN v. RATI-RAM.**

[IV-212]

DUKHU AND OTHERS v. BHINAK.

[IV-209]

(3).—*Tender and subsequent withdrawal of resignation.*] The mere circumstance of an arbitrator having first tendered and then withdrawn his resignation does not formally divest him of his character as arbitrator. **Maharaja Jeymungul Singh Bahadoor v. Mohun Ram Marwaroo (23 W. R., P. C., 429)** referred to. **HAR NARAIN SINGH v. BHAGWANT KUAR AND OTHERS.**

[VIII-28]

(1) s. 514.—*Extension of time.*] A Court has power to act under s. 514 of the Code of Civil Procedure at any time before the award is

CIVIL PROCEDURE CODE, s. 514—
(continued.)

actually made, whether the time previously limited for making the award has expired or not. *RAM MANOHAR MISR v. LAL BEHARI MISR AND ANOTHER.*

[XII-18]

MANGAL SEIN *v.* GOBIND RAM.

[VI-151]

LALI DAI *v.* BALDEO SAHAI.

[I-25]

HAR NARAIN SINGH *v.* BHAGWANT KUAR AND OTHERS.

[VIII-28]

(2.) —————.] *Held* that there must be an express order extending or enlarging the time for delivery of the award. The mere fact that the Court has passed a decree in accordance with the award cannot be taken as affording a presumption that an extension of time was given. *CHUHA MAL v. HARI RAM.*

[VI-179]

Per contra

HAR NARAIN SINGH *v.* BHAGWANT KUAR AND OTHERS.

[VIII-28]

s. 515.—*Award by umpire alone.*] In a reference to arbitration two arbitrators were appointed by each party and it was agreed that if two of the arbitrators should differ from the other two, the question was to be settled by an umpire who should agree with the opinion of one set of the arbitrators and had no power beyond that. *Held* that an award by the umpire which agreed with the award of neither of the two sets of arbitrators was illegal. *JANNAT BIBI AND ANOTHER v. ABDUL AZIZ AND OTHERS.*

[VII-197]

(1) s. 520.—*Questions to be determined by arbitrators.*] A brought a suit against her brother B for the recovery of her share of the property left by their deceased father and got a decree. Subsequently she brought this suit for mesne profits in respect of the property. The defence was (1) that the amount fixed by the plaintiff was wrong, (2) that certain sums paid by the defendants had not been taken into account, *e. g.*

1. Said expenditure of *Patwari*.
2. *Hagg Muqaddam*.
3. Servants' wages.
4. Tax *Chaukidari*.
5. Collective expenses.
6. Debts paid.

CIVIL PROCEDURE CODE, s. 520—
(continued.)

After issues were framed the parties agreed to refer the case to arbitration and to be bound by their decision. The arbitrators decided that the defendant was entitled to a deduction of Rs. 5 per cent. for *lambardari* and collection dues, and that the other items could not be set off in the suit. *Held* that the arbitrators were competent to decide as they did. *MUHAMMAD ISMAIL KHAN v. FIDAYATUNNISSA AND OTHERS.*

[IV-48]

(2.) ————— *Illegal remission—(Act X of 1877).*] An award was remitted under s. 520 of Act X of 1877. The arbitrators refused to reconsider it, and the Court thereupon proceeded with the suit, and gave the plaintiffs a decree. The defendants appealed from such decree on the ground, amongst others, that the award had been improperly remitted under s. 520. *Held* that the question whether the award had been properly remitted under s. 520 or not could be entertained in such appeal. *ABDUL RAHMAN v. YAR MUHAMMAD AND OTHERS.*

[I-34]

(1) s. 521.—*Grounds for setting aside award—Failure to reconsider.*] Where an award was remitted to the arbitrators for reconsideration with an express injunction that a full inquiry was to be made, and where the arbitrators took no evidence but made their second award merely on the strength of a local inspection. *Held* that the award so made as above described must be set aside. *SUJAN RAI v. JHABBA AND ANOTHER.*

[XIII-45]

(2.) ————— *Misconduct—Failure to take evidence.*] The word "misconduct" as used in s. 521 of the Civil Procedure Code is not confined to misconduct of a fraudulent or improper character but it includes action on the part of an arbitrator which is, upon the face of it, opposed to all rational principles which should govern the procedure of a person to whom matters in dispute have been referred for decision. Where an arbitrator has taken no evidence upon such matters, and has not allowed a party an opportunity of proving his contention, he is guilty of "misconduct" within the meaning of the section, and the Court, upon objection being made, should consider whether there has been any real arbitration proceeding, and whether the arbitrator has arrived at his conclusion upon legal and proper materials. Where the lower Court had failed so to consider such an objection, the High Court in the exercise of its revisional powers under s. 622 of the Civil Procedure Code, set aside the decree affirming the award, and the award itself, and directed the case to be restored to the lower Court's file for determination. *DEOKI NANDAN v. RAJ KUMAR.*

[IX-124]

CIVIL PROCEDURE CODE, s. 521—
(continued.)

(3).—“*Unless made within the period.*”] Under s. 521 of the Civil Procedure Code, the rule that no award shall be valid unless “made” within the period fixed by the Court, is equivalent to a rule that the award must be “delivered” within that period. Upon a reference to the arbitration of three persons the Court ordered that the award made by them should be filed on the 19th September, 1885. The award was not filed on that date, but was signed by two of the arbitrators on that date, and by the third arbitrator on the 20th September, on which day it was filed. It had been agreed that the opinion of the majority should carry the decision. *Held* that the award was not “made within the period fixed by the Court” within the meaning of s. 521 of the Civil Procedure Code. **BEHARI DAS v. KALYAN DAS.**

[VI-179]

(4).—“*Unless made within the period.*”] The last paragraph of s. 521 does not imply that an omission by the Court to fix a positive date within which the award is to be filed is fatal to the validity of the award. **HAR NARAIN SINGH v. BHAGWANT KUAR AND OTHERS.**

[VIII-28]

(1) s. 522.—*Decree in accordance with award—Appeal—No award in law or fact.*] *Held*, that an appeal lies from a decree passed in accordance with an award when such decree is impugned on the ground that there is no award in law or in fact, upon which judgment and decree could follow under s. 522 of the Code of Civil Procedure. *Jaymungal Singh v. Mohan Ram* (3 *Suth.*, P. C. C., 145); and *Bhagirath v. Ram Ghulam* (L. L. R., 4 *All.*, 283) observed on. **LACHMAN DAS AND ANOTHER v. BRIJ PAL AND ANOTHER.**

[IV-16]

(2).—“*Award not made within time.*”] An award which is invalid under s. 521, Civil Procedure Code, because not made within the period allowed by the Court is not an award upon which the Court can make a decree, and a decree passed in accordance with such an award is not a decree in accordance with an award from which no appeal lies. **CHUHA MAL v. HARI RAM.**

[VI-179]

BEHARI DAS v. KALYAN DAS.

[VI-179]

(3).—“*Arbitrator exceeding his powers.*”] *Held* that where a decree was strictly in accordance with the award it can not be set aside in appeal on the ground that the arbitrator had exceeded his power or that it was submitted after the time fixed for its

CIVIL PROCEDURE CODE, s. 522—
(continued.)

delivery, (although the Court had enlarged the time, after the period fixed had expired.) **MAN-GAL SEIN v. GOBIND RAM.**

[VI-151]

(4).—“*Award covering matters not in dispute.*”] The scope of the present suit was limited to one plot of land but during the pendency of the case in appeal before the lower appellate Court the parties agreed to refer all disputes between them to the arbitration of certain persons. The matters thus submitted went far beyond the scope of the suit and though the agreement was presented to the District Judge, no such application as is contemplated by s. 506 of the Code of Civil Procedure was made to him, and there was nothing to show that the parties meant to submit the particular dispute (before the Court) to arbitration under chapter XXXVII of the Code. The Judge however made an order of reference which failed to specify the matters referred. The award was objected to, but the District Judge has passed a decree in the terms of the award. *Held* that there being no legal award the suit should have been tried on the merits. **BHAIRO SINGH AND OTHERS v. RUPA SINGH.**

[IV-312]

(5).—“*Misconduct of arbitrators (Act X of 1877).*”] An agreement to refer a certain difference between the parties thereto, to the arbitration of certain persons was, on the application of one of the parties, *A K*, registered and numbered as a suit by the Court of the Subordinate Judge of Barielly. The Subordinate Judge caused the agreement to be filed and made an order of reference thereon. The award was remitted to the arbitrators for reconsideration under s. 520, Civil Procedure Code, and the arbitrators reconsidered it and delivered a fresh award. The Subordinate Judge after disallowing certain objections taken to the award on the ground that they were not of the nature mentioned in s. 521, made a decree in favor of the plaintiff, in accordance with the award. The defendant appealed to the District Judge who set aside the award on the ground that the arbitrators had been guilty of misconduct. *Held* that the District Judge was not competent to hear an appeal from the decree of the Subordinate Judge made in accordance with the award. *Bhagirath v. Ram Ghulam* (W. N. 1882, p. 34) followed. **ASADULLAH KHAN v. AHMADULLAH KHAN.**

[II-95]

(6).—“*Where.*”] a decree has been made upon a judgment given upon an award and which is not in excess of and is in accordance with the award, an appeal from such decree will lie on the ground that the so called award upon which the

CIVIL PROCEDURE CODE, s. 522--
(continued.)

judgment and decree are based is from one cause or another no award in law; but where an application to set aside the award on the ground of the misconduct of an arbitrator has been made under s. 521 of the Code of Civil Procedure, and such application has been refused after judicial determination and a decree made under s. 522 of the Code, which is in accordance with and not in excess of the award, no appeal will lie from the decree so made. *Bhagirath v. Ramghulam* (I. L. R., 4 All., 283) approved. *Maharaja Joymungul Singh Bahadur v. Mohun Ram Marwari* (23. W. R., 429); *Nand Ram Dalu Ram v. Nemchand Jadavchand* (I. L. R., 17 Bom., 357) and *Lachman Das v. Brijjal* (I. L. R., 6 All., 174) referred to. *IBRAHIM ALI AND ANOTHER v. MOHSIN ALI*.

[XVI-137]

(7.)—*Collusion of arbitrators.*] With reference to s. 522, Civil Procedure Code, no appeal lies from a decree of a Court of first instance dismissing objections to an arbitration award on the ground of collusion, and passed in accordance with the award. *MUHAMMAD ISMAIL KHAN v. IMAM ALI KHAN*.

[VIII-131]

(8.)—*Failure of arbitrator to consider plea of limitation.*] Where in an arbitration under chapter XXVII of the Code of Civil Procedure the arbitrators omitted to determine a material point of limitation which arose in the case referred to them, and the Court did not think it necessary to remit the award under s. 520 of the Code for reconsideration by the arbitrators. *Held* that no appeal would lie from the decree on such award, it being in accordance with and not in excess of the award. *Lachman Das v. Brijjal* (I. L. R., 6 All., 174) discussed. *KIRPA RAM v. LALJIT*.

[XII-151]

(9.)—*Suit barred by limitation (Act X of 1877).*] This suit, which was for money lent, was referred to arbitration by the lower appellate Court. The award was in favor of the plaintiff and the lower appellate Court gave judgment in accordance with the award. On appeal by the defendant to the High Court it was contended that the suit was barred by limitation. This defence had not been set up in the lower Courts. The Court observed that the judgment of the lower appellate Court was not appealable being in accordance with the award. *JAGMANDAR DAS v. PIARI LAL AND ANOTHER*.

[I-17]

(10.)—*Award based on agreement.*] The parties to this suit referred their differences to an arbitrator who

CIVIL PROCEDURE CODE, s. 522--
(continued.)

made an award in accordance with a compromise to which the parties had agreed, and sent the award to the Court, and a decree was passed in accordance with its terms by the Court. The lower appellate Court, on the ground that the arbitrator had not himself decided the case judicially and had no jurisdiction to accept a compromise, held that there was no valid award and no decree was consequently passed in accordance with the award within meaning of s. 522 of the Civil Procedure Code. *Held* that the award was valid and the decree passed thereupon could not be questioned in appeal on the grounds taken. *DEONARAIN RAI AND ANOTHER v. JAISRI RAI*.

[V-259]

(11.)—*Plaintiff and defendants in a suit agreed to refer the matter in dispute between them to the arbitration of one S F.* After the reference had been made the parties came to an agreement and submitted this agreement to the arbitrator, who drew up his award in accordance with its terms. The award, however, also dealt with certain matters which arose subsequently to this agreement. *Held* that the award was a good award and was not vitiated by the fact of its having been founded on a previous agreement between the parties. *MHR ALI SHAH v. MUHAMMAD HUSEN SHAH AND OTHERS*.

[XII-79]

(12.)—*Irregularities in procedure.*] An appeal will not lie from a decree passed upon a judgment given according to an award merely because there may have been some irregularities in the procedure of the arbitrator, those irregularities not being of such a nature as to render the award no award in law. *Jagan Nath v. Mannu Lal* (W. N., 1894, p. 60); *Bundes Suri Parshad Singh v. Jankee Parshad Singh* (I. L. R., 16 Cal., 482) and *Lachman Das v. Brijjal* (I. L. R., 6 All., 174) referred to. *RAMDHAN SINGH v. KARAN SINGH AND ANOTHER*.

[XVI-116]

(13.)—*(Act X of 1877).*] The plaintiff in a suit, which had been referred to arbitration, offered before the arbitrator to be bound by the evidence of the defendant given on a certain oath. With the arbitrator's consent the defendant accepted such offer, and gave evidence on such oath. The arbitrator made an award in accordance with the evidence so given. The plaintiff objected to the award, not on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, but on the ground that the procedure of the arbitrator had been illegal. The Court disallowed this objection, and gave a judgment and decree in accordance with the award. *Held* (Straight, J.) that such decree, being in accordance with the award,

CIVIL PROCEDURE CODE, s. 522—
(continued.)

was not appealable. *Held* (Stuart, C. J.) that the award not being open to objection on any of the grounds mentioned in ss. 520 and 521 of the Civil Procedure Code, and the decree being in accordance with the award, the decree was not appealable. *Per* (Oldfield, J.) that the procedure adopted by the arbitrator being illegal, not being warranted by the Oaths Act, and there being in reality no award, within the meaning of the Civil Procedure Code, the decree therefore was appealable. *Per* (Stuart, C. J.) that the procedure of the arbitrator did not require to be warranted by the Oaths Act, as he was entitled by virtue of his office to proceed as he did. **BHAGIRATH v. RAMGHULAM.**

[II-34]

(14). ————— *Failure to consider objections under s. 521.* Where certain objections to an award alleged misconduct and corruption on the part of the arbitrator, and others involved questions of fact and law, and the judge overruled such objections without giving the objector any opportunity of substantiating them, and gave judgment affirming the award. *Held* that as there was no judicial disposal of the objections, the judge was not competent to give judgment in the matter, and his decree was a bad one in law, and an appeal lay therefrom, notwithstanding the concluding portion of s. 522 of the Civil Procedure Code. **RAM MANOHAR MISR v. LAL BEHARI MISR AND ANOTHER.**

[IX-15]

(15). ————— *Passed by appellate Court—Finality.* This suit (for possession of certain zamindari share) was instituted in August, 1884. On the 10th January following the matter was, by consent of the parties, referred to arbitration. On the 19th January, 1885, the defendants put in an application praying that the suit be tried by the Court on the merits. The Court answered that the proper time for objection was when the award had been returned. The award was made on the 16th February, 1885, and the defendants presented a second application containing their objections to the award charging the arbitrators with misconduct and corruption. These objections the Court allowed without going into the evidence on the allegations. It therefore went into the merits of the case and gave partial decree to the plaintiffs. The plaintiffs preferred an appeal. The lower appellate Court remanded the case under s. 566 for enquiry as to whether the award was open to the objections raised by the defendants under s. 521. The Court of first instance found that it was not (the defendants producing no evidence to substantiate their allegations). Upon receipt of this finding the appellate Court held that the award was not open to any legal objection and gave a decree in conformity with the award. *Held* that, no

CIVIL PROCEDURE CODE, s. 522—
(continued.)

second appeal would lie from such decree; the Code throughout gives to appellate Courts all the powers that the Courts of first instance have in connection with litigation in general and with reference to arbitration in particular. **NAURANG SINGH AND OTHERS v. SADAPHAL SINGH.**

[VII-240]

(16). ————— *Decree not in accordance with award—Appeal.* The arbitrators to whom the matters in difference in two suits for money were referred to arbitration made an award for payment to the plaintiff of certain sums by the defendant, and further directed that these sums should be paid by certain instalments. The plaintiff preferred objections to the award in so far as it directed payment by instalments, and the Court, holding that the arbitrators had no power to make such a direction, modified the award to that extent, under s. 518 of the Civil Procedure Code. On appeal the District Judge while allowing the power of the arbitrators to direct payment by instalments reduced the number of instalments which had been fixed. *Held* that the decree of the first Court not being in accordance with the award, an appeal lay to the judge with reference to s. 522 of the Code. *Held* also that as it was clear that the reference to arbitration gave the arbitrators full powers not only as to the amount to be paid, but also as to the manner of payment, the lower appellate Court was wrong in reducing the number of instalments which had been fixed.

Per MAHMOOD, J.—The word "award" used in the last sentence of s. 522 of the Code must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words "in excess of, or not in accordance with, the award", used in s. 522 were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518. **JAWAHAR SINGH v. MUL RAJ.**

[VI-210]

(17). ————— *Objection as to validity of award first taken in appeal.* Where objection to the validity of an award on the ground that it was made beyond the time allowed was not taken by the defendant in the first Court. *Held* that he was not thereby estopped from raising the objection for the first time in appeal, inasmuch as it was not shown that in the first Court he was aware of the defect, or had done anything to imply consent to extension of the time. **CHUHA MAL v. HARI RAM.**

[VI-179]

(18). ————— *Appeal—Revision (Act X of 1877).* In execution of a decree by P one of the two decree-holders, the judgment-debtor pleaded that the decree had been satisfied. The matter

CIVIL PROCEDURE CODE, s. 522—
(continued.)

was eventually referred to arbitration. Before the award was delivered the other decree-holder, *R*, applied to the Court that her interest in the decree should not be affected by the arbitration, as she was not a party thereto. The arbitrator decided that the decree had been satisfied and the Court made an order accordingly overruling the objection of *P*. But it also provided that the order should not affect the other decree-holder *R*. On appeal by *P* the lower appellate Court set aside the award on the ground that the case had been referred without the consent of all the parties. The judgment-debtors applied for a revision of this order to the High Court. *Held* that as an appeal lay to the High Court, the application for revision was inadmissible. **IN RE PETITION OF RAMPHAL AND OTHERS.**

[I-24]

(1). **s. 523—Unauthorized appointment of umpire by Court—Award—Appeal.** In an agreement to refer certain matters to arbitration which was filed in Court under s. 523 of the Civil Procedure Code, and on which an order of reference was made by the Court, no provision was made for difference of opinion between the arbitrators, by appointing an umpire, or otherwise. The arbitrators being unable to agree upon the matters referred, the Court, on the application of one of them appointed an umpire and directed that the award should be submitted on a particular date. And award was made by the umpire and one arbitrator, without the concurrence of the other arbitrator, and submitted to the Court, which passed a decree in accordance with its terms. On appeal by the defendant in the case, the District Judge reversed the decree. *Held* that an appeal would lie to the Judge from the decree of the first Court, where there had been no legal award such as the law contemplated. *Lachman Das v. Brijpal* (I. L. R., 6 All., 174) referred to. *Held* that, in the present case, there had been no legal award such as the law contemplated, inasmuch as the agreement to refer gave the Court no power to appoint an umpire, and required that the award should be made by the arbitrators named by the parties. *Held* that s. 509 and the other sections preceding s. 523 of the Civil Procedure Code, relating to the power of the Court to provide for differences of opinion among the arbitrators, were only made applicable to cases coming under s. 523, so far as their provisions were consistent with the agreement filed under that section. *Held* also that the defendant was not precluded from appealing to the Judge from the first Court's decree because he had not applied to set aside the award within the ten days allowed by art. 158, sch. ii, of the Limitation Act, inasmuch as that article applied to applications referred to in s. 522 of the Civil Procedure Code, *i. e.*, applications to set aside an award on any of the grounds mentioned in s. 521, and the defendant did not contest the award on any of those grounds. **MU-**

CIVIL PROCEDURE CODE, s. 523—
(continued.)

HAMMAD ABID AND ANOTHER v. MUHAMMAD ASGHAR,

[VI-2]

(2).—*Order refusing application to file award—Appeal.* *Held* that an order passed under s. 523, Civil Procedure Code, refusing an application to file an agreement to refer to arbitration was not a decree as defined in s. 2, Civil Procedure Code, and was therefore not appealable. **STAMP REFERENCE.**

[III-56]

(3).—*Order of reference—Appeal.* No appeal will lie from an order of reference made by a Court upon an agreement to refer to arbitration filed in Court by one of the parties to a suit under the provisions of s. 523 of the Code of Civil Procedure. *Daya Nand v. Bukhtarwar Singh* (I. L. R., 5 All., 333); *Bhugwan v. Parmeshree* (5 N. W. P. H. C. Rep. 179) and *Pestonjee Nusserwanjee v. D. Manickjee and Co.*, (3, Mad. H. C. Rep., 183) referred to. **KISHORI MAL AND OTHERS v. BEHARI LAL AND ANOTHER.**

[XV-121]

(1) **s. 525.—Private award.—Not made rule of Court.—How far binding.** Where it is established that the parties have agreed to a reference and the arbitrators have made an award, so long as the validity of that award is not questioned it is binding upon the parties to it. It is not necessary that the award should be made a rule of Court under s. 522 of the Code of Civil Procedure. **BIKHARI DAS AND ANOTHER v. GOBIND RAM.**

[XII-238]

INDUL v. MATABADAL.

[III-237]

PARMESHRI v. LACHMIN AND OTHERS.

[IV-148]

(2).—*"Parties."* The three parties to a deed of partnership agreed that in case of any dispute or difference, the matter should be referred to the arbitration of persons chosen by each party to such disputes, and that in case any such party should refuse or fail to nominate an arbitrator, then the arbitrator named by the other party should nominate another arbitrator, and the two should nominate a third person as umpire. Certain differences having arisen among the three partners two of them called upon the executors of the third to nominate an arbitrator under the terms of the deed but they refused to do so. The first mentioned partners then nominated an arbitrator who in his turn nominated another, and these having appointed an umpire, made an award. One of the partners at whose instance the matter in dispute had been referred to arbitration

CIVIL PROCEDURE CODE, s. 525—
(continued.)

presented an application under s. 525 of the Civil Procedure Code praying that the award might be filed in the Court. This application was opposed by the executors of the third partner, who appeared and lodged verified petitions disclosing grounds of objections within the meaning of s. 520 or s. 521 of the Code. Held that the word "parties" as used in s. 525 should not be confined to persons who are actually before the arbitrators; that if persons by an agreement have undertaken between themselves that, in the event of a certain state of things happening, a particular procedure shall be followed which, under one state of circumstances may be adopted *in invitum* they should, for the purposes of s. 525 be regarded as parties to that arbitration; and that there was sufficient reason to show that the defendants in the present case were *prima facie* bound by the arbitration, so as to bring them within the terms of s. 525 as parties thereto, who should be called on to show cause why the award should not be filed. *Willcox v. Storkey* (L.R., 1 C. P., 671) and *Re Newton and Hetherington* (19 C. B. (N. S.) 342) referred to. JONES v. LEDGARD AND OTHERS.

[VI-107]

(3)———Award made upon reference in criminal proceeding—Validity.] Held that an award made upon reference by the parties in a criminal proceeding is as valid as one made upon reference by the parties in a civil proceeding. *BADSHAH BEGAM v. NATHU KHAN AND ANOTHER*.

[VI-158]

(4)———Order refusing application to file—Appeal.] Held (Oldfield, J., dissenting) that an appeal does not lie from an order disallowing an application to file an award under s. 525 of the Code of Civil Procedure. *Janki Tewari v. Gayan Tewari* (I. L. R., 3 All., 427) distinguished by Stuart, C. J. The same case followed by Oldfield, J. *BHOLA AND OTHERS v. GOBIND DAYAL AND ANOTHER*.

[IV-81]

Per contra.

JANKI AND OTHERS v. GAIYAN.

[I-4]

(1) s. 526.—"If no ground...be shown." It is competent to the father of a joint Hindu family in his capacity of managing member of the family to refer to arbitration the partition of the joint family property and the award made on such a reference, if in other respects valid, will be binding on the sons. In s. 526 of the Code of Civil Procedure the word "shown" is not equivalent to "alleged," but it is necessary that one of the grounds mentioned in s. 520 or s. 521 should be proved to the satisfaction of the Court

CIVIL PROCEDURE CODE, s. 526—
(continued.)

before the Court is justified in refusing to file the award. *Dutto Singh v. Dosad Bahadur Singh* (I. L. R., 9 Calc., 575) and *Dandekar v. Dandekars* (I. L. R. 6 Bom., 663) followed. *Hurro Nath Chowdhry v. Nistarini Chowdhry* (I. L. R., 10 Calc., 74) and *Ichamoyee Chowdhurannee v. Prosunno Nath Chowdhry* (I. L. R., 9 Calc., 557) dissented from. JAGAN NATH AND ANOTHER v. MANNU LAL.

[XIV-60]

(2)———.] An objection to an application made under s. 525 of the Code of Civil Procedure that the parties had not agreed to refer to arbitration any matter, or had agreed to refer some only of the matters determined by the award, or that the document alleged to be an award was not an award of the arbitrators, is an objection which must be considered and determined under s. 526 upon evidence by the Court to which the application is made. *Chowdhry Murtaza Hossein v. Mussumat Bibi Bechunnissa* (L. R., 3 I. A., 209); *Samal Nathu v. Jaisankar Dalsukaram* (I. L. R., 9 Bom., 254); *Venkatesh Khando v. Chanabgovda* (I. L. R., 17 Bom., 674); *Lalla Ishkaree Parshad v. Har Bhanjan Tewarac* (15 W. R. (F. B.) 9); *Hussaini Bibi v. Mohsin Khan* (I. L. R., 1 All., 156); *Surjan Raot v. Bhikari Raot* (I. L. R., 21 Calc., 213) and *Muhammad Nawaz Khan v. Alam Khan* (L. R., 18, I. A., 73) referred to. AMRIT RAM AND ANOTHER v. DASARATH RAM AND OTHERS.

[XIV-187]

(3)———.] Held that sections 525 and 526, Civil Procedure Code, read together mean that the party coming forward to oppose the filing of an award must show cause, that is, must establish by arguments or proof, or both, reasonable grounds to warrant the Court in arriving at the conclusion that the award is open to any of the objections mentioned in ss. 520 and 521 and it is not sufficient when it is sought to make the award a rule of Court, for defeated party to come and merely say upon a verified petition that this or that ground referred to in ss. 520 and 521 existed against the filing. *Sree Ram Chowdhry v. Denobundhoo Chowdhry* (I. L. R., 7 Calc., 490) and *Ichamoyee Chowdhurannee v. Prosunno Nath Chowdhry* (I. L. R., 9 Calc., 557) dissented from. *Dutto Singh v. Dosad Bahadur Singh* (I. L. R., 9 Calc., 575); *Dandekar v. Dandekars* (I. L. R., 6 Bom., 663) and *Chowdhry Murtaza Hossein v. Bechunnissa* (L. R., 3 I. A. 209) referred to. JONES v. LEDGARD AND OTHERS.

[VI-107]

(4)———Unauthorized amendment—Appeal—(Act X of 1877).] The appellants applied to the Munsif under s. 525 of Act X of 1877 that an award might be filed in Court. After the first hearing of the case the Munsif ordered

CIVIL PROCEDURE CODE, s. 526 —
(continued.)

the appellants to amend their plaint, misunderstanding the provisions of s. 525. By the amendment the case was taken out of the scope of Chapter XXXVII of the Code of Civil Procedure. *Held* that, under the circumstances, the Judge had jurisdiction to hear the appeal preferred to him from the Munsif's decree. **GANESH LAL AND ANOTHER v. NARAIN DAS.**

[I-29]

(5). — *Decree in the terms of the award* — *Appeal.*] When an award has been filed in Court as provided by s. 525, Civil Procedure Code, the judgment and decree based thereon must be drawn up specifically in terms of the award. If the decree merely decrees in general terms the claim of one party or of the other it cannot be said that such decree is in accordance with the award, and not being in accordance with the award an appeal will lie therefrom. **UMMI FAZL v. RAHIM-UN-NISSA AND OTHERS.**

[XI-129]

(6). — *Review (Act X of 1877).*] In 1878, respondents applied under s. 525, of Act X of 1877 to have an award filed in Court. The appellants preferred objections to the filing of the award. The Court disallowed these objections, and holding that the award was valid, on the 5th April, 1878, ordered "that the claim of the plaintiffs be decreed." The appellants appealed to the High Court, which held on the 17th November, 1879, that this order was not appealable, adding an instruction that the lower Court should be moved to give judgment in accordance with the award and a decree to follow it. The respondents waited till the 27th April, 1880, and then moved the lower Court in the terms of the High Court's instruction, styling their application one for review of judgment. The "review" prayed for was granted on the 28th September, 1880. The appellants contended in this appeal that a review should not have been granted as long after the date of the original order. The Court observed that the proceedings in the lower Court terminating in the order of the 28th September, 1880, were erroneously called proceedings in review of judgment. But as substantial justice had been done in them, it was not necessary to make any order in this respect. **TULSHI RAM AND OTHERS v. GANESH AND ANOTHER.**

[I-105]

(7). — *Execution.*] The parties to a suit referred the matter in dispute between them to arbitration, and the award given in pursuance of such reference was brought into Court by the plaintiff with an application that a decree should be passed in his favor in accordance with the terms of the award as set out in his application. On this application the only order passed by the Court was that the award should be filed. Subsequently the defendant

CIVIL PROCEDURE CODE, s. 526 —
(continued.)

applied for amendment of the so-called decree based upon the award. The Court thereupon appended to its former order a copy of the award, adding the words "as detailed below" and it further added a detail of the costs incurred by each party. On its being sought to execute as a decree upon the award the order amended as above described, it was *held* that this was no decree on an award such as is contemplated by the Code of Civil Procedure, and was incapable of execution. **BADRI DAS v. SOHAN LAL.**

[XIV-38]

(8). — *Form of decree.*] The *semindar* of a village and his tenants referred to arbitration the question as to the assessment of rent. The arbitrators by an award, dated 7th January, 1880, decided that the tenants should pay collectively an annual rent of Rs. 2,400, and that they should make a distribution of this sum amongst themselves proportionate to the quantity and quality of the land in possession of each. The *semindar* brought the present suit against the tenants in which he asked that the latter might be compelled to carry out the terms of the award and should they fail to do so, the Court would distribute the sum of Rs. 2,400 as it thought proper. The lower appellate Court gave the plaintiff a decree which directed that "in accordance with the arbitration award the defendants are to divide the Rs. 2,400 consolidated rental in a manner proportionate to the land held by each, and if they fail to comply the division will be made through the Court." On the appeal by the defendants the Court directed that the operative portion of the decree of the Judge be amended as follows:—"It is ordered and decreed that the decree of the Subordinate Judge of Saharanpore, dated the 3rd day of May, 1882, dismissing the plaintiff-appellants' suit be and hereby is reversed and that the relief prayed by the plaintiff-appellant in his plaint be and hereby is granted, that is to say, that in accordance with the terms of the award of the 7th of January, 1880, the defendants-respondents, upon the basis of a rental of Rs. 2,400 *per annum*, payable from them in common to the plaintiff-appellant, do by mutual consent and agreement among themselves and in proportion to the shares and the productive power of the lauds cultivated by them on or before the 1st day of December next evening, prepare a list showing the mode in which payment of the abovementioned Rs. 2,400 is to be distributed among and to be payable by them. In the event of the defendants-respondents wilfully failing to prepare such list on or before the date hereinbefore specified this Court will, upon being informed thereof and in the absence of any sufficient cause shown to the contrary, direct the imprisonment of the defendants-respondents or the attachment of their property, or both, in manner

CIVIL PROCEDURE CODE, s. 526—
(continued.)

provided by law. *SHEORAM AND OTHERS v. GANESHI LAL.*

[III-176]

(1.) s. 539 "*Public and religious purpose.*" The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favor, and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom and that he was interested as a Hindu in worshipping at the temple and professing to sue on behalf of the entire body of the worshippers thereat, sued for a declaration that the land was *wakf* and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code. *Held* by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple.

Per EDGE, C. J., and TYRRELL J. that the defendants before the Court did not constitute themselves trustees in any sense. *Held* also by the Full Bench that the suit was not maintainable as against those defendants.

Per STRAIGHT, J., that the suit was not maintainable under the Hindu Law; that the trust was one for public religious purposes; that such a suit in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code.

Per EDGE, C. J., and TYRRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code and if for private or quasi-private religious purposes it must also fail since there was no principle on which the plaintiff as one of the public worshipping in the temple could maintain it against those defendants who were not trustees but (if they had wrongfully taken possession) trespassers; *Jawahra v. Akbar Husain* (I. L. R., 7 All., 178) distinguished. *Manohar Ganesh Tambekar v. Lakshmiram Govind Ram* (I. L. R., 12 Bom., 247); *Lutifunissa Bibi v. Nazirun Bibi* (I. L. R., 11 Cal., 33) and *Hira Lal v. Bhairon* (I. L. R., 5 All., 602) referred to. *Wajid Ali Shah v. Dianat-ullah Beg* (I. L. R., 8 All., 31) approved. *RAGHUBAR DIAL AND OTHERS v. KESHO RAMANUJ DAS.*

[VIII-276]

CIVIL PROCEDURE CODE, s. 539—
(continued.)

(2.) —————.] A Hindu provided for the creation and maintenance of a religious endowment in favor of the sect known as Bhagvatas, appointing managers and directing the manner in which the profits of the endowed property was to be spent. *Held* that this must be taken to be a public religious endowment within the meaning of s. 539 of the Code of Civil Procedure. *KANHAYA LAL AND OTHERS v. SALIG RAM AND OTHERS.*

[XIV-159]

(3.) ————— *Wakf property—Person interested—Trespass.*] Certain Muhammadans sued to set aside a mortgage of endowed property belonging to a mosque, the decree enforcing the mortgage, and the sale of the mortgaged property in execution of that decree, and for the demolition of buildings erected by the purchaser, and the ejectment of the purchaser. *Held* that the plaintiffs, as Muhammadans entitled to frequent the mosque and to use the other religious buildings connected with the endowment could maintain the suit and s. 539 of the Civil Procedure Code had no application to the case, the endowment being a religious institution within the meaning of s. 24 of Act VI of 1871 and therefore governed by the Muhammadan Law. *ZAFARYAB ALI AND OTHERS v. BAKHTAWAR SINGH.*

[III-91]

(4.) —————.] Any Muhammadan who is interested in property belonging to a mosque is competent to bring a suit in respect of a trespass committed with regard to such property. Such suit does not need any permission for its institution under the provisions of s. 539 of the Code of Civil Procedure. *MUHAMMAD UMR v. MAULA BAKHSH AND ANOTHER.*

[XII-9]

FAZ-UL-RAHMAN AND OTHERS v. MUHAMMAD YUSUF

[V-219]

JAWAHRA AND OTHERS v. AKBAR HUSAIN.

[IV-324]

See also

ABDUL RAHMAN AND OTHERS v. YAR MUHAMMAD AND OTHERS.

[I-34]

(5.) ————— *Suit for declaration that property is wakf.*] A Muhammadan brought a suit against a person in possession of certain property, for a declaration that the property was *wakf*. He did not allege himself to be interested in the property further or otherwise than as being a Muhammadan. He stated as his cause

CIVIL PROCEDURE CODE, s. 539--
(continued.)

of action that the defendant had, in a former suit between the same parties, filed a written statement in which he denied that the property now in question was *wakf*. *Held* that, unless it could be shown that the suit was maintainable under some statutory provision it could not be maintained. *Held* that, inasmuch as no permission had been given to the plaintiff to bring the suit, it was not maintainable under Act XX of 1863 or under s. 539 of the Civil Procedure Code. *Held* that the suit was not maintainable under the provisions of s. 42 of Act I of 1877 (Specific Relief Act). *Held*, therefore, that the suit was not maintainable. *Held*, further, that, the relief contemplated by s. 42 of the Specific Relief Act being always a matter of the Court's discretion and inasmuch as the evidence adduced by the plaintiff himself showed that the defendant was using the property for charitable purposes, it would not be proper to make the declaration prayed for by the plaintiff, even if the suit were maintainable. **WAJID ALI SHAH v. DIANAT-UL-LAH BEG.**

[V-318]

(6.)—*Misappropriation by mutwalli—Suit to set aside.*] The plaintiffs brought their suit on the allegations that they were Muhammadans interested in the due carrying out of the provisions of a certain deed of endowment made by a deceased ancestor of theirs; that one of the defendants was the *mutwalli* of the property made *wakf* under the said deed, and that he had mortgaged the *wakf* property to the other defendant who was seeking to bring it to sale by enforcement of his mortgage. The plaintiffs prayed for a declaration that the property in suit was *wakf* and in consequence not liable to be brought to sale under decree obtained by the defendant mortgagee. *Held* that the suit came within the provisions of s. 539 of the Code of Civil Procedure, and that, no permission, as required by that section, having been obtained for its institution, the suit must fail. **HASHMAT BIBI AND ANOTHER v. MUHAMMAD ASKARI AND ANOTHER.**

[XV-2]

(7.)—*Where a plaintiff alleges misappropriation or non-administration of trust funds and trust property by persons upon and in charge of that property and asks the interference of a Court, it is necessary for him to obtain preliminary sanction under s. 539 of the Code of Civil Procedure.* **Zafaryab Ali v. Bakhtawar Singh** (I. L. R., 5 All., 497) and **Raghubardayal v. Kesho Ramani Das** (I. L. R., 11 All., 18) referred to. **AKBAR KHAN AND OTHERS v. MUHAMMAD NUR KHAN AND OTHERS.**

[XIII-71]

(8.)—*Suit to remove trustees.*] This was a suit by the representative in title of the original settlor to have certain alienations by the trustees of an endowment set aside and

CIVIL PROCEDURE CODE, s. 539--
(continued.)

the property restored to its original uses, *viz.*, (maintenance of a temple) and for the appointment of a new trustee or new trustees in place of the trustees defendants to the suit. *Held* that s. 539, Civil Procedure Code, was not applicable to the case. **Lakshmandas Parash Ram v. Ganpatrav Krishna** (I. L. R., 8 Bom., 365) and **Jawahra v. Akbar Husain** (I. L. R., 7 All., 178) referred to. **SHEORATAN KUNWARI v. RAM PARGASHI.**

[XVI-37]

(9.)—*Parties.*] A suit may properly be brought and a decree made under s. 539 of the Code of Civil Procedure for the removal of a trustee. **Narasimha v. Ayyanchetti** (I. L. R., 12 Mad., 157); **Sathappayyar v. Periasami** (I. L. R., 14 Mad., 1); **Rangasami Naickan v. Varadappa Naickan** (I. L. R., 17 Mad., 462); **Chintaman Bajaji Dev v. Dhonda Ganesh Dev** (I. L. R., 15 Bom., 612); **Tricumdass Mulji v. Khimji Vullabhdass** (I. L. R., 16 Bom., 626); **Syed Hussain Mian v. The Collector of Kaira** (I. L. R., 21 Bom., 43); **Sajedur Raja v. Baidyanath Deb** (I. L. R., 20 Cal., 397); **Mohi-ud-din v. Sayiduddin** (I. L. R., 20 Cal., 310); and **Sajedur Raja Chowdhree v. Gour Mohun Das Baishnav** (I. L. R., 24 Cal., 418) referred to. **Subayya v. Krishna** (I. L. R., 14 Mad., 186) followed. In such a suit as above it is not necessary to make the alienees from the trustee defendant parties to the suit. **Bishan Chand v. Syed Nadir** (I. L. R., 15 I. A., 1); **Chintaman Bajaji Dev v. Dhonda Ganesh Dev** (I. L. R., 15 Bom., 612) and **the Attorney General v. The Port Reeve and others of Avon** (33 L. J., N. S.) Ch. 172) referred to. **HUSENI BEGAM AND OTHERS v. THE COLLECTOR OF MORADABAD.**

[XVII-210]

(1.) s. 540.—*Who can appeal—Guardian.*] The mother of a minor defendant having declined to act as his guardian *ad litem* on the ground that his property was under the Court of Wards, the Collector as representing the Court of Wards was appointed guardian. The minor's mother was impleaded as a co-defendant and a decree was passed against her and the minor. The Collector on behalf of the minor, accepted the decree and did not appeal. *Held* on these facts that it was not competent to the mother to assume the office of guardian *ad litem* and to appeal on behalf of the minor. **CHEDI PANDE v. LACHMI NARAIN.**

[XIII-161]

(2.)—*Representative not brought upon record.*] *Held* that when at the time the case was heard by the lower Court a party to the suit was dead and no application was put in by any person to be brought on the record as his legal representative, the legal representative has no *locus standi* to prefer an appeal. **DURGA KUAR v. HAR SAHAI.**

[II-134]

CIVIL PROCEDURE CODE, s. 540—
(continued.)

(3) ———— *Person beneficially interested.* In this case *G N* sued the Collector of Bareilly. He obtained a decree against the Collector in the first Court. The Collector appealed and his appeal was dismissed. Thereupon *SS, B P* and *L M*, persons beneficially interested in resisting the suit of *G N* presented a memorandum of appeal in the High Court, without obtaining leave of the Court and made *G N* the respondent. The appeal was admitted. *Held* that as the appellants were not parties to the decree the order for the admission of the appeal must be discharged but under the peculiar circumstances of the case the memorandum of appeal shall be treated as still a memorandum of appeal presented to the Court and awaiting admission. *SHIB SAHAI AND OTHERS v. JAGAN NATH.*

[XII-139]

(4) ———— “An appeal shall lie from the decrees.”—*Finding not embodied in decree.* In a suit to obtain possession of certain property and to set aside a deed called a deed of endowment (*wakfnama*) on the ground that the defendant had fraudulently obtained its execution, the defendant pleaded (i) that the deed was a valid one and (ii) that she was in possession of the property in satisfaction of a dower debt, and her possession could not be disturbed so long as the debt remained unsatisfied. The Court of first instance held that the deed was invalid, but that the defendant was entitled to remain in possession of the property till her dower-debt was satisfied, and the Court passed a decree which merely dismissed the suit, without embodying the findings as to the deed. On appeal by the plaintiff to the District Judge, the defendant filed objections under s. 561 of the Civil Procedure Code in regard to the first Court's decision that the deed of endowment was invalid. The Judge dismissed the plaintiff's appeal, affirming the finding as to dower, and, refusing to decide the question of the validity of the deed, as being unnecessary for disposal of the claim, disallowed the defendant's objection. The defendant appealed to the High Court. *Held* by the Full Bench (Oldfield and Mahmood, J.J., dissenting) that if a decree is, upon the face of it, entirely in favour of a party to a suit, such decree being the thing which by law is made appealable, and nothing else, that party has no right of appeal therefrom. If, in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party, and he desires to have formal effect given to them by the decree, so as to allow of his filing objections thereto under s. 561 of the Civil Procedure Code, or of appealing therefrom under s. 540, he must take steps under s. 206 to have the decree properly brought into conformity with the judgment, so that there may be matter on the face of it to show that something has been decided against him; but if he fails to take this course,

CIVIL PROCEDURE CODE, s. 540—
(continued.)

the decree, though in general terms, will stand good as finally deciding the issues raised by the pleading upon which the ultimate determination of the cause and the decree itself rested. The findings in a judgment upon matters which subsequently turn out to be immaterial to the grounds upon which a suit is finally disposed of, as to the plaintiff's right to any portion of the relief sought by him as declared by the decree amount to no more than *obiter dicta* and do not constitute a final decision of the kind contemplated by s. 13 of the Civil Procedure Code. *Held* also that, in the present case, the Judge was right in holding that the question as to the validity or otherwise of the deed of endowment was wholly immaterial. The judgment of Straight, J., in *Lachman Singh v. Mohan* (I. L. R., 2 All., 497) approved and followed.

Per OLDFIELD, J.,—*contra* that the decree, to agree with the judgment and fulfil the requirements of s. 206 of the Civil Procedure Code, should contain the material points for determination arising out of the claim and material for the decision thereon; that if this has not been done, the defect is a good ground of appeal, notwithstanding that the decree, on its face, may be altogether in favour of the appellant, and notwithstanding that he may not have applied for amendment of the decree under s. 206, or for review of judgment; and that, in the present case, the defect in the decree would afford a good ground of appeal.

Per MAHMOOD, J., that inasmuch as the provisions of s. 13 of the Civil Procedure Code relate as well as to the trial of issues as to the trial of suits, and in the present case the validity or otherwise of the deed was a matter directly and substantially in issue between the parties, and was adjudicated upon, the finding of the first Court upon that issue was not a mere *obiter dictum*, but would be binding upon the defendant as *res judicata* notwithstanding the fact that the suit against her was dismissed on the ground that she held possession of the property in lieu of dower; that whatever has the force of *res judicata* is necessarily appealable; that the word “from” as used in s. 540 or s. 584, and the expression “objection to the decree” in s. 561, refer not only to matters existing upon the face of the decree, but also to those which should have existed but do not exist there; and that the defendant in the present case was aggrieved or injured by the omission in the decree of the first Court, and was therefore entitled to file objections to it, and, for the same reason, to appeal to the High Court from the decree of the lower appellate Court. Also *per* Mahmood, J., that it was doubtful whether the reliefs contemplated by ss. 206 and 623 were open to the defendant; but that, even conceding that she ought to have sought her remedy under either of those sections, her neglect to do so did not make her incapable of obtaining the same

CIVIL PROCEDURE CODE, s. 540—
(continued.)

result by the exercise of her right of appeal. *Anusuyabai v. Sakaram Pandurang* (I. L. R., 7 Bom., 484); *Man Singh v. Narain Das* (I. L. R., 1 All., 480); *Mohan Lal v. Ram Dial* (I. L. R., 2 All., 843); *Niamat Khan v. Phadu Buldia* (I. L. R., 6 All., 319); *Pan Koor v. Bhagwant Koor*, (N. W. P. 4 H. C. Rep. 1874, p. 19) referred to. *JAMAITUNNISSA v. LUTFUNNISSA*.

[V-89

(5.)—Power of court to deal with portion of decree not appealed against.] An appellate Court is not competent in its decree to deal with any portion of the decree of the first Court which is not before it either by way of appeal or by way of objection under s. 561 of the Code of Civil Procedure. *Cheda Lal v. Badullah* (I. L. R. 11 All. 35) and *Raghunath Singh Manku v. Parashram Mahata* (I. L. R. 9 Calc. 635) referred to. *TIRATH RAJ v. KUNJ BEHARI AND ANOTHER*.

[XIII-144

(6.)—Decree—Dismissal on ground that no plaint could be found.] A plaint was filed and duly registered in the Court of a Munsif. Subsequently the Munsif found that the suit was undervalued and that if properly valued it would be beyond his jurisdiction, and accordingly returned the plaint for presentation in the proper Court. The plaintiffs appealed to the Subordinate Judge against this order, attaching the plaint to their memorandum of appeal. The Subordinate Judge remanded the case under s. 562 of the Code of Civil Procedure. Against this order of remand the defendants appealed to the High Court, but their appeal was dismissed. The case then went back to the Court of the Munsif, and it was brought to his notice that there was no plaint on the record before the Court. He accordingly, on the 9th of August, 1894, dismissed the suit. On appeal to the Subordinate Judge the order of the Munsif was reversed. The defendants appealed to the High Court. Held that the order of the Munsif of the 9th August, 1894, was appealable as a decree; and that it was the duty of the Munsif or of the office of his Court to see that the plaint which had been all along on the record, was present in his Court. *NASIBAN AND ANOTHER v. KHURSHED BANU AND OTHERS*.

[XVI-54

(7.)—Judicial order.] A decree-holder in execution of his decree attached certain immoveable property of his judgment-debtor; but on his taking no other steps to complete the execution of the decree the Court struck off the execution proceedings maintaining the attachment. Against this order the decree-holder appealed. Held that, inasmuch as the order in question was not a judicial disposal of the application for sale and would not preclude the decree-holder from continuing the execution of his decree, an appeal from such order was

CIVIL PROCEDURE CODE, s. 540—
(continued.)

superfluous and must be dismissed. *RATTAN v. HARI HAR DAT DUBE*.

[XV-87

(8.)—Order returning plaint.] The suit out of which this appeal has arisen was instituted in the Court of Munsif who decreed the claim. On appeal from the decree by the defendants, the lower appellate Court finding that the Munsif had no jurisdiction, returned the plaint. Held that returning the plaint was a decree from which an appeal lay under s. 540 and not under s. 588, Civil Procedure Code. *CHATTAR LAL v. HAR LAL AND OTHERS*.

[III-165

BINDESRI AND ANOTHER v. NANDA.

I-12

(9.)—Order returning memorandum of appeal to be presented to proper Court.] An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of s. 2, Civil Procedure Code. *MAHABIR SINGH AND ANOTHER v. BEHARI LAL AND OTHERS*.

[XI-96 & 107

(10.)—Order dismissing appeal for deficient Court fee.] The memorandum of appeal in this case being insufficiently stamped and the appellant having failed to supply such deficiency within the time allowed, the following order was made by the Court below on the memorandum of appeal:—"Appeal dismissed: full fees being unpaid." Held that as no decree was made in the lower appellate Court no appeal lies to the High Court. *GAJRAJ SINGH v. BHAGWANT SINGH AND OTHERS*.

[III-255

(11.)—Order rejecting memorandum of appeal for insufficient court-fee.] An order rejecting a memorandum of appeal for non-compliance with the Court Fee Act is a decree. *ZAINULABDIN v. ALTAF HUSAIN AND ANOTHER*.

[V-323

(12.)—Order rejecting memorandum of appeal as barred by limitation.] An order rejecting a memorandum of appeal as barred by limitation is a "decree" within the meaning of s. 2, Civil Procedure Code. It is therefore appealable and not open to revision by the High Court under s. 622, Civil Procedure Code. *Gajraj Singh v. Bhagwant Singh* (W. N. 1883, p. 255); and *Dianatullah Beg v. Wajid Ali Shah* (I. L. R., 6 All., 438) distinguished. *GULAB RAI v. MANGLI LAL*.

[IV-223

(13.)—Order dismissing application for removal of trustee.] No appeal will lie

CIVIL PROCEDURE CODE, s. 540—
(continued.)

from an order dismissing an application for the removal of a trustee, such order not being a "decree" within the meaning of s. 2 of the Code of Civil Procedure and not being otherwise appealable. *NATHU WILSON v. C. H. MC. AFEE AND ANOTHER.*

[XVI-200]

(1). s. 541—*Presentation.*] Where a pleader duly appointed had prepared and signed a memorandum of appeal in a civil suit, but instead of presenting it to the Court himself gave it to a mukhtar of the appellant who handed it over to the Munsarim of the Court, the said mukhtar being authorised, amongst other acts, also to present appeals on behalf of his principal, it was held that though such a presentation was irregular, yet it need not necessarily be held to invalidate the appeal. *MUHAMMAD GOLAM MOHI-UD-DIN v. MUHAMMAD ABDUL KARIM AND ANOTHER.*

[XIV-181]

(2).—"Shall be accompanied with copy of decree." A memorandum of appeal is not a good memorandum of appeal in law unless it is accompanied by a copy of the decree appealed against. *Gulab Devi v. Shankar Lal (W. N. 1892, p. 47)* followed. *CHAMELA KUAR AND OTHERS v. MIR KHAN.*

[XIII-223]

(3).—"Power of Court to dispense with." An appellate Court cannot dispense with the presentation of a copy of the decree appealed against in connection with a memorandum of appeal. Where therefore no such copy of the decree is presented within the period of limitation prescribed for the appeal the appeal will be barred. *GULAB DEVI AND ANOTHER v. SHANKAR LAL.*

[XII-47]

(4).—"No decree prepared—Practice." In this case the Court of first instance (Assistant Collector) omitted to embody its decision in a decree. On appeal the District Judge holding that there being no decree the Court had no jurisdiction, dismissed the appeal. Held that, the lower appellate Court should have followed the rule laid down in 5 All., 520, and remanded the case for preparation of decree. *KADIR BAKHSI v. KIFAITULLAH.*

[IV-224]

(1). s. 542.—*Power of Court to modify part of decree not appealed from.*] The appellants sued for arrears of rent, and obtained in the Court of first instance a decree for Rs. 116-12-8, a portion of what they claimed. The respondent did not appeal. The appellants appealed from that part of the decree which dismissed a portion of their claim. The lower appellate Court reduced the amount awarded to the appellants to Rs. 46. Held that, as the award of Rs. 116-12-8 to the appellants by the

CIVIL PROCEDURE CODE, s. 542—
(continued.)

Court of first instance was not a subject of appeal to the lower appellate Court, that Court was not competent to interfere with it. *SITA RAM AND ANOTHER v. BANNO BIBI.*

[I-40]

(2).—"Appellant confined to ground set out." Section 542 of the Civil Procedure Code was intended to confer upon the Court a power exercisable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice. *BANSIDHAR AND ANOTHER v. SITA RAM.*

[XI-147]

(3).—"Held that the validity of an order of remand could be questioned in second appeal even though the plea of its illegality was not taken in the memorandum of appeal." *Rameshaur Singh v. Sheodin Singh (I. L. R., 12 All., 510)* followed. *MAHGU KUAR AND OTHERS v. FAUJDAR KUAR.*

[XI-105]

MULLU KHAN v. THAN SINGH AND OTHERS

[XI-187]

(4).—"Act X of 1877." The Court confined the appellant to the ground of objection set out in the memorandum of appeal (which was that the suit was barred by limitation) and refused to give him permission to urge another ground, as it had not been urged by him on first appeal in the lower appellate Court. *BHAWANI GIR v. DALMARDAN GIR.*

[I-40]

(5).—"Held that not only may the point of *res Judicata*, though not taken in the memorandum of appeal, be entertained in second appeal, under the provisions of s. 542, Civil Procedure Code, but that even when such point has not been urged in either of the lower Courts, or in the pleas in appeal, if raised in second appeal, it must be considered and determined either upon the record as it stands, or after a remand for findings of fact." *MUHAMMAD ISMAIL v. CHATTAR SINGH AND ANOTHER.*

[I-116]

(6).—"Act X of 1877." The plea that the plaintiff had improperly been permitted to withdraw from a former suit with liberty to bring the present one, which had not been taken in the lower Courts, and was not taken in the memorandum of second appeal, was not permitted to be urged at the hearing of the second appeal.

Quære. Whether under s. 373 of Act X of 1877 the Court ought to permit the plaintiff to withdraw from the suit with liberty to bring a fresh suit on the ground that the defence to the suit was such that the suit must fail if

CIVIL PROCEDURE CODE, s. 542—
(continued)

proceeded with. *ZAHURUNNISSA v. KHODA YAR KHAN*

[I-18]

(1.) **s. 544.**—“Decree proceeds on any ground—defendants.”] Section 544 of the Code of Civil Procedure does not enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them that under s. 544 any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. *Protab Chunder Dutt v. Koorbanissa Bibee* (14 W. R., 130) referred to. *PURAN MAL v. KRANT SINGH*.

[XVII-154]

(2.) ————— (Act X of 1877).] The plaintiff sued to enforce a right of pre-emption under the *wajib-ul-arz* in respect of a contract which he alleged to be a *zar-i-peshgi* lease. The alleged contract was the subject of two separate deeds the one on hypothecation bond, the other a simple lease. These documents were in favor of different parties and the property which was the subject of one was not precisely the same as the property the subject of the other deed. The parties to the two deeds who were all made defendants contended that the two transactions were separate and independent. The first Court gave the plaintiffs a decree against all the defendants regarding the two deeds as a single *zar-i-peshgi* lease. One set of the defendants *viz.*, parties to the lease, appealed from the whole decree and the lower appellate Court taking a contrary view to that taken by the first Court dismissed the plaintiff's suit. Held that the Court below was competent to dismiss the suit as against those defendants as well who had not appealed. *CHIRAGH ALI v. SALIK RAM AND OTHERS*.

[II-36]

(3.) —————.] Five *zamindars* sued to recover instalments of a certain cess in which they alleged themselves to be all jointly interested by reason of their joint proprietary interest in a Bazar out of which the cess arose. They obtained a joint decree for a portion of their claim. From this decree they appealed, but, by some accident apparently, for it did not appear that he had refused to join in the appeal, the name of one of the plaintiffs was omitted. The lower appellate Court, however, heard the appeal as if all the

CIVIL PROCEDURE CODE, s. 544—
(continued.)

five plaintiffs were appellants before it and decreed the appeal, and subsequently discovering that the name of one of the joint plaintiffs was not entered in the list of appellants added a *post script* to its judgment to amend the decree by addition of his name, under the provisions of s. 544, Civil Procedure Code. The four plaintiffs-appellants then applied for revision of the judgment in appeal as against the 5th plaintiff. Held that the lower appellate Court must under the circumstances be taken to have been acting within the provisions of s. 544, Civil Procedure Code, and that there was no reason to interfere in revision with the decree. *BHAWANI PRASAD PATAK AND OTHERS v. RAGHUNATH PRASAD*.

[XI-207]

(1) **s. 545.**—*Sufficient cause.—Security.*] This was an application by an appellant for stay of execution of the decree appealed from. The decree was for the payment of certain money and costs. The application stated that the respondents had applied for execution of the decree, and a warrant had been issued for the appellant's arrest; that the money ordered by the decree to be paid was money to which the respondents were not personally entitled; and that if this was paid to them, it could not be recovered, as they were persons of no means. These statements were supported by an affidavit. Held that if the allegations contained in the application are true there is sufficient reason to stay execution, and as the affidavit filed by the petitioner was not contradicted by any affidavit to the contrary the application for stay should be allowed but not independent of clause (c) of s. 545, Civil Procedure Code. *FARIDUD-DIN v. WILAYAT ALI AND OTHERS*.

[VIII-249]

(2.) ————— *Applicability of section to appeal under s. 244, Civil Procedure Code—Substantial loss.*] This was an application for staying an order for execution of a decree. It appeared that a dispute between *H S* and *K S* was referred to arbitration. The arbitrator by an award dated the 27th August, 1887, assigned certain villages to *K S*. This award was subsequently filed in Court under the provisions of s. 525, Civil Procedure Code, on the application of *K S*, and a decree made in accordance with this award. No appeal was preferred from this decree. *K S* applied for possession of the villages in execution of this decree, and *H S* took objections relating to the validity of the decree. The Court executing the decree disallowed the objections and made an order for delivery of possession. *H S* thereupon appealed from the order disallowing the objections and then applied for stay of the order for execution. Held that the order disallowing the objections taken by *H S* was appealable as a decree as it fell within the purview of s. 244, Civil Procedure Code, and in an appeal from such order the provisions of s. 545, Civil Procedure Code, would be

CIVIL PROCEDURE CODE, s. 545 —
(continued.)

applicable. The application for stay was therefore entertainable by this Court. But as no danger of injury such as is contemplated by s. 545, has been shown, the application must be rejected. **HARIRAJ SINGH v. KIRAT SINGH.**

[VIII-245]

(3).—*Security—Liability of.* On an application by *A*, to stay the execution of the decree appealed against, the appellate Court ordered him to find security to a certain amount under section 545(c) of the Code of Civil Procedure. The amount was deposited by *B* on behalf of *A*. *A*'s appeal was successful, whereupon *B* applied and obtained the return of the amount deposited as security. *Held* that the question whether *B* would be liable for the judgment-debtor for the due performance of the decree or not (supposing the decree of the district Court was reversed in second appeal) must be determined with reference to the intention of the parties when the security was given. **GOBIND DEO AND ANOTHER v. BALDEO NARAIN.**

[IV-4]

(4).—*Security—Mode of enforcement.* Where in an appeal security has been given to the appellate Court for the due performance of such decree as it may pass, the decree-holder may enforce such security in the manner provided for by s. 253, Civil Procedure Code. **Bans Bahadur Singh v. Mughla Begam (I. L. R., 2 All., 604)** followed. **Thirumalai v. Ramayyar (I. L. R., 13 Mad., 1)** approved. **Kali Charan Singh v. Balgobind Singh (I. L. R., 15 Calc., 497)** and **Venkabanaik v. Baslingapa (I. L. R., 12 Bom., 411)**; **Tokhan Singh v. Udwant Singh (I. L. R., 23 Calc., 25)** dissented from. **JANKI KUAR v. SARUP RANI AND ANOTHER.**

[XV-19]

(5).—*Security—Loss occasioned by stay.* When a judgment-debtor applies for stay of execution of the decree against him it is open to the decree-holder to ask the Court to make it a term of any order for stay that the judgment-debtor should pay into Court a sum sufficient to cover, not only the money decreed, but also any loss sustained by the decree-holder by reason of the execution being stayed; but if no such order is obtained by the decree-holder there is no precedent for the Court executing the decree assessing interest by way of damages against the judgment-debtor to compensate the decree-holder for loss occasioned by the stay. **PITAM MALL v. SARA SUTHERLAND.**

[XV-104]

ss. 545 & 546.—Review—Stay of execution. An application for review of judgment under s. 623 was made by a party against whom the High Court, on second appeal, had passed a decree. Subsequently the applicant made a further application for stay of execution of the

CIVIL PROCEDURE CODE, ss. 545 & 546—(continued.)

decree sought to be reviewed. *Held* that s. 647, Civil Procedure Code, provides for the procedure to be followed in miscellaneous matters other than suits and appeals and its provisions, read with ss. 545 and 546, give no power to the Court or a Judge after the passing of a decree and before the granting of an application for review, to order a stay of execution of the decree. No such power exists under the Code. **AMIR HASAN KHAN v. AHMAD ALI.**

[VI-293]

(1.) **s. 546—Stay of execution—Security—Condition precedent.** Where, pending an appeal, execution of lower Court's decree is stayed upon the appellant furnishing security to the lower Court's satisfaction, the furnishing of such security is a condition precedent to the stay of execution. In such a case where the appellate Court's order leaves the time in which such security is to be given to the lower Court's discretion, that Court is not entitled for an unlimited period to keep open the judgment-debtor's opportunity to file the security, so as to admit of an indefinite stay of proceedings without the condition precedent to such stay being satisfied. **MADAN LAL v. RASUL BAKSH.**

[VIII-84]

(2).—*Application under para (3)—Court to which it should be made.* An application under the third paragraph of s. 546 of the Code of Civil Procedure to stay the sale of immoveable property in execution of a decree for money against which an appeal has been filed must be made to the Court which passed the decree and not to the appellate Court. **Gossain Money Puree v. Gour Pershad Singh (I. L. R. 11 Calc., 146)** referred to. **IN THE MATTER OF THE PETITION OF MURAD-UN-NISSA.**

[XIII-99]

(3).—*"Decree for money"—Hypothecation decree.* A decree for enforcement of hypothecation by sale of immoveable property is not a "decree for money" within the meaning of the last paragraph of s. 546 of the Civil Procedure Code. The object of these words is to confine the decree mentioned in the paragraph to a decree for money in satisfaction of which a Court has ordered a sale of immoveable property. **HARSARAN DAS AND OTHERS v. GANGA PRASAD AND OTHERS.**

[IX-139]

(4).—*Decree for costs.* A decree for costs not declared to be chargeable in any specific immoveable property is a decree for money within the meaning of the last paragraph of s. 546 of the Code of Civil Procedure. **HAIDAR BAKSH v. ZAHUR-UL-HASAN.**

[XVI-74]

(1.) **s. 549—Discretion of Court—Terms of security.** In this case the District Judge, on

CIVIL PROCEDURE CODE, s. 549—
(continued.)

the application of the respondents, ordered that the appellants should give security for the costs of the respondents within 5 days from the date of the order, and such sureties should undertake to pay the respondent's costs, if the same were not paid to them by appellants within 10 days from date of decision awarding costs. The appellants furnished a security bond which was not drawn in the terms of the Judge's order, and the Judge dismissed the appeal for failure to furnish security for costs within the appointed time. *Held* that the Judge's order not being unreasonable, he did not improperly exercise the discretion given him by law. DWARKA DAS AND ANOTHER *v.* SOHAN LAL AND OTHERS.

[I-35]

(2.) ————— *Notice.* The discretion conferred on an appellate Court by s. 549 to demand security for costs must be properly exercised; and such discretion is not so exercised when the order requiring such security is made without notice to the appellant to show cause why the order should not be made. No order affecting a party should be made without notice to him calling upon to show cause why the order should not be made. STRAJULHAQ AND ANOTHER *v.* KUADIM HUSAIN AND ANOTHER.

[III-60]

(3.) —————. As failure to give security for costs of an appeal entails the dismissal of the appeal the Court before giving an order on an application under s. 549 should be supplied with the fullest information and the most complete materials on which to have its formal opinion. GAURA *v.* JHABBI LAL.

[VI-64]

(4.) ————— *Grounds for demanding security—Poverty.* *Held* by the Full Bench (Tyrrell, J., *dubitante*) without laying down any general rule by which the exercise of the discretion conferred by s. 549 of the Civil Procedure Code should be governed, that the mere fact of the poverty of an appellant, standing by itself and without reference to any general fact of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs. JIWAN ALI BEG *v.* BASA MAL AND OTHERS.

[VI-310]

DALIP SINGH AND ANOTHER *v.* AZIM ALI KHAN AND OTHERS.

[IV-99]

AJUBULNISSA *v.* RIASAT HUSAIN.

[VIII-46]

LAKHMI CHAND *v.* GUTTO BAE.

[V-127]

CIVIL PROCEDURE CODE, s. 549—
(continued.)

Per contra.

MUHAMMAD HUSAIN AND OTHERS *v.* AHMAD BUKHSH AND OTHERS.

[VI-286]

(5.) ————— *Champany—Appellant in hiding.* This was an application by the respondents that the appellants should be required to give security for costs. It was urged that the appellants have been invited to bring the suit by one A A and that one of the appellants is in hiding or can not be found. *Held* that the two considerations could not prejudice the case and the rule must be discharged. MUHAMMAD HUSAIN AND OTHERS *v.* AHMAD BAKHSH AND OTHERS.

[VI-286]

(6.) ————— *Order not written by Judge.* On the 16th November, 1886, on the application of the plaintiffs, the lower appellate Court required the defendants-appellants before that Court, to give security for costs under s. 549, Civil Procedure Code. On the 20th November, 1886, an order was made directing that the security should be furnished before the 13th December, 1886. This order was written in *Hindustani* by a clerk and signed by the Judge. On the 13th December, 1886, the defendants presented a security bond in which a house was offered as security. On the same date the appeal was brought on for hearing and was rejected by the Judge on the ground that the defendants had failed to comply with the order of the 20th November, 1886, as the nature of the security offered was not known. *Held* that the order of the lower appellate Court was bad for the following reasons:—

(i) Because there do not appear to have existed any reasons for requiring such a security as the order demanded. (ii) Because the order, dated the 20th November, 1886, was not written out by the Judge himself as a judgment in the case or as a judicial order. (iii) Because it was the duty of the lower appellate Court to have considered whether or not the security filed by the appellants on the 13th December, 1886, was an adequate security. FASHUDDIN AND ANOTHER *v.* BABU LAL AND ANOTHER.

[VIII-241]

(7.) ————— *Delay in making application—Effect of.* This was an application by the respondent under s. 549 of the Code of Civil Procedure for security for costs, made about twenty months after the date the appeal was filed, and in the meanwhile appellant had incurred considerable expenses in presenting their evidence, &c. *Held* that as the appellants had *prima facie* a good case and the suit is not proved to be speculative as alleged, the mere fact that the appellant is a poor man is no sufficient ground to require them to find security. DALIP

CIVIL PROCEDURE CODE, s. 549—
(continued.)

SINGH AND ANOTHER *v.* AZIM ALI KHAN AND OTHERS.

[IV-99]

(8.)—Where an appeal has been filed and admitted, and the respondents have appeared and are represented, and there is no danger of any further extraordinary costs being incurred, the Court will not make an order calling upon the appellant to give security for costs under s. 549, Civil Procedure Code. *FARKHANDATUNNISSA v. THE COLLECTOR OF MEERUT.*

[IX-147]

(9.)—*Evidence in support of application—Nature of.* Held that to justify the use of the provisions of s. 549 of the Code of Civil Procedure very clear and satisfactory ground must be shown by affidavit. *C. BACHMAN v. J. A. H. BACHMAN AND OTHERS.*

[IV-103]

(10.)—*Order not specifying amount.* Where a Court acting under s. 549 of the Code, orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given should be named in the order for security. It is sufficient for the order to direct the appellant to furnish security within a time to be stated "for the costs of the appeal" or "for the costs of the original suit," or "for the costs of the appeal and for the original suit." *Thakur Das v. Kishori Lal (I.L.R., 9 All., 164)* overruled on this point. *LEKHA v. BHAWNA AND OTHERS.*

[XV-238]

(11.)—*Security furnished after time.* The appellant in this case was, on the 4th August, 1883, ordered to furnish security for costs of the appeal. On the 3rd September, the High Court was closed for the long vacation. On the 9th November on the opening of the Court the appellant presented a security bond. Held that as it was not presented within time allowed by the Court the appeal must be rejected; the applicant could not pray in his aid the provisions of the Limitation Act as no such application as is contemplated by the Act was presented and moreover the Court was open during the vacation for business of this nature. *HIJAB BANU v. MAHUMMAD SHAFI AND ANOTHER.*

[III-254]

(12.)—*Order dismissing appeal should be obtained before hearing.* Held that an order for rejecting the appeal on the ground that security has not been furnished, as ordered, should be obtained at any time before the suit comes for hearing. *THAKUR DAS AND ANOTHER v. KISHORI LAL.*

[VII-7]

CIVIL PROCEDURE CODE, s. 549—
(continued.)

(13.)—*Appeal.* An order rejecting an appeal under s. 549, Civil Procedure Code, is not appealable either as an order or as a decree. *LEKHA v. BHAWNA AND OTHERS.*

[XV-238]

Per contra.

SIRAJULHAQ AND ANOTHER v. KHADIM HUSAIN AND ANOTHER.

[III-60]

s. 550.—*Record lost—Decision in absence of.* Held that the decision of an appeal in the absence of the record (had been lost) was illegal. *MANGAL PRASAD v. KALWANTA AND OTHERS.*

[I-26]

(1.) s. 551.—*Applicability of section to first appeals.* Held that the powers conferred by s. 551, Civil Procedure Code, should be very sparingly exercised by Courts of first appeal. *MAHRU BEGAM v. GILPIN.*

[III-221]

(2.)—*Summary rejection of appeals.* *Per EDGE, C. J.*—A Judge to whom a memorandum of appeal from an appellate decree is presented for admission is entitled to consider whether any of the grounds mentioned in s. 584 of the Code of Civil Procedure in fact exist and apply to the case before him and if they do not to reject the memorandum of appeal summarily. S. 551 of the Code of Civil Procedure applies to appeals which have been admitted.

Per AIKMAN, J.—When a memorandum of appeal is summarily rejected, whether under s. 543 or under s. 54 read with s. 582 of the Code of Civil Procedure, the reasons for such rejection should be recorded *sed quare* whether unless it appears from the memorandum of appeal taken by itself that a second appeal does not lie, a second appeal can be summarily rejected and should not rather be dealt with under s. 551 of the Code. *Semble* that a ground of appeal to the effect that the lower appellate Court has misconstrued a document is not one of the grounds of second appeal contemplated by s. 584 of the Code of Civil Procedure. *RUDR PRASAD v. BAIJNATH AND ANOTHER.*

[XIII-115]

s. 552.—*Altering the date of hearing.* On the 3rd February the respondent in an appeal pending before the District Judge informed the Court that he was prepared for the case being taken any day that week. The 9th March was then fixed for the hearing. On the 3rd March, application was made on behalf of the appellant that the case might be taken on the 5th for the convenience of the counsel who was being brought from Allahabad on that date. This application was opposed by the pleader for the respondent, on the ground that the respondent had engaged counsel for the 9th, and

CIVIL PROCEDURE CODE, s. 552—
(continued.)

could not be informed of the change of date in so short a time. On the 4th March, the application was brought before the Judge, and he then ordered that the hearing should take place on the 5th, and, upon the 5th, the appeal was heard, the pleaders for the respondent being present but taking no part in the argument. The Judge decreed the appeal. *Held* that care should be taken not only in fixing the original date for the hearing of a case, but in altering the date of hearing, so that none of the parties should be taken by surprise, but that there was nothing illegal in a Judge taking an appeal on any day he chose to fix so long as the parties or their pleaders had sufficient notice and no prejudice was caused, and that in the present case there was no proof of surprise or prejudice. **ANDHA KUAR v. DALIP LAL AND OTHERS.**

[IX-20]

(1.) **s. 558.—Dismissal for default—Disposal on merits in absence of appellant—Appeal.** When an appellate Court in a case in which the appellant made no appearance whatever, instead of dismissing the appeal for default, proceeded to hear it upon the merits and delivered judgment thereon. *Held* that the decision of the Court must nevertheless be regarded as a dismissal under s. 556 of the Code of Civil Procedure and no appeal would lie therefrom. *Pohkar Singh v. Gopal* (I. L. R., 14 All., 361); *Mansab Ali v. Nihal Chand* (I. L. R., 15 All., 359); *Kanhai Lal v. Naubat Rai* (I. L. R., 3 All., 519); *Zainab Begam v. Manawar* (I. L. R., 8 All., 277) and *Mohesh Chander v. Thikoor Dass* (20 W. R. 425). **MURDARI v. MARIAM BIBI AND OTHERS.**

[XV-140]

(2.) **Revision — Proper remedy.** *Held* that the dismissal of an appeal on the merits in the absence of the appellant (as distinguished from dismissal for default under s. 556) should be treated as dismissal for default and therefore the course open to the appellant would be to apply to the same Court under s. 558. No revision to the High Court lies from such order dismissing on merits instead of dismissing for default. **BRIJ LAL v. KHUBI.**

[IV-167]

ZAINAB v. MANAWAR HUSAIN AND ANOTHER.

[VI-95]

RAM CHANDAR RAO v. MADHO RAO.

[IX-125]

SITA RAM AND ANOTHER v. NAUBAT RAI

[I-17]

(3.) **Pleader unable to argue.** A civil appeal was being

CIVIL PROCEDURE CODE, s. 556—
(continued.)

heard before a Subordinate Judge, the appellant and two pleaders on his behalf being present. During the argument one of the pleaders was called away to another Court and remained absent, and as neither the other pleader nor the appellant was in a position to continue the argument, the Subordinate Judge passed an order, purporting to be under s. 556 of the Code of Civil Procedure, dismissing the appeal "for default of prosecution." An application under s. 558 to reinstate the appeal was rejected. The appellant appealed under s. 588 to the High Court against the order under s. 558. *Held* that no such appeal lay, as the order in question could not have been made under s. 556. But the appellant was allowed to apply in revision under s. 622 against the order under s. 556 and upon that application it was *held* that the Court below had acted illegally and with material irregularity in dismissing the appeal for default under s. 556. **JAWAHIR SINGH AND ANOTHER v. DEBI SINGH AND OTHERS.**

[XVI-9]

(4.) **Where** on an appeal being called on for hearing the vakil who held the brief for the appellant stated that he was unable to argue the case, the fact being that the brief had come into his hands too late for him to prepare himself in the case and the appeal was in consequence dismissed, it was *held* that this was not a dismissal for default of appearance. *Shankar Dat Dube v. Radha Krishna* (W. N. 1898, p. 17) distinguished. *Ram Chandra Naik v. Madhav Purushottam Naik* (I. L. R., 16 Bom., 23) referred to. *Rakkhal Chandra Rai Chowdhuri v. The Secretary of State for India in Council* (I. L. R. 12 Calc., 605) dissented from. **CHIRANJILAL v. KUNDAN LAL AND OTHERS.**

[XVIII-35]

(5.) **Appellant unable to support appeal.** Where upon the day fixed for the hearing of an appeal the appellant's pleaders were not present in Court, and the appellant who was present declined to support the appeal, it was *held* that the appeal was properly dismissed for default of prosecution. **GOPAL BAKSHSH v. DAULAT RAI AND OTHERS.**

[XVI-92]

(6.) **Held** that the fact that a legal practitioner is unable to appear through illness is no reason for postponing the hearing of an appeal before the High Court, and the Court has power to treat such a case as in default. **MAHANT RANG LAL BHUGAT v. DEONARAIN AND OTHERS.**

[VII-282]

(7.) **Appeal.** No second appeal lies from an order under s. 556 of the Code of Civil Procedure dismissing an

CIVIL PROCEDURE CODE, s. 558—
(continued.)

appeal for default, *Nand Ram v. Muhammad Bakhsh* (1. L. R., 2 All., 616) and *Kanahi Lal v. Naubat Rai* (1. L. R., 3 All., 519) followed. *Ajudhia Prasad v. Balmukand* (1. L. R., 8 All., 354) distinguished. *GOPI KOERI v. GAJADHAR AND OTHERS.*

[XII-2

(1). s. 558.—*Dismissal for default—Application for re-admission—Appeal.*

See s. 556, No. (3).

(2).—*Sufficient cause—Proper adjudication.* The appellant's appeal to the lower appellate Court was dismissed on the 29th March, 1880, for the appellant's default, under s. 556 of Act X of 1877. The appellant applied, under s. 558, for the re-admission of the appeal on the ground, that, of his pleaders, one was present, another was absent "on sick leave" and a third and a fourth had, owing to holidays, gone home after obtaining permission. The lower appellate Court made the following order on this application:—"It was brought forward to-day in the presence of the pleaders for both parties: after perusing the English judgment there appears no sufficient reason for allowing this application: ordered, that the petition be disallowed." The Court held that the lower appellate Court had dismissed the appellant's application, with reference to its former order of the 29th March, without due consideration and inquiry into the circumstances alleged. The appellant's allegation should have been inquired into, and a proper order passed after inquiry. (The lower appellate Court was accordingly directed to dispose of the application afresh.) *SHIMBHU NARAIN v. MUBARAK ALI AND OTHERS.*

[I-22

(3).—*Evidence—Practice.* When an application is made to restore an appeal which has been dismissed *ex parte* for default of appearance the applicant must produce all his evidence in support of the application before the Court to which it is made. If he does not do so and the application is dismissed, he cannot be allowed to supplement such evidence in a Court of appeal on appeal from the order dismissing his application. *Hari Das Mukerji v. Radha Kishan Das* (W. N. 1890, p. 166) followed. *MUZAFFAR ALI KAN v. KEDAR NATH.*

[XVIII-34

(1). s. 559.—*Power of Court to add party—Limitation.* The power of an appellate Court to make a person respondent under s. 559 of the Civil Procedure Code is not affected by the Limitation Act. In exercising its powers under s. 559 of the Civil Procedure Code, an appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant. *SOHNA v. KHALAK SINGH AND ANOTHER.*

[XI-1

CIVIL PROCEDURE CODE, s. 559—
(continued.)

(2).—*Person interested in the result.* It is competent to a Court acting under s. 559 of the Code of Civil Procedure to add a person as respondent in an appeal, though the time within which an appeal might have been preferred against such person has expired. *BINDESI NAIK v. GANGA SARAN SAHU AND ANOTHER.*

[XII-13

(3).—*Person interested in the result.* The Court of first instance gave the plaintiff in a suit for money a decree against the defendant *B*, exempting the defendants *A* and *H*. *B* appealed, making the plaintiff the respondent to the appeal. The plaintiff did not appeal from the decree of the Court of first instance in respect of the exemption of *A* and *H*. The appellate Court made *A* a respondent to the appeal, under s. 559 of the Civil Procedure Code, and, exempting *B*, gave the plaintiff a decree against *A*. Held that, inasmuch as s. 559 does not empower an appellate Court virtually to make an appeal for an appellant, who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal, and it could not be said that *A* was "interested in the result of the appeal," as, having the unappealed decree of the Court of first instance behind him, his position was secure, the appellate Court had improperly made *A* a respondent to the appeal and given a decree against him. *ATMA RAI v. BALKISHEN AND OTHERS.*

[III-24

(4).—*Person not a party in the Court below.* A Court cannot in a second appeal act under s. 559 of the Code of Civil Procedure, and add a party as a respondent unless such party was a party to the appeal below and this notwithstanding that he was a party to the suit in the Court of first instance. *CHUNNI v. LALA RAM.*

[XIII-141

(5).—*Order under section.* The plaintiff in a pre-emption suit died during the pendency of the suit leaving as his representatives two sons. The defendant appealed making both sons respondents. Having been defeated he again appealed but on this occasion named only one of the representatives of the deceased plaintiff as respondent. Twenty-two days after the time for filing the appeal had expired he applied to the Court to be allowed to bring on to the record the name of the other son. On this application the Court passed the following order. "Ordered as prayed subject to any objection at the hearing on the point of limitation." Held that this was not an order under s. 559 of the Code of Civil Procedure, and that the second son of the plaintiff being a necessary party the appeal must be dismissed. *UMED SINGH v. DALIP.*

[XIII-85

CIVIL PROCEDURE CODE.—

(1) s. 561.—*Withdrawal of appeal—Effect on objection.* If an appeal in which objections have been filed under s. 561 of the Code of Civil Procedure is withdrawn the objections cannot be heard. *Bahadoor Singh v. Bughwan Dass* (1 *Agra*, 23); *Ram Prasad Ojha v. Bhurosa Kunwar* (9 *W. R.*, 328); *Shama Churn Ghose v. Radha Kristo Chaklanuvis* (14 *W. R.*, 210); *Coomar Puresh Narain Roy v. Messrs. R., Watson and Co.* (23 *W. R.*, 229); *Subhai Dayalji v. Ragnathji Vasanji* (10 *Bom. H. C. R.*, 397); *Dhondi Jagannath v. The Collector of Salt Revenue and the Secretary of State for India* (1 *L. R.*, 9 *Bom.*, 28); *Maktab Beg v. Hasan Ali* (1 *L. R.*, 8 *All.*, 551). *JAFAR HUSAIN v. RANJIT SINGH.*

[XV-115]

RAMJIWAN MAL AND ANOTHER v. CHAND MAL AND OTHERS.

[VIII-258]

(2) —————. Where an appellant filed his appeal on the eighty ninth day of limitation and the respondent, after the period of limitation for an appeal had expired, filed objections under s. 561 of the Code of Civil Procedure, and where at the hearing the appellant abandoned the appeal. *Held* that the objections also could not be entertained. *THAKUR RAI v. GULZAR RAM AND OTHERS.*

[XIII-68]

(3) —————. *Objection against person no party to appeal.* A brought a suit against B, C, and D for the possession of certain land. The suit was dismissed by the first Court. A appealed and the appellate Court gave him a decree against C and D but dismissed his suit as against B. C and D appealed to the High Court and A preferred objections under s. 561, Civil Procedure Code. *Held* that as B was no party to the appeal the objections against him could not be entertained. *BISHESHAR RAI AND OTHERS v. TAPESHURI LAL AND OTHERS.*

[VI-88]

(4) —————. *Objection—Decree entirely in favor.* In this case judgment was given in favor of the defendant but one of the several issues was decided against him by the Munsif. In appeal to the Judge that issue was also decided in his favor. It was contended before the High Court that the defendant not having given any notice of objection under s. 561 the Court could not consider that issue. *Held* that s. 561 does not apply to the cases of a respondent in whose favor the whole decree is passed. He can support that decree by any contention with which he could have contested the case in the Court of first instance unless he has waived any particular point. *BHAGWANT RAI v. DEO DAT RAI AND OTHERS.*

[VII-44]

CIVIL PROCEDURE CODE, s. 561—
(continued.)

(5). —————. *Act X of 1877.* The plaintiff sued the defendants for compensation for the wrongful taking of the fruit on a tree which he alleged belonged to him. The defendants set up as a defence that the fruit on such tree had not been removed, and that such tree belonged to them. The Court of first instance dismissed the suit on the ground that the fruit on such tree had not been removed, but found incidentally that such tree belonged to the plaintiff. The plaintiff appealed from the decree of the Court of first instance; and the defendants objected to the decree, contending that such tree belonged to them. *Held* that, inasmuch as the Court of first instance did not, in deciding that such tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter "against the defendants," within the meaning of s. 561 of the Civil Procedure Code, and, as the decree was limited to dismissing the suit, the defendants as respondents were not qualified to take an objection which they could not have taken by way of appeal, and therefore the appellate Court was not warranted by law in entertaining the objection taken by the defendants. *BALAK TEWARI v. KAUSAL MISR AND OTHERS.*

[II-124]

Per contra

GUMAN SINGH v. BUJHAWAN SINGH AND OTHERS.

[I-88]

(6). —————. *Limitation—Act X of 1877.* The notice of objections referred to in s. 561 of the Civil Procedure Code must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties. *MISR DEO KISHEN AND ANOTHER v. MAHESHAH SAHAI AND OTHERS.*

[II-82]

DHANI RAM AND OTHERS v. PUNNIA.

[III-229]

DORI LAL AND OTHERS v. NARAIN DAS AND OTHERS.

[III-237]

(7). —————. A Court of appeal is not competent to deal with matters raised in a memorandum of objection filed by a respondent after the time prescribed by s. 561 of the Code of Civil Procedure for filing such objections has expired. *LEKHRAJ v. HAMID KHAN AND OTHERS.*

[XIV-2]

(8). —————. *Power of Court to extend time—(Act X of 1877).* *Held* following *Degamber Mozumdar v. Kallynath Roy* (1 *L. R.*, 7 *Calc.*, 654) that the Court has no discretion to extend the period of seven days within

CIVIL PROCEDURE CODE, s. 561—
(continued.)

which a notice of objections to a decree by a respondent, under s. 561 of the Code of Civil Procedure must be given. **MASITI BEGUM AND ANOTHER v. WILAYTI BEGUM.**

[II-213]

(9.)—*Objections not urged at hearing—Subsequent application for hearing same—(Act X of 1877).* When this appeal was filed, the respondents, under s. 561, Act X of 1877, filed an objection to the decree of the lower Court on the ground that it improperly ordered them to pay their own costs. At the hearing of the appeal, which was dismissed on the 23rd January, 1882, the respondents did not urge their objection. On the 26th January, 1882, they asked the Court to make an order allowing their objection. *Held* that it was too late. **ASGHAR ALI AND ANOTHER v. RIAYAT HUSAIN AND OTHERS.**

[II-29]

(10.)—*Stamp.* *Held* that s. 12 of Act VII of 1870 does not apply to a petition of objection under s. 561, Civil Procedure Code. **HASAN BANO v. NIZAM-UD-DIN AND OTHERS.**

[XIII-55]

(1.) s. 562—*“Disposed...preliminary point.”* S. 562 of the Civil Procedure Code authorizes a remand only where the entire suit and not merely a portion of it, has been disposed of by the Court below upon a preliminary point. **BANWARI LAL v. SAMMAN LAL.**

[IX-188]

KAMALUDDIN v. ATA HUSAIN AND OTHERS.

[XII-11]

(2.)—*—* *Held* that where a suit had not been disposed of on a preliminary point to the exclusion of any evidence of facts the Court in appeal had no jurisdiction to make an order of remand for a second decision under s. 562, Civil Procedure Code. **RAMESHUR SINGH AND ANOTHER v. SHEODHIAN SINGH AND ANOTHER.**

[X-188]

MULLU KHAN v. THAN SINGH AND OTHERS.

[XI-187]

UMRAO SINGH v. RAGHUNATH SINGH.

[II-5]

(3.)—*Illegal Remand—Subsequent proceedings.* *Held* that where an order of remand is set aside as illegal all the proceedings subsequent to that order must also be set aside. **MULLU KHAN v. THAN SINGH AND OTHERS.**

[XI-187]

RAMESHUR SINGH AND ANOTHER v. SHEODHIAN SINGH AND ANOTHER.

[X-188]

CIVIL PROCEDURE CODES, s. 562—
(continued.)

MAGHU KUAR AND OTHERS v. FAUJDAR KUAR. [XI-105]

JARBANDHAN SINGH AND OTHERS v. NAKCHHED SINGH AND ANOTHER.

[VII-224]

(4.)—*Remand—Ground for—Improper return of plaint.* Section 562 of the Code of Civil Procedure has no application to a case when the appeal is against an order returning a plaint for presentation to the proper Court. **SRI LAL v. KISHAN LAL AND ANOTHER.**

[XI-165]

(5.)—*—* *Report of Amin unreliable.* The lower appellate Court made an order purporting to remand a case under s. 562, Civil Procedure Code, not because the case had been dismissed on a preliminary ground by the Court of first instance, but on the ground that a report which had been called for from an Amin regarding the subject matter of the litigation was founded upon imperfect materials and unreliable. *Held* that such an order of remand was illegal and must be set aside together with all proceedings in the same litigation subsequent to the said order. **MAHGU KUAR AND OTHERS v. FAUJDAR KUAR.**

[XI-105]

(6.)—*—* *Judgment defective.* *Held* that where the judgment of a lower appellate Court does not satisfy the requirements of s. 574, Civil Procedure Code, the proper order to make is to remand the case under s. 562 read with s. 587. **HARNANDAN MISR v. SHEOGHULAM MISR.**

[IX-178]

SHEOAMBAR SINGH AND OTHERS v. LALLU SINGH.

[II-158]

SAHAWAN AND ANOTHER v. BABUNAND.

[VI-284]

KOLAHAL v. NANKU.

[VI-285]

MAHADEO PRASAD v. SARJU PRASAD AND ANOTHER.

[VI-171]

MANGRU RAI AND ANOTHER v. BISHUNDIAL RAI.

[IV-99]

JAGANNATH AND ANOTHER v. SURAWAN DULAIYA.

[VIII-61]

(7.)—*—* *That certain persons should be made parties—(Act X of 1877.)* In this case A sued to enforce a right of pre-emption against the vendor and the vendees.

CIVIL PROCEDURE CODE, s. 562—
(continued.)

The vendees (two minors) objected that they were not the real purchasers, but that *X* and *Y* were the real purchasers. *A* did not apply to have *X* and *Y* made parties nor did the Court of first instance make them parties. The suit was decreed against the minors. In appeal it was remanded in order that *X* and *Y* may also be made parties. *Held* that the order of remand was illegal. *AMIR BEG v. ZAINULABDIN AND OTHERS.*

[I-49]

(8). ————— *Witness not examined.*] In this case, on the day fixed for hearing, two out of eleven witnesses for the defendant were absent, being engaged in another Court. The defendant applied for an adjournment which the Munsif refused. The defendant on that refused to examine his witnesses, and the Munsif then decided against him. *Held* that the Judge in appeal was competent to send the case back for retrial. *Haji BU ALI v. HUSAIN BAKHSH AND ANOTHER.*

[VII-145]

(9). ————— *Exclusion of evidence—(Act X of 1877).*] In this case it was contended that although the lower appellate Court had erroneously disposed of the suit upon a preliminary point, the High Court was not competent to remand the case under s. 562, Civil Procedure Code, as the evidence upon the record was sufficient to enable the High Court to pronounce judgment, and no essential evidence of fact had been excluded. *Held* that ss. 565 and 566 were not applicable to this case s. 587 notwithstanding. The contention therefore fails. *RAMNARAIN v. BHAWANIDIN.*

[II-104]

GIRDHARI LAL v. W. CRAWFORD.

[VI-325]

SHEORATAN RAI AND OTHERS v. LAPPU KUAR AND ANOTHER.

[II-157]

(10). ————— *(Act X of 1877)*] *Held* that where an appellate Court has before it all the materials for deciding the case, it is precluded from remanding it under s. 562, Civil Procedure Code. *KUSHI RAM AND ANOTHER v. DALJIT KHAN.*

[II-45]

(11). ————— *Cases not contemplated by section—Power of High Court.*] Where the date fixed for the hearing of an appeal was altered to an earlier date without notice to the appellant or his pleader, in consequence of which the appellant's pleader was unable to proceed with the appeal and it was dismissed. *Held* that the Court was competent to remand the appeal to the Court below for trial upon the merits, notwithstanding that neither the

CIVIL PROCEDURE CODE, s. 562—
(continued.)

provisions of s. 562 nor those of s. 566 of the Code of Civil Procedure were strictly applicable. *KANHAI LAL v. MANORATH RAM.*

[XIV-19]

(12). —————.] The plaintiffs in the Court of first instance produced both documentary and oral evidence in support of their claim. The Court being satisfied with the documentary evidence produced by the plaintiffs declined to record the evidence of the witnesses tendered by them. The defendants appealed, and the lower appellate Court reversed the decree of the Court of first instance, but in its turn declined to allow the plaintiffs-respondents to produce fresh evidence before it. On appeal by the plaintiffs to the High Court, it was *held* that, though there was no section of the Code of Civil Procedure strictly applicable to the circumstances of the case, the Court was warranted *ex debito justitie* in setting aside all proceedings of both Courts below and directing the Court of first instance to retry the case, admitting all admissible evidence which had previously been tendered to the Court of first instance and which that Court had refused to record. *DURGA DIHAL DAS AND OTHERS v. ANORAJI AND ANOTHER.*

[XIV-190]

(13). ————— *Order carried out—Appeal—(Act X of 1877).*] *Held* that the High Court would not, in an appeal from an order of remand under s. 562, Civil Procedure Code, open the question of propriety of the order, where the Court to which the suit had been remanded had carried such order into effect and passed a decree in the suit. *IKRAMUNNISSA v. MUHAMMAD WAZIR.*

[II-53]

PRAG LAL AND ANOTHER v. RAGHUBAR DAS AND ANOTHER.

[I-174]

KARORI MAL v. SAHODRA.

[IV-5]

(14). ————— *Question finally decided.*] When a decree is set aside on a preliminary point and an order of remand made under s. 562 of the Code of Civil Procedure, the only point which the Court below must accept as decided is the point on which the Court of appeal actually decided and on the decision of which the Court of appeal set aside the decree of the Court below. All other points of law or fact are open, and it is competent to the Court below to consider them and determine them. *Sheo Sahoi Tewaree v. Ram Pershad Narain Tewaree* (24, W. R., 332) dissented from. *BENI PRASAD KUNWARI v. SAMPAT.*

[XVII-108]

CIVIL PROCEDURE CODE, s. 562—
(continued.)

(15) —————.] Where the High Court has decided a question of law in an appeal from an order under s. 562, Civil Procedure Code, that decision of the question of law will be final for all purposes in the suit and in any appeal which may subsequently be made to the High Court *Deokishan Misr v. Bansil Dube* (I. L. R., 8 All., 172) distinguished. **GAURI SHANKAR v. KARIMA BIBI AND OTHERS.**

[XIII-178

(16) —————.] Held that an order of the High Court, on appeal from an order of remand, setting aside the order of remand, being merely of an interlocutory kind, can not have the effect of *res judicata* upon any point that may be urged in appeal on the merits. **DEOKISHAN MISR v. BANSI DUBE.**

[VI-55

(17) —————.] *Remand by one Judge—Jurisdiction of another Judge to reconsider—Order—(Act X of 1877).* A Court of first instance dismissed a suit upon a preliminary point. On appeal by the plaintiff against the decree of such Court the then Judge of the appellate Court, Mr. B., reversed the decree upon such preliminary point, and remanded the suit under s. 562 of Act X of 1877 for the trial of a certain issue. The Court of first instance tried such issue and made a decree in accordance with its finding thereon. On appeal against the decree of the Court of first instance the defendant again raised such preliminary point. The then Judge of the appellate Court, Mr. K., dismissed the suit upon such preliminary point. Held that, as, although Mr. B. had irregularly remanded the suit under s. 562 of Act X of 1877, his decision disposed of such preliminary point and only left open for trial the issue which he had directed to be tried Mr. K. was not competent to retry and decide such preliminary point. **SURAJ DIN v. CHATAR.**

[I-55

(18) —————.] *Jurisdiction of Court after making an order of remand.* This suit was remanded under s. 562, Civil Procedure Code, on the ground that the first Court had refused permission to deliver interrogatories for the examination of the plaintiffs. The first Court on receiving the order of remand directed the plaintiffs to attend personally. Thereupon the plaintiffs applied to the appellate Court to set aside the order directing their personal appearance, and to direct the Court of first instance to act in accordance with the order of remand, which was for the service of interrogatories only. This application the appellate Court granted. Held (on an application for revision by the defendants) that the suit having been remanded to the first Court the appellate Court had no jurisdiction to grant the application and the order

CIVIL PROCEDURE CODE, s. 562—
(continued.)

was illegal. **TILAKDHARI AND ANOTHER v. GOBIND PRASAD AND ANOTHER.**

[III-171

(19.) —————.] *Finding on remand—Finally.* On an appeal from an order of remand under s. 562 of the Code of Civil Procedure the High Court is bound to accept the findings of fact of the Court which made the remand, that Court being a Court of first appeal, provided that there is evidence to support them. **GAURI SHANKAR v. KARIMA BIBI AND OTHERS.**

[XIII-178

(20.) —————.] *Costs.* In an appeal against an order of remand under s. 562 of the Code of Civil Procedure costs should not, in the absence of special reasons to the contrary, be specially decreed, but should be left to abide the final result of the suit in which such order is made. **SARFARAZ ALI v. RAM RATAN AND ANOTHER.**

[XII-215

(21.) —————.] *(Act X of 1877).* The plaint in this suit, which was instituted by the appellant, was rejected by the original Court on the ground that it was written upon paper insufficiently stamped, and the appellant, when required to supply the requisite stamped paper, within a fixed time, had failed to do so. On appeal by the appellant the High Court, being of opinion that the plaint was sufficiently stamped, allowed the appeal "with costs," and set aside the original Court's order, and directed it to restore the suit to its file and dispose of it on the merits. The respondents applied for a review of the High Court's judgment so far as it related to the costs of the appeal. The Court being of opinion that neither party was responsible for the error which led to the dismissal of the suit, decided that the liability for the costs of the appeal and of the application for review of judgment should abide the result of the trial of the suit and the costs in the cause; and so ordered. **LACHMI NARAIN v. THAKURDAS AND OTHERS.**

[I-9

s. 564—Remand in cases not provided for by s. 562—Illegality.]

See s. 562, Nos. (1) and (2).

ss. 562 & 566—Remand—(Act X of 1877). The three issues involved in this case were:— (i) Whether sums of Rs. 127 and Rs. 200 were respectively paid by the defendant in Sambat 1926 and 1928? (ii) Whether the claim against the persons of the defendants and their un-hypothecated property was barred by limitation? (iii) What should be the rate and amount of *post diem* interest? With reference to the first issue the Court ordered the plaintiff to produce his account books. He failed and the Court dismissed the whole suit with reference to s. 136, Civil Procedure Code. The lower

CIVIL PROCEDURE CODE, ss. 562 & 566—(continued.)

appellate Court held that the plaintiff-appellant having failed to produce the account books the defendants were entitled to be credited with the sums they said they had paid but their non-production was no ground for dismissing the suit *in toto*. That Court therefore remanded the suit under s. 562, Civil Procedure Code, for the trial of the remaining two issues. *Held* in second appeal that the appellant not having complied with the order for the production of the account books nor having given any satisfactory reason for their nonproduction, the order of the Court below was right but that Court should have proceeded under s. 566 or s. 568 and not under s. 562 of the Code of Civil Procedure. *SADA SUKH v. RAMBHAROSA AND OTHERS.*

[I-147]

(1). **ss. 565 & 566—***Not applicable to second appeals so as to enable the High Court to determine questions of fact.* *Held* that s. 587 of the Civil Procedure Code does not make ss. 565 and 566 applicable to second appeals so as to enable the High Court in cases where the lower appellate Court has omitted to frame or try any issue or to determine any essential question of fact, to itself determine the same upon the evidence on the record; but the High Court in such cases must remit issues for trial to the lower appellate Court. *Balkishen v. Jasoda Kuar* (I. L. R., 7 All., 765); *Deokishen v. Bansil* (I. L. R., 8 All., 172) overruled on this point. *GIRDHARI LAL v. W. CRAWFORD.*

[VI-325]

SHEORATAN RAI AND OTHERS v. LAPPU KUAR AND ANOTHER.

[II-157]

RAM NARAIN v. BHAWANI DIN.

[II-104]

(2). ———— *Findings on remand—Finally.* *Held* by the Full Bench (Tyrrell, J., dissenting) that the findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined. *Nivath Singh v. Bhikki Singh* (I. L. R., 7 All., 649) referred to. *BAL KISHEN v. JASODA KUAR.*

[V-225]

(1). **s. 566—***Fresh evidence.* *Held* that on a remand under s. 566, if the issues framed by the Court are new which were not before the lower Court, the lower Court is bound to take such evidence as the parties produce, but if the issues remanded were before the lower Court, and the parties had full opportunity of giving evidence yet the Court omitted to record findings, no fresh evidence need be taken. *JAI AND OTHERS v. RAM GHULAM.*

[VII-192]

CIVIL PROCEDURE CODE, s. 566 — (continued.)

(2). ———— *It is not as a matter of right but only with the sanction of the Court that further evidence can be taken upon remand; and under ordinary circumstances the duty of a Court to which issues are remitted under s. 566 of the Civil Procedure Code is to try those issues upon the evidence on record.* *RAMNATH v. SYED ALI AZIM AND OTHERS.*

[VIII-81]

(3). ———— *It was not intended by s. 566 of the Code of Civil Procedure that a High Court when making an order for the trial of an issue should direct further evidence to be taken if the issue had been tried on the evidence in the first Court, and if the only reason for making the order was that the Court of first appeal had not tried the issue having the evidence before it on the record.* *CHANGA MAL v. GULABI.*

[XIV-158]

(4). ———— *(Act X of 1877.)* In this case, an order of remand, made by the High Court, under the provisions of s. 566, Civil Procedure Code, did not make it clear that additional evidence was required. The lower appellate Court, being doubtful whether additional evidence could be taken, refused to take the evidence of witnesses summoned by the appellant, and determined the issue referred, upon the evidence upon the record. On the return of the finding to the High Court, the appellant objected to the finding on the ground that the lower appellate Court should have allowed the additional evidence to be taken. *Held* that the order of remand was faulty. The lower appellate Court should be directed under ss. 568 and 569 to take the additional evidence. *ASHRAF ALI v. WAHAJUDDIN HAIDAR.*

[I-75]

(5). ———— *Remand—Finality of order.* A single Judge of the High Court hearing a second appeal made an order of reference under s. 566 of the Code of Civil Procedure. On the return to the reference the appeal came before another Judge, who holding that the reference was unnecessary, and that the original findings of fact in the Court below were sufficient to dispose of the appeal, disregarded the findings on the reference and dismissed the appeal. In appeal under s. 10 of the letters patent it was *held* that it was competent to the Judge before whom the appeal had subsequently come to disregard the findings on the order of reference. *MUBARAK HUSAIN v. BIHARI.*

[XIV-97]

(6). ———— *Held* that the determination of an appeal where there has been a remand, must be on the hearing of the whole case when the case comes

CIVIL PROCEDURE CODE, s. 566—
(continued.)

back. **LACHMAN PRASAD v. JAMNA PRASAD AND OTHERS.**

[VII-295]

(7).—*Remand—Delegation.*] When a case is remanded under s. 566, Civil Procedure Code, to the lower appellate Court for findings on certain issues it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto. **SABRI v. GANESHI.**

[XI-205]

(8).—*Reference to arbitration.*] Held that a Court to which issues have been remitted under s. 566, Civil Procedure Code, can not make a reference of the case to arbitration which is only within the jurisdiction of the appellate Court. **Gossain Dowlut Geer v. Bisse-seur Geer** (22 W. R., 207) referred to. **NAND RAM AND ANOTHER v. FAKIR CHAND.**

[V-139]

(9).—*Failure to determine case set up by parties.*] Where both the Courts below, omitting to consider and decide upon the case set up by the plaintiffs, found upon an issue raised by the defendants and upon its finding on that issue dismissed the plaintiffs' suit. Held that the issues raised by the plaintiffs in their plaint must be remitted to the lower appellate Court for decision. **HARI SINGH AND OTHERS v. DEBI SARAN SINGH AND OTHERS.**

[XV-79]

(10).—*Improper rejection of evidence.*] Where an appellate Court in trying the main issue which arose between the parties to an appeal before it improperly had rejected an important piece of evidence bearing on that issue and had failed to notice the existence on the record of other evidence directly bearing on that issue, it was held that the issue had really not been tried, inasmuch as the trial of an issue implied the consideration by the Court of all the material evidence bearing on the issue, and that a reference under s. 566 of the Code of Civil Procedure was called for. **YAR ALI v. HASHMAT BIBI AND ANOTHER.**

[XVII-90]

(1) s. 537.—*Return of finding—Power of Court to transfer.*] Where an appellate Court has made an order of reference under section 566 of the Code of Civil Procedure, the return to such order must be made to the same Court and such Court is not competent to transfer the appeal for disposal elsewhere. **UDIT NARAIN SINGH AND ANOTHER v. JHANDA.**

[XIII-108]

(2).—*Time for filing objections.*] Where a case was remanded under s. 566 of the Code of Civil Procedure, and no time was fixed for filing objections under s. 567; held that

CIVIL PROCEDURE CODE, s. 567—
(continued.)

the objections filed before the date on which the case was heard by the appellate Court should have been considered. **KIRAT CHAND AND OTHERS v. MADAN MOHAN DAS.**

[IV-158]

(3).—*Power of Court to receive objections after time—Duty of Court.*] Where a first appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of the findings on these issues, no objections have been preferred under section 567 of the Code of Civil Procedure, the appellate Court, alter the period fixed for presenting objections, may, at its discretion, receive or decline to receive any written objection, but is, in any case, bound to consider the findings of the lower Court on the merits, and is not precluded from hearing arguments for and against the findings at the hearing of the appeal. **Akbari Begam v. Wilayat Ali** (J. L. R. 2 All., 908) followed. The imperative provisions of s. 574 of the Code of Civil Procedure apply alike to cases remanded by the first appellate Court for the trial of issues and to those in which no such remand has taken place. **UMED ALI v. SALIMA BIBI.**

[IV-127]

(4).—*Where a first appellate Court has remanded a case to the Court of first instance for the trial of issues, and where, on the return of findings on these issues, objections under s. 567 of the Code of Civil Procedure have not been filed until after the expiration of the prescribed period, the appellate Court, though not bound to entertain the objection, should nevertheless, upon the hearing of the remand, allow the party filing them to be heard with regard to them.* **Rajan Singh v. Wazir** (J. L. R., 1 All., 165) and **Akbari Begam v. Wilayat Ali** (J. L. R., 2 All., 908) referred to. An appellate Court, because it remands issues, does not therefore, in the absence of subsequent objection by either or both of the parties to the findings when returned, divest itself of its power to exercise its judicial mind as to the propriety of such findings; but, apart from any objection by the parties, it should examine and test them to see whether or not they ought to be accepted. **Akbari Begam v. Wilayat Ali** (J. L. R., 2 All., 908) followed. **Umed Singh v. Salima Bibi** (J. L. R., 3. All., 383) referred to. **MUMTAZ BEGAM v. FATEH HUSAIN.**

[IV-129]

(5).—*Objections—Practice.*] In this suit the plaintiffs' claim was decreed in part. He preferred an appeal, the lower appellate Court remanded the case under s. 566, Civil Procedure Code. The plaintiffs took no objection to the findings of the lower Court on those issues which they could under s. 567 but the

CIVIL PROCEDURE CODE, s. 567—
(continued)

defendants-respondents took, and the lower appellate Court disallowed them and dismissed the appeal. *Held* that the plaintiffs-appellants could not, now in second appeal, take objections to those findings. **MUHAMMAD ABDUL HAI AND ANOTHER v. SHEO BISHAL RAI.**

[VII-234]

(1.) **s. 568—Additional evidence—(Act X of 1877).** *Held* that an appellate Court was not bound to receive in evidence a document which had been withheld in the Court of first instance. **IMRAT KHANUM AND ANOTHER v. MUHAMMAD SARFARAZ KHAN AND OTHERS.**

[II-5]

(2.) ————.] Where a party against whom an *ex parte* order has been passed seeks to get that order set aside he must produce all his evidence in Court in which he applies. The High Court will not in such a case receive fresh evidence in appeal which was not tendered in the Court below. **HARI DAS MUKERJI AND OTHERS v. RADHA KISHEN DAS.**

[X-166]

ss. 568 & 569.—Fresh—Evidence.]

See s. 566 No. (4)

(1) **s. 574—Defective judgments.]** The judgment of the lower appellate Court in this case was as follows:—"There can, I think, be no doubt that the lower Court has rightly decided in favor of the plaintiff-respondent. The pleas put forward in appeal are merely a repetition of the reply to the suit and are satisfactorily disposed of in the lower Court's judgment. Of the two stories, the plaintiff's is by far the most probable, and the evidence in his favor is more trustworthy than that adduced by defendant-appellant. I dismiss the appeal with costs." *Held* that the judgment of the lower appellate Court did not comply with the requirements of s. 574, Civil Procedure Code, and the irregularity was not covered by s. 578 of the Code. The appeal must therefore be decreed and the case remanded for a re-hearing on the merits. **KOLAHAL v. NANKU.**

[VI-285]

(2.) ————.] *Held* that by reason of the lower appellate Court's failure to consider the evidence and decide the pleas in appeal for itself, no judgment, properly so called, was delivered by that Court and there was in fact no judgment before the Court in appeal. **MAHADEO PRASAD v. SARJU PRASAD AND ANOTHER.**

[VI-171]

(3) ————. (Act X of 1877).] The judgment of the lower appellate Court in this case was as follows:—"The suit appears to me to be a bit of wanton litigation. I cannot

CIVIL PROCEDURE CODE, s. 574—
(continued.)

find anything tangible upon which the claim is grounded: the appeal is dismissed with costs." *Held* that it was not a judgment within the meaning of s. 574, Civil Procedure Code, that in such cases the judgment of the Court below should be set aside and the suit remanded under s. 562. **SHEOAMBAR SINGH AND OTHERS v. LALLU SINGH.**

[II-153]

(1) ————.]. The judgment of the lower appellate Court after setting forth the claim, the defence, the nature of the decree of the Munsif and the effect of the pleas in appeal continued as follows:—"The point to be determined is whether or not the decision is consistent with the merits of the case. This Court having considered the evidence in the record and the judgment of the Munsif concurs with the lower Court. The witnesses allege the possession of their respective parties. The disputes in the Revenue Courts afford evidence favourable to the plaintiffs. The finding arrived at by the Munsif is consistent with the evidence; hence the appeal fails." *Held* that the judgment of the appellate Court not being in accordance with s. 574 it was no judgment. **SAHAWAN AND ANOTHER v. BABUNAND.**

[VI-284]

(5) ————. S. 578.] Non-compliance with the provisions of s. 574, Civil Procedure Code, regarding the contents of the judgment of an appellate Court is an irregularity not covered by s. 578. **JAGANNATH AND ANOTHER v. SURAWAN DULAIYA.**

[VIII-61]

SHEOAMBAR SINGH AND OTHERS v. LALLU SINGH.

[II-158]

SAHAWAN AND ANOTHER v. BABUNAND.

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MAHADEO PRASAD v. SARJU PRASAD AND ANOTHER

[VI-171]

HARNANDAN MISR v. SHEO GHULAM MISR.

[IX-178]

MANGRU RAI AND ANOTHER v. BISHUNDIAL RAI.

[IV-99]

CIVIL PROCEDURE CODE, s. 574—
(continued.)

(1) ———— *Applicability of section to judgments of High Court.* Held that s. 574, Civil Procedure Code, was not applicable to judgments of the High Court. **SUNDAR BIBI v. BISUESHAR NATH AND OTHERS.**

[VI-302]

(1.) s. 575.—“*Appeal is heard*”—*Cases to which section does not apply—Letters Patent s. 27.* S. 27 of the Letters Patent for the N.-W. P. has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647 does not apply, and to these s. 27 of the Letters Patent is still applicable. One of the cases to which s. 575 of the Code does not apply is where, a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877) for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a “hearing” of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which, by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless “affirm” the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail. **Appaji Bhivray v. Shiv Lall Khub Chand** (I. L. R., 3 Bom., 204) and **Gossein Sri 108 Gridharaji Maharaj Tickait v. Purushottam Gossami** (I. L. R., 10 Cal., 814) distinguished. Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s. 10 of the Letters Patent, affirmed such judgment, held that, under the circumstances, there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting a review of the Court's decree, under s. 623 of the Code. **HUSAINI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR AND OTHERS.**

[IX-27]

(2.) ———— *Reference—Composition of Bench.* The only Bench which can legally deal with an appeal which has been referred under the provisions of s. 575 of the Code of Civil Procedure is one which includes the Judges who first heard the appeal, and whose difference in opinion on a point of law necessitated the re-

CIVIL PROCEDURE CODE, s. 575—
(continued.)

ference. **Khelut Chunder Ghose v. Tara Churn Koondoo Chowdhry** (6 W. R., 269); **Mahomed Akil v. Asad-un-nissa Bibi** (Wyman's Rep., Vol. V., p. 69) and **Brand v. Hammer Smith and City Railway Company** (36 L. J. Q., B, 137) referred to. The word “judgment” as used in Rule II of the Rules made by the High Court, North-Western Provinces, to regulate references under s. 575 of the Civil Procedure Code, must not be understood in its strict sense, but merely as an expression of opinion containing reasons for a contemplated or proposed judgment. **ROHILKHAND AND KUMAON BANK, LIMITED v. ROW AND ANOTHER.**

[IV-248]

(3) ———— *After delivery of judgment.* Held that an order of reference under s. 575 after delivery of judgment was illegal as the Judges, no sooner they had delivered their judgments, ceased to be possessed of the case. **LAL SINGH v. GHANSHAM SINGH.**

[VII-154]

s. 577.—*Compromise.* Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *sulahnamah* being sent down to the lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured. Held that the High Court was not justified in passing a decree under s. 577 of the Code of Civil Procedure in accordance with the terms of the unverified *sulahnamah*. Where a decree for redemption of mortgage stated that the amount due under the mortgage should be paid within four months, but omitted to state what the result would be if the mortgage debt was not so paid. **BANDHU BHAGAT v. SHAH MUHAMMAD TAQI**

[XII-40]

(1) s. 578.—*Judgment defective under s. 574.* Noncompliance with the provisions of s. 574, Civil Procedure Code, regarding the contents of the judgment of an appellate Court is an irregularity not covered by s. 578. **JAGAN-NATH AND ANOTHER v. SURAWAN DULAIYA.**

[VIII-61]

SHEOAMBAR SINGH AND OTHERS v. LALLU SINGH.

[II-158]

SAHAWAN AND ANOTHER v. BABUNAND.

[VI-284]

KOLAHAL v. NANKU.

[VI-285]

MAHADEO PRASAD v. SARJU PRASAD AND ANOTHER.

[VI-171]

CIVIL PROCEDURE CODE, s. 578—
(continued.)

HARNANDAN MISR *v.* SHEO GHULAM.

[IX-178]

MANGRU RAI AND ANOTHER *v.* BISHUNDIAL RAI.

[IV-99]

(2.)—*Irregular order to amend plaint.*—(Act X of 1877.) One K sued R for damages for the loss of the produce of 3 *bighas* of land in field No. 90; and R sued K for damages for the loss of the produce of 2½ *bighas* of land in field No. 90, and 1 *bigha* 15 *biswas* of land in field No. 374. The Court of first instance dismissed both these suits on the merits. The lower appellate Court remanded the cases in order that the plaints might be amended by the addition of a clause praying for possession of the definite lands on which the crops in dispute had been sown, and the cases be retried. The first Court retried the suits and again dismissed them. The lower appellate Court gave R a decree, and dismissed the suit of A. Held that as the irregularity committed by the lower appellate Court in ordering the plaint to be amended did not affect the merits of the case or the jurisdiction of the Court it was covered by s. 578 of Act X of 1877. *Farzand Ali v. Yusuf Ali* (L. L. R., 2 All., 669) followed. KASHI NATH AND OTHERS *v.* RACHPALI.

[I-121]

(3.)—*Defect in verification.* Where the defect in the verification of plaint is such that it is covered by the provisions of s. 578 of the Code of Civil Procedure there is no necessity for the appellate Court to take any steps to procure the amendment. RAJIT RAM AND OTHERS *v.* KATESAR NATH AND OTHERS.

[XVI-102]

(4.)—*Admission in evidence of unstamped document.*—(Act X of 1877.) AK sued AK, A, AB, B and AR, for an account and for any profits which might be found due to him and also for the recovery of Rs. 2,100 advanced by him to the defendants for the purposes of a certain partnership business. The defendant AK admitted a partnership but only as between himself and the plaintiff. A admitted the receipt of Rs. 600. All the defendants with the exception of AK denied the partnership and with the exception of A they all denied the receipt of Rs. 2,100. The Court of first instance found that there was a partnership between the plaintiff and all the defendants but that no profits had been made. It also found that the Rs. 2,100 were advanced to the defendants and accordingly gave a decree for that sum against all the defendants. Separate appeals were preferred AB, B and A *v.* K, joining in one and A *v.* K and A in the other. The first of these appeals was wholly decreed and the second was partly decreed by reducing the amount to Rs. 1,565. The lower appellate Court admitted an

CIVIL PROCEDURE CODE, s. 578—
(continued.)

entry in the account book of AK as evidence of an acknowledgment of the receipt of Rs. 665 by the plaintiff from AK and A. This entry was not stamped. The plaintiff preferred a single appeal from the two judgments making all the defendants respondents, the grounds upon which he impeached the lower appellate Court's decision being common to all of them. The respondents objected to this mode of procedure and they also contended that the unstamped entry in AK's account-book should not have been received in evidence. Held that as the plaintiff's case against all the defendants was one and the same and the grounds of his appeal identical, the Court in the present case did not feel itself constrained to give effect to the first objection. With regard to the second objection, assuming that a stamp was necessary, the admission in evidence of the entry in account-book was not an error affecting the merits of the case and the Court therefore did not consider itself called upon to entertain such objection. ABDUL RAHIM *v.* ABDUL KADIR AND OTHERS.

[I-115]

(5.)—*Improper admission of secondary evidence.*—(Act X of 1877.) This was a suit under s. 93 (c) of Act XVIII of 1873 to cancel a lease for the breach of its conditions—a copy of the lease and not the original was produced by the plaintiff, the original being with the defendant. The defendant did not deny the existence of the lease, nor raise any objection as to the admissibility of the copy and the first Court tried the suit upon the merits. In appeal also by the plaintiff the defendant did not object to the admission of the copy as evidence, but the lower appellate Court dismissed the appeal on the ground that the original of the lease had not been produced. Held that under the circumstances the lower appellate Court was not justified in summarily throwing out the plaintiff's suit, but should have decided it on the merits. ATA HUSAIN *v.* JAMNA DAS.

[I-9]

(6.)—*Error in the frame and valuation of suit.*—(Act X of 1877.) The plaintiffs in this suit, alleging that they were co-sharers of a certain village: that certain land situate in such village was the property of the co-sharers: and that such land had been improperly sold by the persons occupying it to one of the co-sharers, sued the vendors and the purchaser and the other co-sharers for possession of their share of such land and the setting aside of the sale so far as their share was concerned, and valued the suit according to their share. Held that the error in the frame and valuation of the suit, inasmuch as it did not affect the jurisdiction of the Court in which the suit was instituted or the merits of the case, was not, under s. 578 of the Civil Procedure Code, a ground on which the appellate Court should have reversed the decree of the Court of first instance. *Unnoda*

CIVIL PROCEDURE CODE, s. 578—
(continued.)

Persad Roy v. Erskine (12 B. L. R., 370) distinguished. *PARAM AND OTHERS v. ACHAL*.

[II-36]

(7)——*Allowing wrong party to begin—(Act X of 1877).* Held that it was doubtful having regard to the provisions of s. 578, Civil Procedure Code, whether it was competent for a Court of appeal to reverse the decision of a Court of first instance on the simple ground that it had allowed the wrong party to begin. *MAKAND AND OTHERS v. BAHORI LAL*.

[I-86]

(8)——*Suit based on wrong deed.* One T mortgaged certain property to D and L jointly by an instrument, dated the 17th March, 1869. Rs. 156 of the mortgage money was furnished by D. On the 26th June, 1876, T gave two mortgages on the same property to L alone, which covered the money due on the mortgage of 1869. D alleged that he consented to these subsequent mortgages and attested the instruments on the understanding that L should pay him back Rs. 156 when mutation of names took place. D alleging that the money had not been paid to him, brought this suit against T and L for recovery of the same from L and the mortgaged property. The suit was described in the plaint as based on the mortgage of 1869. Held that D could not sue to enforce the mortgage of 1869 since it was superseded by his own admission by the subsequent deeds. His cause of action is the agreement by which L undertook the payment of the money to him. Held further that with reference to s. 578, Civil Procedure Code, the suit was maintainable though in the plaint it was based on the mortgage of 1869. *DAMMAR SINGH v. LALAK SINGH*.

[III-129]

(1.) s. 582—*Exercise by appellate Court of power conferred by ss. 54 and 55.*

See ss. 54 and 55.

(2.)——*Exercise by appellate Court of power conferred by s. 372.*

See s. 372, No. (2).

3.——*"Plaintiff"—Plaintiff-appellant.* Held by the Full Bench (Mahmood, J., dissenting) that s. 582 of the Civil Procedure Code, does not make the provisions of Chapter XXI relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal, so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be made parties to the appeal; and that, where there has been no such application, the appeal does not abate.

Per PETHERAM, C. J.—The words "so far as may be," in the second clause of the first para-

CIVIL PROCEDURE CODE, s. 582—
(continued.)

graph of s. 582 must be construed as meaning "so far as may be" necessary to carry into effect the remedies contemplated by Chapter XXI.

Per MAHMOOD, J., contra, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of Chapter XXI so as to make them applicable to appeals and the words "appellant" and "respondent" as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that Chapter XXI applies to cases where a plaintiff-respondent has died; and that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates.

Also *Per MAHMOOD J.*, The word "defendant" as used in art. 171 B of the Limitation Act (XV of 1877) must be taken to include a respondent, whether plaintiff or defendant in the suit. *Lakshmibai v. Balkrishna* (1. L. R., 4 Bom., 654); *Rajmonee Dabee v. Chunder Kant Sandel* (1. L. R., 8 Calc., 440); *Bai Faver v. Hathisingh Kesri Singh* (1. L. R., 9 Bom., 56) referred to. *NARAIN DAS AND OTHERS v. LAJJA RAM*.

[V-169]

CHAJMAL DAS AND OTHERS v. JAGDAMBA PRASAD.

[VIII-111]

RAM SARUP v. RAM SAHAI AND ANOTHER.

[VIII-114]

DEBI DIN v. CHUNNA LAL.

[VIII-112]

(4)——*"As nearly as may be"—Substitution of name.* In a suit for declaration of title to, and for possession of, a share in alleged ancestral property with *mesne* profits, the plaintiff obtained a decree in the lower appellate Court from which the defendants appealed to the High Court. Pending the appeal, the plaintiff died childless, and, on her application, his widow was substituted for him as respondent. Subsequently the defendants-appellants applied to the High Court to have the deceased's father brought upon the record as respondent, alleging that he and not the widow was the deceased's legal representative and solely entitled to be placed on the record as such. The father made no objection to the proposed substitution. It was common ground that either the father alone or the widow alone was the deceased respondent's true legal representative. Held by the Full Bench (Mahmood, J., dissenting) that having regard to the words "as nearly as may be" and, "as far as may be" in s. 582 of the

CIVIL PROCEDURE CODE, s. 582—
(continued.)

Civil Procedure Code, ss. 365, 366 and 367 might be applied, at all events analogically, to the case so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought upon the record; that the latter portion of s. 582 did not limit the earlier words of the section so as to make s. 368 the only provision applicable to the case; that a Court of record must have an inherent power to ascertain whether or not it has before it the proper parties to an appeal if the question be substantially raised; and that, therefore, the Court could and should, either before or at the hearing of the appeal, ascertain and determine for the purposes of the prosecution of the appeal the preliminary question whether the father or the widow was the legal representative of the deceased, and should act accordingly. *Held* also by the Full Bench (Mahmood, J., dissenting) that s. 32 of the Code did not apply to the case, and that if it did apply, it would be the duty of the Court to decide whether the father or the widow was the legal representative of the deceased plaintiff-respondent. *Held* by Mahmood, J., *contra* that the effect of s. 582 read with s. 587 was to place the defendants-appellants in the position of plaintiffs and deceased respondent in that of a defendant, for the purposes of array of parties; that consequently the provisions of ss. 363, 364, 365, 366 and 367 had no application; that, applying s. 368 the Court was bound to implead the person named by the defendants-appellants as a respondent to the appeal; that, applying s. 32 the widow occupied a position which gave her a sufficient *prima facie* status to be impleaded as respondent; and that as there existed no authority in the Code allowing the Court to hold an enquiry whether the father or the widow was the true legal representative of the deceased plaintiff-respondent, the Court should bring both upon the record as respondents and proceed to decide the appeal after hearing both. MUHAMMAD HUSAIN AND OTHERS v. DIP CHAND.

[VIII-98]

(1.) s. 583—*Restitution.*

See s. 244, Nos. (51)—(56.)

(2.) ———— *From assignee not party to appeal—Suit.* The holder of a decree of the High Court for costs assigned his rights under that decree. The assignee caused his name to be brought on to the record as transferee in place of the decree-holder, and he, and after him his legal representative, executed the decree against the judgment-debtor. The decree was appealed to the Privy Council but the assignee was not a party to the record in that Court. The Privy Council reversed the decree. Thereupon the successful plaintiff applied under s. 583, Civil Procedure Code, to obtain restitution from the representative of the assignee of the

CIVIL PROCEDURE CODE, s. 583—
(continued.)

amount realized in execution of the decree of the High Court. *Held* that, whether or no the amount realized by the assignee was recoverable by suit, it was not recoverable by proceedings under s. 583, Civil Procedure Code, inasmuch as the assignee was no party to the decree of the Privy Council. BHAGWATI PRASAD v. JAMNA PRASAD.

[XVII-6]

(3.) ———— *Interest—Preemption.* *Held* that appellants in the Privy Council who had, antecedently to filing their appeal to Her Majesty in Council, paid to the assignee of the decree appealed against, which was for costs only, the amount then payable under that decree, could not on succeeding in their appeal, obtain restitution, merely by virtue of and in execution of the order of Her Majesty in Council, of the amount so paid, from the assignee when that assignee had been no party to the appeal to Her Majesty in Council. *Bhagwati Prasad v. Jamna Prasad* (I.L.R., 19 All., 136) referred to. SADIQ HUSEN v. LALTA PRASAD AND ANOTHER

[XVII-222]

(4.) ———— *Interest—Preemption.* A pre-emptor paid into Court the amount decreed as the condition of pre-emption and it was drawn out by the vendee. Subsequently the decree was modified on appeal, the price being reduced by the appellate Court. At a date slightly under three years from the date of the appellate decree, the pre-emptor demanded from the vendee a refund of the amount drawn by him in excess of the sum decreed on appeal, and, being met with a refusal, sued for recovery of the refund. *Held* that the lower appellate Court in decreeing the claim was wrong in allowing interest on the amount claimed for a period between the date of the appellate decree and the date of the plaintiff's demand for the refund and the defendant's refusal to pay it, there having been no express or implied contract for interest, but that the defendant was liable to pay damages by way of interest for the improper retention of the plaintiff's money from the date of his refusal to refund it. HATTI PRASAD v. CHATARPAL DUBEY AND ANOTHER.

[VIII-287]

(5.) ———— A plaintiff in a pre-emption suit obtained a decree and paid into Court the pre-emptive price as stated in that decree, and the money was drawn out of Court by the vendor. Subsequently the decree was reversed on appeal, and the plaintiff then applied under s. 583 of the Code of Civil Procedure for a refund of the money paid into Court as above described with interest. *Held*, that the pre-emptor was entitled to a refund of the money together with interest up to date of repayment. *Rogers v. The Comptoir D'Es-compte de Paris* (L.R., 3 I. A., 475) followed.

CIVIL PROCEDURE CODE, s. 583—
(continued.)

Jaswant Singh v. Dip Singh (Weekly Notes, 1885, p. 67) referred to. *Hatti Prasad v. Chattarpal Dubey* (Weekly Notes, 1888, p. 287) dissented from. BHAGWAN SINGH AND OTHERS v. UMMAT-UL HASNAIN AND OTHERS.

[XVI-42]

(6) —————.] A successful appellant in an appeal to the High Court applied, in execution of his decree, for a refund of a sum of money which he had paid to the respondent, by way of costs with interest thereon in execution of the lower Court's decree. He further applied for interest on the refund claimed, at the rate of Rs. 6 per cent per annum. The respondent objected to paying interest on the refund. Held that the appellant was entitled to the interest claimed on the refund of costs. *Forester v. The Secretary of State for India in Council* (L. L. R., 3 Cal., 161) referred to. RAM SAHAI AND OTHERS v. THE BANK OF BENGAL.

[VI-87]

(7) —————.] No interest is allowable on money the restitution of which is claimed under s. 583, Civil Procedure Code. MEWA KUAR v. BANARSI PRASAD.

[XVII-76]

(8) ————— *Mesne profits.* ————] G obtained a decree against R for possession of a house and in execution thereof obtained possession. On appeal, the decree was set aside by the High Court whose decree did not direct that the appellant should be restored to possession and was silent as to mesne profits. Held that with reference to s. 583 of the Code of Civil Procedure, R was entitled to recover possession of the property in execution of the High Court's decree, but that, with reference to the decision of the Full Bench of the Court in *Ram Ghulam v. Dwarka Rai* (L. L. R., 7 All., p. 170) he could not in execution of that decree recover mesne profits. GANNU LAL v. RAM SAHAI.

[IV-332]

(1) s. 584.—*Summary rejection of appeals.*]

See. s. 551 No. (2).

(2) ————— *Grounds for second appeal—Judgment defective under s. 574.* ————] In this case the following grounds were held sufficient for interference in second appeal. That the Court below had not considered the various points in regard to the merits of the case, that its judgment fell short of adequate compliance with the provisions of s. 574, Civil Procedure Code, and that it was greatly influenced by an erroneous view of the Mahomedan law in arriving at conclusion on the merits of the case. MUHAM-

CIVIL PROCEDURE CODE, s 584—
(continued.)

MAD ZIA-UL-HAQ AND ANOTHER v. BASANTA AND OTHERS.

[II-147]

(3) ————— *That Court below has overlooked evidence—(Act X of 1877).* ————] The Court holding that the procedure of the lower appellate Court, in overlooking so much of the evidence on the record, had been defective, and might have occasioned error in the determination of the case on the merits, remanded the case under s. 566 of Act X of 1877. MAHESH SINGH v. MASRI SINGH AND OTHERS.

[I-12]

(4) ————— *"Substantial error in procedure."* ————] In a suit for sale on a mortgage the defendant pleaded that he had purchased the property in suit and had paid off liens prior to that of the plaintiff, but without particularizing what these liens were. The Court of first instance did not try the issue raised by this plea, and disposed of the suit on another ground. On appeal the lower appellate Court merely held that the appellant's evidence in support of the plea above stated was insufficient without corroboration, and that the bonds produced by him and alleged to have been paid afforded no corroboration. That Court, however, decided the appeal on the finding that the view taken by the first Court on another point disposed of the case, which in reality it did not. On appeal to the high Court it was held that there was a substantial error in the procedure of the lower appellate Court which had probably produced a defect in the decision of that Court within the meaning of s. 584 of the Code of Civil Procedure. SHEO DIHAL SINGH v. JAI MANGAL SINGH.

[XVI-104]

(5) ————— *Finding of fact—Finality.* ————] Held that a finding of fact cannot be disturbed in second appeal. KISHEN DAT PANDEY AND OTHERS v. PERMESHURI PRASAD AND OTHERS.

[V-173]

(6) —————.] A Court of second appeal is bound to accept the findings of fact arrived at by the lower appellate Court, provided that there is any evidence to support such findings. *Nivath Singh v. Bhikki Singh* (L. L. R., 7 All., p. 649) dissented from, on the authority of *Durga Choudhrai v. Jawahir Singh Choudhri*, decided by the Privy Council on the 25th April, 1890. MEWA BHAGAT AND OTHERS v. GOPAL DAS AND OTHERS.

[X-196]

KARAMAT-UL-LAH AND ANOTHER v. BADAR-UD-DIN AND ANOTHER.

[VI-161]

(7) —————.] The only question in this case was whether a prior

CIVIL PROCEDURE CODE, s. 584—
(continued.)

mortgage had been superseded by a subsequent mortgage given by the mortgagor to the prior mortgagee. It was contended in this second appeal that there was no finding by the Court that the previous mortgage had not been superseded by the subsequent. *Held* that the Court below had found in plain and specific terms that there was no such new contract superseding the old contract and that this was a finding of fact which settled the question. *Pahlwan Singh v. Sardar Singh* (W. N., 1882, p. 167); *Harsahai Mal v. Makund Ram* (W. N., 1883, p. 198); *Khub Chand v. Kalian Das* (I. L. R., 1 All., 240); *Muhammad Ibrahim v. Dirja* (W. N., 1882, p. 118) and *Goluk Nath Misr v. Lalla Prem Lal* (I. L. R., 3 Cal., 307) referred to. *RAMZAN ALI v. JAGAT SINGH*.

[VI-18

(5.) ———— *Finding based on surmises and assumptions.* *Held* that where a Judge indulges in surmises and assumptions, and peremptorily dismisses direct and positive evidence of execution of a document, and the payment of consideration, he bases his judgment upon mere speculation and makes it open to second appeal. *BEHARI LAL v. BIRJAL DAS*.

[II-6

(9.) ———— *Finding based on unreasonable and strained conclusions.* *Held* that it was a good ground for second appeal that the lower appellate Court had drawn unreasonable and strained conclusions from the facts; all of which conclusively pointed in a direction exactly opposite to its decision. *RAJRANI KUARI AND ANOTHER v. MANNI SAHU*.

[II-86

(10.) ———— *Finding based on conjecture.* *Held* by the Full Bench (Petheram, C. J., dissenting) that, under s. 584 (c) of the Civil Procedure Code, it is competent for the High Court to entertain pleas in second appeals which impeach the findings of fact recorded by the lower appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Where a lower appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has stated no intelligible reasons for arriving at its findings of facts, the High Court may take notice of all such matters in second appeal. *Futtehma Begam v. Mohamed Ausur* (I. L. R., 9 Cal., 309); *Assanullah v. Hafiz Mahomed Ali* (I. L. R., 10 Cal., 932) and *Lal Mahomed Bepari v. Shaila Bewa* (11 Cal., L. R., 104) referred to.

Per PETHERAM, C. J.—The High Court is not at liberty in second appeal to look into the evi-

CIVIL PROCEDURE CODE, s. 584 —
(continued.)

dence in the cause for the purpose of ascertaining whether the lower Courts have found the facts correctly, inasmuch as no question of fact is included in the grounds of appeal allowed by s. 584 of the Civil Procedure Code, and it would seem that the intention of the Legislature was that in Small Causes the findings of the lower Courts on questions of fact should be absolutely final. By "specified law" in clause (a) of s. 584 is meant the statute law, and by "usage having the force of law" the common or customary law of the country or community, and the clause is confined to cases in which the lower appellate Courts have either misconstrued a statute or written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties. Clause (b) can only refer to mistakes in law, and does not extend the operation of clause (a). The term "procedure" in clause (c) means the practice followed by the Courts in the trial of cases, and can not be construed as including the mental process by which a Court comes to a conclusion upon a question of fact.

Per MAHMOOD, J.—That the Legislature, by framing s. 574 of the Civil Procedure Code intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal; and a judgment of a Court of first appeal which falls short of due compliance with the various clauses of s. 574 is essentially defective, and may properly be made the subject of complaint in second appeal under s. 584. *Ramnarian v. Bhawanidin* (W. N., 1882, p. 103) and *Sheoambar Singh v. Lalla Singh* (W. N., 1882, p. 158) referred to. The word "procedure" in clause (c) of s. 584 must be understood in its most generic sense, including all the rules contained in the Civil Procedure Code or any other law regulating the investigation of cases by the Civil Courts. When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, when the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence or are arrived at under a misconception either of the rules of evidence or of any

CIVIL PROCEDURE CODE, s. 584—
(continued.)

other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower appellate Court open to second appeal under cl. (c) of s. 584, so long as the error was substantial enough to have possibly affected the justice of the case upon the merits. *NIVATH SINGH v. BHIKKI SINGH*.

[V-15]

(11)——Practice—Question not raised in Court below—(Act X of 1877.) The plaintiff in this suit claimed for two declarations, namely, (a) That the two documents in dispute were fraudulently and collusively executed. (b) That one of them, described as a deed of conditional sale, was not an instrument of that character, but was a mere bond for the payment of money by instalments. The first Court framed two issues accordingly, and finding the first in favor, and the second against the plaintiff, gave the plaintiff a decree declaring the said deeds to be null and void. The defendants appealed but the plaintiffs took no objection as to that part of the decision which was against them. The lower appellate Court found the deeds to be genuine and accordingly reversed the decree of the first Court. The finding of the first Court in regard to the character of the conditional sale was not questioned by either party. Held that the plaintiff not having raised the question before the lower appellate Court he could not complain in second appeal that the lower appellate Court failed to consider whether under the deed in question supposing it to be genuine the defendants had a right of foreclosure. *GUMAN SINGH v. BUJHAWAN SINGH AND OTHERS*.

[I-88

(12)——Second appeal—As to costs.] An appeal as to costs will lie from an appellate decree when the Court has exercised its discretion as to costs arbitrarily, and not according to general principles. *Khooda Buksh v. Elahsee Buksh* (S. D. A., N. W. P., 1861, p. 235) and *Assa Ram v. Kashmeeree Dass* (N.-W. P. H. C. Rep., 1867, (F. B. 90) followed. *DAULAT RAM AND OTHERS v. DURGA PRASAD AND OTHERS*.

[XIII-110

(13)——Appeal from decree set aside on review.] On the 14th May, 1888, a second appeal was presented to the High Court and on the 15th May, it was admitted, from a decree passed on the 17th March. On the 12th April, the plaintiff-respondent applied to the lower Court for review of judgment under s. 623 of the Code of Civil Procedure and in June, 1888, the review was granted, and a fresh decree passed. On the appeal to the High Court coming on for hearing, Held that there was no decree existing, the subject of appeal, and that the

CIVIL PROCEDURE CODE, s. 584—
(continued.)

appeal must therefore be dismissed. *KUAR SEN v. GANGA RAM*.

[X-144

(14)——Second appeal from ex-parte decree.] Held by the Full Bench (Straight Officiating C. J., and Tyrrell, J., expressing no opinion) that a respondent in whose absence the appeal has been heard ex-parte, and against whom judgment has been given, may prefer a second appeal from the decree, under the provisions of s. 584 of the Civil Procedure Code, and his remedy is not limited to an application under s. 560 to the Court which passed the decree to re-hear the appeal. *Ramjas v. Baijnath* (I. L. R., 2 All., 567); approved.

Per OLDFIELD, J.—There is a distinction between the case of a defendant in a Court of first instance and that of a respondent in an appellate Court not appearing, with reference to ss. 108 and 560 of the Code. *Lal Singh v. Kunjan* (I. L. R., 4 All., 387) and *Ramshet Bachaset v. Balkishna Ababhat* (6 Bom., H. C. Rep. 161) referred to.

Per MAHMOOD, J.—The distinction is one of detail merely and not of principle. *Lal Singh v. Kunjan* (I. L. R., 4 All., 387) dissented from, *Zain-ul-ab-din Khan v. Ahmad Raza Khan* (I. L. R., 2 All., 67); *Jamaitunnissa v. Lutfunnissa* (I. L. R., 7 All., 606); *Ashruf-un-nissa v. Lehareaux* (I. L. R., 8 Cal., 272); *Luckmidas Vithal Das v. Ebrahim Oosman* (I. L. R., 2 Bom., 644); *Anantharama v. Madhava Paniker* (I. L. R., 3 Mad., 264) and *Modalatha's case* (I. L. R., 2 Mad., 75) referred to.

Also per MAHMOOD, J.—Where two procedures or two remedies are provided by statute, one of them must not be taken as operating in derogation of the other. *FATEH LAL AND OTHERS v. BALMUKAND AND OTHERS*.

[VI-110

(15)——Appeal where amendment of decree proper remedy.] The respondent sued the appellants to redeem the mortgage of a house. The lower appellate Court, in giving the respondent a decree, decided that certain additions to the mortgaged property made by the appellants must be demolished, but the appellants were entitled to take away the materials. The decree of the lower appellate Court was, however, silent on this point. On appeal by the appellants to the High Court one of the grounds of appeal was that that decree was defective as it contained no provision for the removal of such materials. Held that properly speaking an amendment of the decree should have been applied for, but the plea might be entertained although this had not been done. The decree of the lower appellate Court must be supplemented by declaring the appellants entitled to remove the materials when the building was demolished. *BANSI AND OTHERS v. HIRA LAL*.

[I-60

CIVIL PROCEDURE CODE.

(1.) s. 536—*Small Cause Court suit—Suit for damages.* C, a decree-holder, alleging that K, a *lambardar* of a village, had objected to the attachment, in his hands of money due as profits to the judgment-debtor, a co-sharer, on the ground that he had paid such money to the judgment-debtor, before the attachment, by reason whereof the attachment had been removed; and that such objection was dishonest and wrongful, inasmuch as such money was still in K's hands, sued K for the amount of such money and the costs of the attachment proceedings. *Held* that the suit was one for damages, and, the amount claimed not exceeding Rs. 500, one of the nature cognizable in a Court of Small Causes, and consequently a second appeal in the suit would not lie. **KALIAN SINGH v. CHUNNI LAL AND ANOTHER.**

[III-172]

(2.)—*Suit for mesne profits—Suit against mortgagee for account.* In a suit brought by the mortgagor for redemption of the mortgaged property the plaintiff obtained a decree and was put in possession. He subsequently brought this suit to recover from the defendant Rs. 407-2-1 as profits alleged to have accrued during the period between the date of the decree and the date upon which plaintiff obtained possession. *Held* that the suit was not for mesne profits (as the lower Courts have held) but a suit by a mortgagor against a mortgagee, who was rightfully in possession, for an account of the profits and consequently a second appeal would lie. **THE COLLECTOR OF SHAJAHANPORE v. MEHTAB KUNWAR.**

[V-174]

(3.)—*Suit for money wrongly taken out of Court.* *Held* that a suit for the refund of money wrongly taken out of Court by the defendant, and belonging to the plaintiff was in the nature of a suit cognizable by a Court of Small Causes and consequently not liable to second appeal. **Jagjivan Jauher Das v. Gulam Jelani Chaudhri (I. L. R., 8 Bom., 17) referred to. RAM PRASAD SINGH v. NAND KISHORE.**

[VII-213]

(4.)—*Suit to recover from decree-holder money paid as price of property sold.* *Held* that a suit to recover from a decree-holder money paid as the price of the property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 536 of the Code of Civil Procedure. **MAKUND RAM v. BODH KISHEN.**

[XVII-198]

CIVIL PROCEDURE CODE, s. 536—
(continued.)

(5.)—*Suit against ex-proprietary tenant for damages for use of land—(Act X of 1877).* Certain *sir* land belonging to the appellants was assigned on partition to the respondent. After partition the appellants continued to cultivate such land. This they did for a certain period without their rent having been fixed. In the present suit the respondent claimed from them Rs. 189 as compensation for their use and occupation of such land for such period. *Held* that the suit was of the nature cognizable in a Court of Small Causes, and that therefore no second appeal would lie. **RAM PRASAD AND OTHERS v. DINA KUAR.**

[I-160]

(6.)—*Applicability of section to appeals arising out of execution proceedings.* Where the original suit is a suit of the nature cognizable in Courts of Small Causes, no second appeal will lie in respect of an order made in execution proceedings relating thereto, whether such proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. **NAZAR HUSAIN v. Kesri Mal (W. N., 1890, p. 203) approved. SRI HARAKH v. RAM SARUP.**

[X-296]

BHAGWANTI PRASAD v. THE COLLECTOR OF BASTI.

[V-269]

See also

NAZAR HUSAIN v. KESRI MAL.

[X-203]

(7.)—*Held* that no second appeal lies from orders passed in first appeals in execution of a decree in Small Cause Court suits instituted before Act XLIII of 1860 came into force, and the order in execution being subsequent in date to Act XXIII of 1861. **BHAGWATI PRASAD v. THE COLLECTOR OF BASTI, MANAGER OF THE ESTATE OF SUMMERAT LAL AND OTHERS.**

[VI-181]

(8.)—*Where the original suit is a suit of the nature cognizable in Courts of Small Causes, and the subject matter of the suit does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relative thereto.* **Harakh v. Ram Sarup (I. L. R., 12 All., 579) approved. Sri Pundit Bhattacharya v. Bhubram Chatteropadhyaya (I. L. R., 11 Cal., 169) and Aithala v. Subbanna (I. L. R., 12 Mad., 116) referred to. DIN DAYAL v. PATRA KHAN.**

[XVI-180]

(9.)—*Nature of suit and not of appeal determines jurisdiction.* For the purpose of determining whether a second appeal lies or is prohibited by s. 536, Civil Procedure Code,

CIVIL PROCEDURE CODE, 1908—
(continued.)

what must be looked at is not the shape in which the case comes up to the High Court but the shape in which the suit was originally instituted in the Court of first instance. **KIAMUD-DIN AND ANOTHER v. RAJJO AND ANOTHER.**

[VIII-280]

(10.) ————. For the purposes of determining the venue of an appeal, whether from a decree in a regular suit or from an order passed in execution of such decree, the pecuniary test of jurisdiction is the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. Therefore where execution was applied for in the Munsif's Court in respect of a sum of Rs. 422-14, the value of the matter in dispute in the original suit having been above Rs. 500, and the Munsif's order having been upheld in appeal by the District Judge, revision of both orders was applied for in the High Court. *Held* that no proceedings by way of revision could be taken because a second appeal would lie from the order of the District Judge. **NAZAR HUSAIN v. KESRI MAL.**

[X-208]

(1.) s. 588 (2)—*Order making defendant plaintiff.* Where a Court having of its own motion added certain persons as defendants to a suit subsequently transferred the names of such parties from the array of defendants to the array of plaintiffs, it was *held* that the last mentioned order transferring the names was appealable. **ACHAMBIT RAI v. HANS RAJ RAI AND ANOTHER.**

[XVI-101]

(2.) ———— (6)—*Order directing lower Court to return plaint for presentation to proper Court—(Act X of 1877.)* The lower appellate Court (Subordinate Judge) decided on appeal by the defendant from the decree of the Court of first instance (Munsif) that the Court of first instance had no jurisdiction to entertain the suit, as the value of the subject matter of the suit exceeded the pecuniary limits of its jurisdiction; and ordered that the appellant's appeal be decreed, the decision of the Munsif be reversed and the record of the case be sent to the Munsif to return the plaint to the plaintiff for presentation to the proper Court. The plaintiff appealed to the High Court from such order as an order returning a plaint to be presented to the proper Court. *Held* that such order could not be regarded as one to which art. (6) of s. 588 of Act X of 1877 was applicable. That relates to orders returning plaints for amendment or to be presented to the proper Court passed by a Court of first instance and not to an order by an appellate Court upon an appeal to it from the decree of a Court of first instance on general grounds. The plaintiff's

CIVIL PROCEDURE CODE, s. 588—
(continued.)

proper course was to have preferred a second appeal. **BINDESI AND ANOTHER v. NANDU.**

[I-12]

CHATTAR LAL v. HAR LAL AND OTHERS.

[III-165]

(3.) ———— *Order returning memorandum of appeal.* An order returning a memorandum of appeal for presentation to the proper Court on the ground that the Court to which it was presented had no jurisdiction to entertain the appeal is not an order coming within the scope of s. 588 of the Code of Civil Procedure and no appeal will lie therefrom. **MAHABIR SINGH AND ANOTHER v. BEHARI LAL AND OTHERS.**

[XI-96]

(4.) ———— (16).—*Order disallowing objection to confirmation of sale—(Act X of 1877.)* *Held* that an appeal lies from an order disallowing the judgment-debtor's objection to the confirmation of the auction sale. **HIRA SINGH v. UMRAO SINGH.**

[II-45]

(5.) ———— (17).—*Order in insolvency matter.* A Muhammadan died, leaving a widow and several sons. On the 12th June, 1880, **W H**, one of the sons, borrowed Rs. 16,000 from one **K S** mortgaging his share in his father's estate. On the 30th August, 1884, he again borrowed from **K S** a sum of Rs. 3,000 upon the same security. On the 4th April, 1881, the widow of the deceased sued **W H** for dower-debt and obtained a decree for one lac of rupees on the 30th April, 1881. On the 23rd April, 1881, **K S** sued on his two bonds and obtained a decree for Rs. 21,117 beside costs on the 4th May, 1881. These decrees were passed after **W H** applied to be declared an insolvent, but before he was declared one. **W H**'s share in his father's estate having been sold in execution of **K S**'s decree, the proceeds were paid to the Receiver. On the distribution of the assets the question arose whether the widow's or **K S**'s claim should be first satisfied. The District Judge decided in favour of **K S** and made an order accordingly. *Held*, on appeal by the widow, that no appeal lay to the High Court under s. 588 (17). **ALLAHDAI v. KISHEN SAHAI.**

[III-255]

(6.) ———— (28).—*Remand—Appeal.* Where a lower appellate Court instead of remanding a suit under s. 566 of the Code of Civil Procedure, erroneously remands it under s. 562, and the party aggrieved by its order appeals to the High Court, under clause (28) s. 588, the High Court cannot deal with the case as if it were a first appeal from a decree. All that the High Court can do is to rectify the procedure of the lower appellate Court, and to direct

CIVIL PROCEDURE CODE, s. 588—
(continued.)

that Court to decide the case on the merits. *Badam v. Murat* (I. L. R., 3 All., 675) distinguished. *Ram Narain v. Bhawanidin*. (W. N., 1882, p. 104); and *Sheoamber Singh v. Lallu Singh* (W. N. 1882, p. 158) referred to. *SOHAN LAL v. AZEEZ-UN-NISSA BEGAM AND OTHERS.*

[IV-294]

(7).—*Questions to be determined—(Act X of 1877).* An appeal from an order on appeal remanding a suit for retrial is not to be confined to the question whether the remand has been made contrary to the provisions of s. 562 of Act X of 1877 or not, but the question whether the decision of the appellate Court on the preliminary point is correct or not may also be raised and determined in such an appeal. *BADAM v. IMRAT AND ANOTHER.*

[I-48]

(8).—*Competence of High Court.* It is competent to the High Court in an appeal from an order of remand under s. 562 of the Code of Civil Procedure to pass a decree dismissing the appeal preferred to the lower Court from the decree in the suit. *Bhanu Bala v. Bahaji Babuji* (I. L. R., 14 Bom., 14) and *Abraham Khan v. Faiz-un-nissa* (I. L. R., 17 Cal., 168) referred to. *HASAN ALI v. SIRAJ HUSAIN AND OTHERS.*

[XIV-84]

(9).—*Finality of orders passed under section.* Held that an order passed on appeal from an order, rejecting an application to set aside an *ex-parte* decree setting aside the lower Court's order, was final from which no appeal lay to the High Court. *PACHU v. JAIKISHEN.*

[IV-322]

(10).—*Co-defendant.* In this suit one B was added as a co-defendant by the first Court. The plaintiff appealed from this order to the District Judge who, hearing the appeal as one under s. 588, cl. (2), cancelled the lower Court's order. The original defendant then appealed to the High Court. Held that no such appeal lay. The defendant's remedy was by revision. *R. H. SKINNER v. C. W. KINLOCH.*

[VI-138]

(11).—*Finding of fact—Finality.* In an appeal from an order of an appellate Court the High Court is bound to accept as in a second appeal from a decree the findings of fact arrived at by the lower appellate Court. *Gauri Shankar v. Karima Bibi* (I. L. R., 15 All., 413) approved. *TIKA RAM AND ANOTHER v. SHAMA CHARAN.*

[XVII-195]

(1.) s. 591.—*Questioning under section of appealable orders.* An order made under the

CIVIL PROCEDURE CODE, s. 591—
(continued.)

Code of Civil Procedure from which an appeal is given under s. 588 of that Code may be questioned under s. 591 in an appeal from the decree in the suit if the ground of objection is stated in the memorandum appeal. So held by the Full Bench following *Rameshwar Singh v. Sheodin Singh* (I. L. R., 12 All., 510); *Satyid Mazhar Hossan v. Mussammul Bodha Bibi* (I. L. R., 17 All., 112) distinguished. S. 591 of the Code of Civil Procedure does not enable an appellant to avoid limitation by coming up under s. 591 when the only ground of appeal is an order made under s. 562. S. 591 contemplates two things—there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under s. 591. *SUREO NATH SINGH v. RAM DIN SINGH AND OTHERS.*

[XV-134]

(2).—*Legality of order of remand.* Held that the question of the legality of an order of remand, being a question of jurisdiction, was one which could be raised in second appeal from the decree in the suit, notwithstanding that an appeal from the order itself was provided by cl. (28) of s. 588 of the Civil Procedure Code. *RAMESHWAR SINGH AND ANOTHER v. SHEODIN SINGH AND ANOTHER.*

[X-188]

(3).—*Validity of illegal order of remand.* Held that the validity of an illegal order of remand under s. 562, Civil Procedure Code, could be questioned in second appeal from the decree even though the plea of its illegality was not taken in the memorandum of appeal. *Rameshwar Singh v. Sheodin Singh* (I. L. R., 12 All., 510) followed. *MAHGU KUAR AND OTHERS v. FAUJ-DAR KUAR.*

[XI-105]

(4).—*Substitution of legal representative.* One A brought a suit against B, and got a decree. In appeal A died, and on B's application H was brought on the record as the representative of the deceased respondent. K applied to be substituted for H claiming to be the legal representative of the deceased. The Judge made him also a representative. Held that the judge was wrong in proceeding thus. He ought to have proceeded under s. 367. Held also that the Court was competent under s. 591 to correct this irregularity. *HAR NARAIN SINGH v. KHARAG SINGH AND ANOTHER.*

[VII-89]

(5).—*Objection not set forth in memorandum.* An appellant can not be heard in support of an objection to an order in the case affecting the decision unless such objection is set forth in his memorandum of appeal. *TILAK RAI SINGH AND ANOTHER v. CHAKARDHARI SINGH AND ANOTHER.*

[XIII-14]

CIVIL PROCEDURE CODE,—

s. 592.—*Power to reject appeal summarily.*] A Court to which an application for leave to appeal *in forma pauperis* is presented is under certain circumstances empowered to reject that application summarily; but he is not under similar conditions empowered to reject the appeal itself. It is the duty of a Court to which an application for leave to appeal as a pauper is presented to consider for itself the judgment and decree against which it is sought to appeal and not merely to accept and reiterate the reasons given by the lower Court. IN THE MATTER OF THE PETITION OF INAYET BEG.

[XV-34]

(1). s. 595.—*Appeal to Her Majesty—Order cancelling notification declaring applicant a qualified vakil.*] The petitioner had been through a mistake declared qualified for admission as a vakil of the High Court and in consequence so much of the notification was cancelled by a subsequent notification. He then applied to the High Court, but his petition was rejected. The present application was made with reference to the above order under Chapter XLV of the Code of Civil Procedure (Appeal to Her Majesty in Council). *Held* that the chapter was inapplicable to such orders. SUKHNANDAN LAL, PETITION OF.

[IV-15]

(2).—*Final decree—(Act X of 1877.)* This was an application "for leave to appeal to Her Majesty in Council from the decree of the High Court." *Held* that the order of the Court appealed against virtually dismissed the appeal on the ground that no appeal lay from the order of the Subordinate Judge, which erroneously styled an application, to have judgment and decree passed upon an award that had been filed, as being one for review. No final decree had consequently been as yet passed on the arbitration proceedings by the Court. TULSI RAM AND OTHERS v. GANESH AND ANOTHER.

[II-30]

(3).—*(Act X of 1877.)* An order passed on appeal by a High Court determining a question mentioned in s. 244 of Act X of 1877 is a final "decree" within the meaning of s. 595 of that Act. *Held* therefore, where such an order involved a claim or question relating to property of the value of upwards of ten thousand rupees, and reversed the decisions of the lower Courts, that notwithstanding the value of the subject-matter of the suit in which the decree was made in the Court of first instance was less than that amount, such order was appealable to Her Majesty in Council. IN THE MATTER OF THE PETITION OF RAM KIRPAL V. RUP KUAR.

[I-32]

(1). s. 596.—*"Substantial question of law."* The representative of a decree-holder applied

CIVIL PROCEDURE CODE, s. 596—

(continued.)

for execution of the decree without producing before the Court a certificate of succession as required by Act No. VII of 1889, s. 4. The Court to which the application was made granted execution. The judgment-debtor appealed to the High Court, by which the order of lower Court was sustained upon production before it (the High Court) of the necessary certificate of succession. *Held* that an objection that the said application for execution was improperly granted by reason of the non-production of the succession certificate did not raise a "substantial question of law" within the meaning of s. 596 of the Code of Civil Procedure so as to warrant the High Court in granting leave to appeal to Her Majesty in Council. SHUJA ALI KHAN v. RAM KUAR.

[XVII-220]

(2).—"Involve directly or indirectly." In an application for leave to appeal to Her Majesty in Council the value of the property ostensibly affected by the decree sought to be appealed was below Rs. 10,000, but it appeared that the suit in appeal in which the said decree had been passed was connected with another suit relating to the same property in which a decree had been passed which was the subject of another similar application, and that the aggregate value of the two decrees was much above Rs. 10,000, and that it could not be known which of such decrees could affect which specific portion of the property in question. *Held* that under the above circumstances the application under consideration should be granted under the last paragraph of s. 596 of the Code of Civil Procedure. IN THE MATTER OF THE PETITION OF KHWAJA MUHAMMAD YUSUF.

[XVI-39]

(3).—*Decree affirming decision of Court below.* *Held* that a decree of the High Court dismissing an appeal for want of prosecution, the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing, was a decree affirming the decision of the Court immediately below within the meaning of s. 596 of the Code of Civil Procedure. BENI RAI AND OTHERS v. RAM LAKHAN RAI AND ANOTHER.

[XVIII-77]

(1) s. 602.—*Time for giving security—Extension.*] The time allowed by s. 602 of the Code of Civil Procedure for giving the security and making the deposit required by that section may be extended. FAZULUNNISSA BEGAM v. MULO AND ANOTHER.

[IV-71]

(2).—*Security given after time—(Act X of 1877.)* Certain persons, desirous of appealing to Her Majesty in Council from a decree of the High Court, applied for and obtained the certificate required by s. 600 of Act X of 1877.

CIVIL PROCEDURE CODE, s. 602—
(continued.)

Two days after the time allowed by s. 602 they applied to the High Court for leave to deposit certain bonds giving security for the payment of the costs of the respondents, and to deposit the amount required to defray the expenses of translation &c. *Held* that, looking at the terms of s. 602 of Act X of 1877, and following the undeviating practice of the Court, the application, being two days beyond time, must be refused. **NARAIN SINGH AND OTHERS v. RUSTAM KHAN AND OTHERS.**

[I-76]

DEOTADIN v. GAYADIN.

[II-55]

(3)—*Security—Appeal.* Where the High Court admits an appeal to Her Majesty in Council and directs the District Court to consider the sufficiency of the security tendered by the appellant for the costs of the respondent, no appeal lies to the High Court from the decision of the District Court accepting the security as sufficient. **RAM KUAR v. HAR NARAIN SINGH.**

[X-75]

(1) s. 608.—*Stay of execution.* Under s. 608 of the Code of Civil Procedure the High Court has no power to stay execution of a decree in respect of which leave to appeal to Her Majesty in Council has been asked for, and a certificate granted to the petitioner, but the appeal has not yet been admitted.

Per MAHMOOD, J.—An order for stay of execution could not be passed under s. 608 even though at that time the appeal had been admitted, if at the time when the application for stay was made it had not been admitted. **KUMAR LAL v. RANI.**

[X-92]

(1). s. 610.—*Interest on costs.* In the execution of a decree of the Privy Council the High Court allowed interest at 6 *per cent* from the date of the order in Council on the costs incurred in British India by the successful appellant. **Nilmadhob Das v. Bissumbhur Das** (21 W. R. 411) referred to. **A. B. MILLER v. MADHO DAS.**

[XVII-70]

(2)———*Rate of exchange.* Under the last paragraph of s. 610 of the Civil Procedure Code the amount payable must be estimated at the rate of exchange "for the time being fixed by the Secretary of State for India in Council" and the words "for the time being" mean the year in which the amount is realized or paid or execution taken out, and not the year in which the decree was passed. The decree-holders under a decree passed by Her Majesty in Council having taken out execution for a sum of £119-11 s. under s. 610 of the Civil Procedure Code. *Held* that the rate of exchange being fixed yearly by the Secretary of State for India in Council, the rate of exchange on the date of the application

CIVIL PROCEDURE CODE, s. 610—
(continued.)

for execution was the proper rate of exchange the decree-holders were entitled to. **PARAM SUKH AND OTHERS v. RAM DAYAL.**

[VI-249]

NANHU MAL v. BENI RAM AND ANOTHER.

[VII-60]

(1) s. 617.—*Reference—"The decree is final."* A Munsif being of opinion that he had no jurisdiction to entertain a particular suit made an order returning the plaint for presentation to the proper Court. An appeal was preferred under s. 588 of the Civil Procedure Code, to the District Judge, who, entertaining doubts upon the question of jurisdiction referred the matter to the High Court, under s. 617. *Held* that, inasmuch as the order of the Munsif was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a "final" decree within the meaning of s. 617 of the Civil Procedure Code, the High Court had not jurisdiction to entertain the reference. **RAMPHUL v. DURGA AND OTHERS.**

[V-245]

(2)———*Rent suits—(Act X of 1877).* This was a reference under s. 617 of Act X of 1877 by a District Judge trying a second appeal in a suit for arrears of rent under Act XVIII of 1873. *Held* that the Court was unable to entertain this reference as s. 617 did not apply to suits under the Rent Act. The only provision in respect of reference of cases under the Rent Act was contained in s. 204 and 205 of that Act. **MADHO PRAKASH SINGH v. BHUNDI LAL.**

[I-145]

(1) s. 622.—*Power of High Court to revise—Order of Collector under s. 183 Rent Act.* The High Court has no power to revise under s. 622 of the Code of Civil Procedure, an order passed by a Collector under s. 183 of the N.-W. P. Rent Act (XII of 1881) on appeal from an Assistant Collector of the 2nd class. *Hur Pershad v. Lahu* (N.-W. P. H. C. Rep. 1891, p. 60) distinguished. **RAM DIAL v. RAMADHIN.**

[X-59]

(2)———*Proceedings under Regulation XVII of 1806—(Act X of 1877).* *Held* that s. 622, Civil Procedure Code, has no application to proceedings in foreclosure held by the District Judge under Regulations XVII of 1806, which do not fall within the term "case" as mentioned in that section. **MENDAKOOR v. BHAGGI SINGH.**

[II-2]

MOHAN AND ANOTHER v. BISRAM.

[II-32]

(3)———*(Act X of 1877.)* After a mortgage had been foreclosed under the

CIVIL PROCEDURE CODE, s. 622—
(continued.)

provisions of Regulation XVII of 1806 the representative of the mortgagor deposited the mortgage money in Court. The District Judge ordered that the money should be paid to the mortgagee on the ground that the mortgagor had not been personally served with the notice required by s. 8 of that Regulation, and that it did not appear that she had been aware of the foreclosure proceedings. The District Judge subsequently ordered the mortgagee, who was in possession of the mortgaged property under the terms of the mortgage, to surrender the property. The mortgagee applied to the High Court to revise these orders under s. 622 of Act X of 1877. *Held* that the application was entertainable under the provisions of that section, and that the orders of the District Judge were made without jurisdiction and should be set aside. *In re* PETITION OF HAZARI LAL *v.* KHIRU RAI.

[I-41]

(4.) ———— *Order refusing to discharge surety—(Act X of 1877).* One R was the guardian of a lunatic. B, a relative of the lunatic, represented to the District Judge that R was mismanaging the lunatic's estate. While the Judge was making an inquiry the lunatic died. Both the parties thereupon claimed the lunatic's estate. The Judge decided that their claims must be determined by a suit, and finding that R had not mismanaged the estate, allowed him to retain the possession, on furnishing security. One S L gave security on behalf of R. He subsequently applied to withdraw, but B objected on the ground that he was about to bring a suit against R, who had misappropriated the lunatic's moneys. The District Judge made an order declining to release S L. This was an application for revision of that order. *Held* that the order was not of a judicial nature but one of merely interlocutory and ministerial character and the petitioner was not a party to the case. No application for revision under s. 622 would lie. PETITION OF SUNDAR LAL *v.* BUDH PRAKASH.

[II-143]

(5.) ———— *Revision—Order under s. 57—(Act X of 1877).* A joint owner of certain land sued another, who had begun to build a house and plant a tree on the joint land, for joint possession of the land by restoration thereof to its original position. He valued the suit for purposes for jurisdiction at Rs. 6-8, the value of the building and the tree. The Munsif holding that the land with the building thereon were worth more than Rs. 1,000 returned the plaint to be presented to the proper Court. The decision was upheld by the District Judge. *Held* (with reference to the preliminary objection that there was no case and no decision within the meaning of s. 622, Civil Procedure Code, and therefore no revision lay to the High Court) that the Court was not disposed to refuse to entertain

CIVIL PROCEDURE CODE, s. 622—
(continued.)

the application: and (with reference to the merits of the application) that the view taken by the lower Courts was erroneous, and the Munsif was directed to receive the plaint. *Jogal Kishore v. Tale Singh* (I. L. R., 4 All., 320) followed. MUHAMMAD JALALUDDIN *v.* ASAD ALI.

[III-89]

(6.) ———— [A suit was instituted in the Court of a Munsif to recover from the defendants a sum of Rs. 49, being the amount due under a bond and which the plaintiff alleged had been recovered on her account by one of the defendants from the obligor. The Munsif, being of opinion that the determination of the plaintiff's right to the bond involved the question of her heirship to the estate of a certain deceased person and that consequently the case before him raised a question affecting the title to property exceeding Rs. 1,000 in value, held that he had no jurisdiction to entertain the suit, and accordingly returned the plaint for presentation to the proper Court under s. 57 of the Civil Procedure Code. *Held* by the Full Bench, that the Munsif had acted upon an erroneous view as the only subject matter of the suit was the Rs. 49; that he had consequently failed to exercise a jurisdiction vested in him, and the High Court was therefore competent to revise his order under s. 622 of the Civil Procedure Code. The result of *Amir Hasan v. Sheo Bakhsh Singh*, (I. L. R., 11 Cal., 6) and *Magni Ram v. Jiwa Lal* (I. L. R., 7 All., 336) is that the question to which s. 622 of the Civil Procedure Code applies are questions of jurisdiction only. The meaning of the decision of the Privy Council in the former case is that, if the Court has jurisdiction to hear and determine a suit, it has jurisdiction to hear and determine all questions which arise in it, either of fact or law, and that the High Court has no jurisdiction under s. 622 to inquire into the correctness of its view of the law, or the soundness of its findings as to the facts; but that, when no appeal is provided, its decision on questions of both kinds is final.

Per STRAIGHT and TYRRELL, JJ.—Clauses (a) and (b) of s. 584, specifying the grounds on which a second appeal lies High Court, embody what s. 622 refers to in the word "illegally;" that is to say, to cases where the Court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage. Clause (c) of s. 584 indicates the meaning of the words "material irregularity" in s. 622, i. e., some material irregularity in procedure, "which may possibly have produced error or defect in the decision of the case upon the merits" *Maulvi Muhammad v. Syed Husain* (I. L. R., 3 All., 203) referred to, *BADAMI KUAR v. DINU RAI AND OTHERS*,

[VI-28]

CIVIL PROCEDURE CODE, s. 622—
(continued.)ABU SAID KHAN v. HAMID-UN-NISSA AND
OTHERS.

[VI-39]

(7.)—Order returning memorandum of appeal.] The plaintiff in this case had stamped his plaint with stamps to cover a value of Rs. 105. The decree being against him, he appealed to the District Judge and valued his appeal at Rs. 105. The plaintiff had stated in the course of the hearing that he had purchased the property in question for Rs. 75. The property was a growing crop. The Judge assumed that he should have valued his suit at Rs. 75. Held following *Mahabir Singh v. Behari Lal* (W. N., 1891, p. 207) that there being no suggestion of fraud, the Judge was bound to take the valuation put by the plaintiff on his suit as indicated by the stamps. Held further that the proper remedy for the plaintiff was by an application for revision under s. 622, Civil Procedure Code. The order of the District Judge is set aside and he is directed to receive the memorandum of appeal and to dispose of it according to law. MUHAMMAD ABDUL KADIR v. HUSAIN KHAN AND ANOTHER.

[XIV-55]

(8.)—Order under s. 108.] A Court which admits an application to set aside a decree *ex-parte* after the true period of limitation has expired, acts in the exercise of its jurisdiction illegally and with material irregularity within the meaning of s. 622 of the Civil Procedure Code, and such action may therefore be made the subject of revision by the High Court under that section. *Amir Hasan Khan v. Sheo Baksh Singh* (I. L. R. 11 Cal., 6) and *Magni Ram v. Jiwa Lal* (I. L. R., 7 All., p. 336) commented on by Mahmood J.

Per MAHMOOD, J.—The term "jurisdiction" as used by their Lordship of the Privy Council in *Amir Hasan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal., 6) must be understood in its broad legal sense signifying the power of administering justice according to the means which the law has provided, and subjected to the limitations imposed by the law upon the judicial authority. HAR PRASAD AND ANOTHER v. JAFAR ALI.

[V-73]

(9.)—In execution of an *ex-parte* decree, dated the 18th May, 1883, the defendant's property was attached on the 16th September, 1883. On the 18th January, 1884, the defendant presented an application to set aside the *ex-parte* decree. The first Court dismissed the application as barred by limitation (art. 164). But the Court of first appeal, relying upon a reply made by the Collector, dated the 4th January, on an enquiry by the first Court, as to whether the property attached was ancestral or self-acquired, and holding

CIVIL PROCEDURE CODE, s. 622 —
(continued.)

that reply to be the execution of a process for enforcing the judgment, held that the application was within time. The judgment-debtor applied to the High Court for revision of the lower appellate Court's order. Held that the application for revision was entertainable as the application to which the Judge's order had reference was one made under s. 588 (9), Civil Procedure Code, and that order was therefore final and not appealable. PACHU v. JAIKISHEN.

[IV-322]

(10.)—Order under s. 206.] In execution of a decree for partition of immoveable property passed in 1872, a dispute arose as to the execution in reference to a portion of the property, and in 1881 it was finally decided that the decree was defective in its description of the property, and therefore incapable of execution. In May, 1885, on application by the decree-holder, the Court passed an order amending the decree, the amendment having reference to an arithmetical error. The judgment-debtor applied to the High Court for revision of this order, on the grounds that the amendment of the decree was barred by limitation, and that the decree itself being barred by limitation and finally pronounced to be incapable of execution, the Court had acted beyond its jurisdiction in amending it. Held that the application for revision must be rejected.

Per OLDFIELD, J.—that the High Court had no power to entertain the application under s. 622 of the Civil Procedure Code, with reference to the decision of the Privy Council in *Amir Hasan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal., 6) and of the Full Bench in *Badami Kuar v. Dinu Rai* (I. L. R., 8 All., 111), and further that upon the facts stated, the Court ought not to interfere.

Per MAHMOOD, J.—that the Court was not precluded from entertaining the application for revision under s. 622 of the Civil Procedure Code. *Amir Hasan Khan v. Sheo Baksh Singh* (I. L. R., 11 Cal., 6); *Badami Kuar v. Dinu Rai* (I. L. R., 8 All., 111); *Raghunath Das v. Raj Kumar* (I. L. R., 7 All., 276); *Surtia v. Ganga* (I. L. R., 7 All., 411); *Magni Ram v. Jiwa Lal* (I. L. R., 7 All., 336); *Har Prasad v. Jafar Ali* (I. L. R., 7 All., 345) referred to. *Bhagwant Singh v. Jageshar Singh* (W. N., 1886, p. 57); *Abu Said Khan v. Hamid-un-nissa* (W. N., 1886, p. 39) dissented from. The meaning of the term "jurisdiction" used in s. 622 of the Civil Procedure Code must not be confined to the territorial or pecuniary limits of the powers of a Court, or to the nature of the class to which the case belongs. It implies in addition to questions of these kinds, the presence or absence, of a positive authority or power conferred by the law upon tribunals in cases which satisfy the other conditions referred to. In framing the section, the Legislature gave to the High Court power to interfere with the

CIVIL PROCEDURE CODE, s. 622 —
(continued.)

action of subordinate tribunals in cases where there is no remedy either by appeal or otherwise, and where those tribunals have either exceeded or wrongly declined to exercise the authority, the power and the jurisdiction which the law confers upon them, or, under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law. *Combe v. Edwards* (L. R. 3, P. D., 103) and *Crepps v. Durdan* (*Smith's L. C.*, 8th Ed., 711) referred to. *Held* also *per* MAHMOOD, J., that in the present case the Court below had jurisdiction to entertain the application under s. 206 of the Code, that it did so entertain it, and that in making the amendment its action could not be regarded as beyond the limits of its legal power and authority, so as to render it open to the objection of the exercise of jurisdiction "illegally or with material irregularity" within the meaning of s. 622. *Lucas v. Stephen* (9 W. R., 301); *Oomanund Roy v. Maharajah Sutish Chunder Roy* (9 W. R., 471); *Zuhoor Hossein v. Syedun* (11 W. R., 142) and *Goluck Chunder Mussant v. Ganga Narain Mussant* (20 W. R., 111) referred to. DHAN SINGH v. BASANT SINGH AND OTHERS.

[VI-182]

(11.)———. The plaintiffs mortgagees, brought a suit against their mortgagors and the assignees of the property. Three of the defendants appeared and defended the suit, the rest made no appearance. The plaintiffs obtained a decree which was framed as against the answering defendants only, though the judgment did not indicate any intention of excluding the other defendants. The answering defendants appealed and their appeal was dismissed. Subsequently the decree-holders applied to the Court which passed the decree to bring the decree into conformity with the judgment, by making it applicable to the non-answering defendants. The application was rejected on the ground that it was made after unreasonable delay. The decree-holders then applied to the High Court for revision. *Held* that it was immaterial whether or not an appeal had been filed by the answering defendants. There was nothing to show that the decree-holders had delayed unreasonably in making their application to bring the decree into conformity with the judgment and the Court in rejecting that application had illegally declined to exercise jurisdiction vested in it. DWARKA PRASAD AND OTHERS v. GHULAM KAMBAR AND OTHERS.

[XI-114]

(12.)———. *Order under s. 318-319.* In execution of a decree against several joint judgment-debtor's certain immoveable property was proclaimed for sale. The sale proclamation described the property as so many *biswas* in certain villages. The judgment debtor

CIVIL PROCEDURE CODE. s. 622 —
(continued.)

possessed property in those villages over and above that sought to be sold. The property as above described was sold and certificates of sale were granted which in terms followed the description contained in the proclamation of sale. The decree-holders purchased the property so sold and applied for possession thereof but in their application they inserted a detail of the specific shares of property held by the several judgment-debtors over which they prayed for possession. The Court executing the decree went into the question of the specification of shares and ordered possession to be delivered over certain specified shares of the several judgment-debtors. *Held* that under the circumstances described above the High Court would interfere in revision under s. 622 of the Code of Civil Procedure, although it was possible that the matters complained of might be grounds for a separate suit. *Guise v. Faisraj* (I. L. R., 15 All., 405); *Gopal Das v. Alaf Khan* (I. L. R., 11 All., 383) and *Prosunnu Kumar Sanyal v. Kali Das Sanyal* (I. L. R., 19 Calc., 683) referred to. GHULAM SHABBIR v. DWARKA PRASAD AND OTHERS.

[XVI-18]

(13.)———. *Order under s. 407—(Act X of 1877.)* *Held* that an order refusing permission to sue as a pauper did not fall within the term "case" in s. 622, Civil Procedure Code. PHUL SINGH v. JAGAN NATH AND ANOTHER.

[II-39]

BHULNESHRI DATA AND ANOTHER v. BIDIA-
DHIS AND OTHERS.

[II-69]

SITAL SAHU v. BECHU RAM AND RAM GOPAL
v. SHEO KHATIK.

[II-92]

(14.)———. *Order under s. 492—(Act X of 1877.)* One HS had applied by his pleader to the District Judge for permission to appeal as a pauper from a decree of the Subordinate Judge dismissing his suit for certain property. The District Judge rejected the application on the ground that under ss. 404 and 592 (Act X of 1877) such an application could not be presented by a pleader but must be presented personally. HS applied to the High Court for a revision of the order. *Held* that the application was inadmissible and could not be entertained as s. 622, Civil Procedure Code, did not apply to a proceeding of so purely an interlocutory character as that mentioned in s. 592. PETITION OF HARSARAN SINGH v. MUHAMMAD RAZA AND OTHERS.

[I-136]

(15.)———. *Order under s. 521—(Act X of 1877.)* An order under s. 521 of the Civil Procedure Code, setting aside an award, made on a reference to arbitration in the course of a suit, under Chapter XXXVII of the Code, on the

CIVIL PROCEDURE CODE, s. 622—
(continued.)

ground of the arbitrator's misconduct, is not subject to revision by the High Court in the exercise of the powers conferred on it by s. 622 of the Code. *CHATAR SINGH v. LEKHRAJ SINGH*.

[VIII-39]

(16)———. [The High Court can not in the exercise of its powers of revision under s. 622 of Civil Procedure Code reverse an order under s. 521 setting aside an award made on a reference to arbitration in the course of a suit, and remitting the case to the arbitrators on the ground of defects in the reference, inasmuch as the applicant for revision would, after the final decision of the case, have a remedy by way of appeal. *LAL CHAND v. KISHORI DAS AND OTHERS*.

[VIII-123]

(17)———. *Order under s. 522—(Act X of 1877.)* Held that where an award had been objected to on the ground that the umpire had been guilty of misconduct and the lower Court had made the decree before the time allowed for making objections had expired, so as to deprive the party from producing evidence in support of his objection, the High Court would in revision set aside the decree. *NEM CHAND v. DUNGAR MAL AND ANOTHER*.

[II-76]

(18)———. *Ground of revision—Misinterpretation of document.* The fact that a Court has misunderstood the effect of a document in evidence does not constitute a ground upon which the High Court can interfere in revision under s. 622 of the Code of Civil Procedure. *DASRATH RAI AND OTHERS v. SHEODIN RAI AND ANOTHER*.

[XIII-199]

(19)———. [The suit out of which this application for revision under s. 622, Civil Procedure Code, has arisen, was a suit for the recovery of some wheat under a bond, dated the 8th July, 1869, executed in favor of the plaintiff's father *GD*. *GD* died on the 23rd April, 1870, leaving the plaintiffs as his legal representatives. The plaintiffs attained majority on the 10th August, 1884, and the suit was instituted on the 14th December, 1886. The suit was met by the plea of limitation, it being contended that the cause of action having arisen in the life-time of *GD* the subsequent disability of the plaintiff could not save limitation (s. 9 of Act XV of 1877). Held that as the question whether the cause of action accrued in the life-time of *GD* depended upon the interpretation which was to be put on the bond sued upon, and as the Courts below had jurisdiction to determine that question and have determined it, there was no case for interference under s. 622, Civil Procedure Code. *Amir Hassan Khan v. Sheobaksh Singh*, (I. L. R., 11 Calc., 6);

CIVIL PROCEDURE CODE, s. 622—
(continued.)

Badami Kuar v. Dinu Rai (I. L. R., 8 All., 111); *Dhan Singh v. Basant Singh* (I. L. R., 8 All., 519) followed. *MALLU AND ANOTHER v. RAM BHAROSE AND ANOTHER*.

[VIII-148]

(20)———. *Finding not supported by evidence (Act X of 1877.)* A, a cultivator, sued B, the *zamindar* and C, the *karinda*, in a Court of Small Causes for Rs. 104-9-0, alleged to have been borrowed by C, on account of B, on the understanding that the tenant was to be given credit to that extent in the next demand for rent. The suit was decreed against B, though there was no evidence to show that C had any express or implied authority to borrow the money. Held (in revision) that the order must be set aside. *ABDUL AZIZ v. JARBANDHAN SINGH*.

[I-65]

(21)———. [A Judge has no jurisdiction to pass, in a contested suit, a decree adverse to the defendant where there is no evidence or admission before him to support the decree, and where the burden of proof is not or has not continued to be upon the defendant. If he passes such a decree it is liable to be set aside in revision under s. 622, Civil Procedure Code. *Moulvi Muhammad v. Syed Husain* (I. L. R., 3 All., 203) and *Sarnam Tewari v. Sakina Bibi* (I. L. R., 3 All., 417) referred to. *SHIELDS v. WILKINSON*.

[VII-44]

(22)———. *Wrong determination of a question of jurisdiction.* A suit for the recovery of Rs. 84-13 was brought in the Small Cause Court. The Court holding that the bond sued upon being a mortgage bond, it had no jurisdiction and therefore dismissed the suit. The plaintiff applied to the High Court for revision under s. 622 on the ground that the Small Cause Court had erroneously refused to exercise his jurisdiction. Held that the Small Cause Court has not refused to exercise jurisdiction but it received the suit and considered its character, it cannot be said that in non-suiting the applicant on the finding that the suit was in respect of an immoveable property, it had refused jurisdiction, consequently no revision lay. *BHAGWANT SINGH v. JAGESHAR SINGH AND ANOTHER*.

[VI-57]

(23)———. *Wrong decision of a question of limitation.* The fact that a Court having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it, was held to afford no ground for revision under s. 622 of the Code of Civil Procedure. *Amir Hassan Khan v. Shoo Baksh Singh* (I. L. R., 11 Calc., 6) and *Sarman Lal*

CIVIL PROCEDURE CODE, s. 622—
(continued.)

v. Khuban (I. L. R., 17 All., 422) referred to.
SUNDAR SINGH v. DORU SHANKAR AND OTHERS.

[XVII-168]

ALI MAZHAR v. SHEO BAKHSH AND ANOTHER.

[V-32]

(24). — [The judgment in this case was pronounced on the 26th January, 1885. On the 20th February, the defendant applied and got a copy of the judgment; on the 26th February, he presented his appeal. The Court below held that it was time-barred. *Held* (in revision) that the appeal was within time and as the lower Court had acted illegally in exercising its jurisdiction an application for revision lay to the High Court. **DAMRU v. MURDAN.**

[V-257]

(25). — *Misplaced on wrong party.* In a suit to enforce the right of pre-emption in respect of a usufructuary mortgage of immoveable property, the plaintiffs alleged that the consideration money was less than that stated in the mortgage-deed. The Court of first instance gave the plaintiffs a decree for possession of the property, on payment of an amount less than that mentioned in the deed; and this decree was affirmed on appeal. The mortgagees appealed to the High Court on the following grounds:—(i). Because it was for the respondents to prove that any portion of the consideration was not paid. (ii). Because the lower Court has not considered the evidence of the appellants. (iii). Because the finding of the lower Court is based on conjecture. *Held* on the question whether, such grounds not being grounds on which a second appeal is allowed by Chapter 42 of the Civil Procedure Code, the appeal should not proceed rather under Chapter 46, s. 622 of that Code, that the appeal could not proceed under s. 622 of the Civil Procedure Code, in consequence of the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh (I. L. R., 11 Cal., 6)*. That only questions relating to the jurisdiction of the Court could be entertained under that section. **MAGNI RAM AND ANOTHER v. JIWA LAL AND OTHERS.**

[V-32]

(26). — *Failure to give party opportunity to substantiate his allegation.* A Court which rejects an appeal as beyond time without giving the appellant any opportunity to substantiate his allegation (with reference to s. 5 of the Limitation Act) that he had sufficient cause for not presenting the appeal within time, acts wrongly and illegally in the exercise of its jurisdiction, and fails to exercise its jurisdiction within the meaning of s. 622 of the Civil Procedure Code. **NARAIN DAI v. SHAMLI PRASAD AND ANOTHER.**

[VIII-126]

CIVIL PROCEDURE CODE, s. 622—
(continued.)

(27). — *That no interest was awarded.* This was a suit for money paid for the defendant by the plaintiff, with interest. The Small Cause Court gave a decree for the principal sum but refused to award any interest. The plaintiff applied to the High Court for revision. *Held* that it was no ground for revision that the Court did not award interest. **ABUL HASAN AND OTHERS v. QUTUB HUSAIN AND OTHERS.**

[II-118]

(28). — *Inadmissibility of document.* *Held* that ordinarily applications for revisions under s. 622, upon the ground of inadmissibility of documents in the lower Courts, by reason of insufficiency of stamp, should not be entertained by the High Court. Such a ground goes neither to the merits of the case nor to the jurisdiction of the Court, nor is it one of the regularities contemplated by s. 622. **BHAIRU RAM v. SUNDRI.**

[IV-154]

(29). — *Inadmissibility of evidence.* Where the terms of a contract on which the plaintiff sued were reduced to writing but the document was not signed by the defendant, and the Judge dismissed the plaintiff's suit on the ground that no extraneous evidence of the contract could be given because it had been reduced to writing, and that the document could not be proved because it was not signed by the defendant. *Held* that such action on the part of the Judge was not a failure to exercise a jurisdiction vested in him by law within the meaning of s. 622 of the Code of Civil Procedure. **HASAN SHAH AND OTHERS v. RAM RATAN.**

[X-234]

(30). — *That property was not liable to attachment.* Where a Subordinate Judge decided an objection to an attachment on the preliminary ground that the property in question was as a matter of law not capable of being attached under the particular decree. *Held* that the Judge whether his decision was right or wrong could not be said either to have failed to exercise a jurisdiction vested in him by law or to have acted illegally in the exercise of a jurisdiction vested in him by law. **RADHA KISHAN AND ANOTHER v. DILLI AND ANOTHER.**

[X-233]

(31). — *That suit by one partner not maintainable.* Of two partners *A* and *B*, *B* alone (after the death of *A*) brought a suit against *C*, for the balance of an account during the life-time of *A*. The suit was brought in the Small Cause Court. The Small Cause Court Judge dismissed the suit holding that *B* alone, without the representatives of *A* being brought on the record either as plaintiffs or defendants, could not

CIVIL PROCEDURE CODE, s. 622 —(continued.)

maintain the suit. *Held* (i) That *B* alone could maintain the suit. (ii) That the Court could in the exercise of its revisional powers under s. 622, Civil Procedure Code, reverse the decree of the Small Cause Court. *Kendall v. Hamilton* (4 *L. R. App. Cas.*, p. 543); *Dacey On the parties to an action*, pp. 11, 104, 105, 106, 148-150, 153, 154, 230, 231, 502, 503, and 506; *Bullen and Leakes, Presidents of pleadings* (3rd edition 227). *Jell v. Douglas* (4 *B and Ald.*, 374.) *Story's equity pleadings* (8th edition) ss. 159 and 167; *Story On the Law of Contracts*, 5th edition, Vol. 1, p. 44; *Kandhiya Lal v. Chandar* (1 *L. R.*, 7 *All.*, pp. 326 and 327); *Kali Das Kaval Das v. Nathu Bhagwan* (1 *L. R.*, 7 *Bom.*, 217); *Ramsebuk v. Ram Lal Koondoo* (1 *L. R.*, 6 *Calc.*, 815); *Uma Sundari Dasi v. Ramji Halder* (1 *L. R.*, 7 *Calc.*, 242); *Palinharipat Krishnan v. Chekur Manuk, hal* (1 *L. R.*, 4 *Mad.*, 141); *Gopal Chunder Gooho v. Juggo Dumba Dossia* (10 *W. R.*, 411); *Domat's Civil Law, Part I, Book III, Title 3*, ss. 1 and 2, p. 712; *Williams On Executors*, 8th edition, p. 850; *MacClean v. Kennard* (9 *L. R. Ch.*, App., 346, 347); *Muhammad Suleman Khan v. Fatima* (1 *L. R.*, 9 *All.*, 104); *Dhan Singh v. Busant Singh* (1 *L. R.*, 8 *All.*, 519). *GOBIND PRASAD v. CHANDAR SEKHAR.*

[VII-133]

(32.)—*Revision—Where other remedy exists.* The High Court will not, in the exercise of its revisional powers under s. 622, Civil Procedure Code, interfere with an order where there is a remedy by way of appeal from the final decree in the case. *GOPAL DAS v. ALAF KHAN AND ANOTHER.*

[IX-151]

LAL CHAND v. KISHORI DAS AND OTHERS.

[VIII-123]

HARNARAIN SINGH v. BAKHTAWAR SINGH.

[V-259]

RAM PRASAD AND ANOTHER v. RAM LAL.

[V-261]

In re PETITION OF MACHAL SAHU.

[I-51]

In re PETITION OF RAMPHAL AND OTHERS.

[I-24]

MASITAN v. SAHIBZADI AND OTHERS.

[III-35]

(33.)—*Appeal.* No appeal lies under s. 10 of the Letters Patent from an order in revision made by a Judge of the High Court under s. 622

CIVIL PROCEDURE CODE, s. 622 — (continued.)

of the Code of Civil Procedure. *NAND KISHORE AND ANOTHER v. KHERI SINGH AND OTHERS.*

[XII-31]

(1) s. 623—*Applicability of section to rent suits.* S. 623 and the following sections of the Code of Civil Procedure which deal with reviews of judgments have no application to suits and proceedings under the N.-W. P. Rent Act. 1881. *WAZIR SINGH v. THAKUR KISHORI RAWANJI. MAHARAJ THROUGH SHIB GOPAL AND ANOTHER.*

[XVII-139]

(2)——*Form of application.* Applications for review of judgment are matters to a great extent within the discretion of the Court to which the application is made, but such discretion, in case of the application being granted, is subject to appeal. In dealing with applications for review Courts should not be too technical, but should look to the substance of the application rather than the form in which the application is made. *Reasut Hossein v. Hadjee Abdoollah* (1 *L. R.*, 3 *L. A.*, 221) and *Ramu Rai v. Dayal Singh* (1 *L. R.*, 16 *All.*, 300) referred to. *CHITRANJI AND OTHERS v. MOTI RAM AND OTHERS.*

[XVIII-33]

(3)——*“Discovery of new matter”—New ruling.* *Held* that a review of judgment, on the sole ground that a subsequent Full Bench ruling of the High Court contained an exposition of the law contrary to that which prevailed at the time when the decision sought to be reviewed was passed, was not authorized by the law as it was not a new discovery contemplated by S. 623, cl. (c) of the Code of Civil Procedure. *Allad Monee Dossia v. Jai Sunkar Roy* (7 *W. R.*, 408) distinguished. *SHEOPAL v. MADHO DAS AND OTHERS.*

[IV-89]

(4)——*“Any other sufficient reason.”* *Held* that facts coming into existence subsequently to the pronouncing of judgment by a Court of first appeal could not form grounds for a review of the judgment of the Court of second appeal. *BANDHAN SINGH AND OTHERS v. CHET NARAIN SINGH AND OTHERS*

[XV-131]

(5.)——*“Any other sufficient reason.”—Judgment inconsistent with another judgment.* Two suits were instituted in the Court of the Munsif. The first was decided in March, 1882, the other came up for hearing in May. In this latter suit the Munsif took a view of the facts contrary to that he had taken in the first and decided it accordingly, apparently not remem-

CIVIL PROCEDURE CODE, s. 623—
(continued.)

bering his first decision. His own view appears to be that the two decisions are opposed to each other. An application for review was made on the ground that the two decisions are inconsistent. The Munsif admitted the review and altered his decision of May, 1882. *Held* that the decision of May, 1882, was as likely to be correct as the other and that this was no ground for review. The appeal is consequently allowed and all the proceedings subsequent to 31st May, 1882, set aside. **MUHAMMAD SHAH KHAN v. MUHAMMAD YAR KHAN.**

[V-123]

(6) ———— *Egustem generis—Act VI of 1882, s. 169—Notice.* In s. 623 of the Code of Civil Procedure the words “any other sufficient reason” do not necessarily imply that such reason is to be of a like nature with the other two reasons for review previously stated in that section; but a Court is competent, if it considers any other reason than the first two sufficient, to review its previous order, if it deems it necessary in the ends of justice to do so. In s. 169 of Act No. VI of 1882 the phrase “in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure” implies that the appeal must first be filed and then notice served through the Court in the customary manner. It is competent to a Court on cause shown to extend the time limited for serving notice of appeal under s. 169 of Act No. VI of 1882 even after such period has expired, and after notice has in fact been served beyond time. *Lallah Barroomal v. The Official Liquidator, Sarawak and Hindustan Banking and Trading Co., Ltd.* (1. L. R., 4 Calc. 704) referred to. Where an appellant under s. 169 of Act No. VI of 1882 filed his appeal fifteen days after the passing of the order appealed against, and the Court did not issue notice to the respondent until after the twenty-one days limited by s. 169 had expired, it was *held* that no unreasonable delay could be charged to the appellant, and that the Court was justified in its discretion in extending the time allowable for service of notice of appeal. **THE HIMALAYA BANK, LD., IN LIQUIDATION v. DORA E. JERVIS.**

[XIV-148]

(7) ———— *Failure to appear at hearing for good cause.* An appeal which was referred to the Full Bench for disposal was heard and determined by the Full Bench and judgment given in favour of the appellant in the absence of the respondent. Subsequently the respondent applied for a review of judgment and proved that his absence at the hearing before the Full Bench was due to a mistake which had been made in not serving him with notice of the reference. *Held* by the Full Bench that, under the circumstances, the applicant's absence at the hearing came within the words “any other sufficient reason” in s. 623 of the Civil Procedure Code, and the review should be granted and the appeal re-heard. Upon the hearing of

CIVIL PROCEDURE CODE, s. 623—
(continued.)

an application for review of judgment, upon which an order has been passed directing the opposite party to show cause why the application should not be granted, counsel for the opposite party should begin. **GHANSHAM SINGH v. LAL SINGH.**

[VI-296]

(8) ———— *Judgment is unsound—(Act X of 1877.)* *Held* that it is not a “sufficient reason” within the meaning of s. 623, Civil Procedure Code, for admitting an application for review of a judgment, that the soundness of the judgment is questionable. **KISHNA RAM v. RAI RUKMIN SEWAK AND OTHERS.**

[II-102]

(9.) ———— *Want of jurisdiction—Limitation—Stay of execution pending review.* S. 623 gives a more extensive right of review than existed in England, where a review could only be obtained by showing that there was apparent on the record error in law, or that new and relevant matter had been discovered after the judgment which could not possibly have been used when the judgment was given, or that judgment was obtained by fraud. The words “or for any other sufficient reason” mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases “any other sufficient reason” may depend on a question of law or a question of fact, or a mixed question of law and fact. *Reasut Hossein v. Hadjee Abdoolah* (L. R., 3 I. A., 221) referred to. In cases where a stay of execution or an injunction is granted on an *ex-parte* application, liberty to apply to the Judge to vary or set aside his order must be implied, if not expressed. *Fritz v. Hobson* (L. R., 14 Ch. Div., 542) referred to. On the 29th July, 1886, an application was made by a party against whom the High Court, on second appeal, had passed a decree, dated the 18th March, 1886, for review of judgment. On the 28th August, the applicant made a further application that execution of the decree might be stayed pending the determination of the application for review, and an order was passed *ex-parte* granting this application. Subsequently, the opposite party applied under s. 623 of the Civil Procedure Code for a review of the *ex-parte* order on the grounds, (i) that the Court had no jurisdiction to make it, and (ii) that the application of the 29th July was beyond time, and therefore there could be no review of judgment, and no order for stay of execution pending such review. *Held* that the Court had power, under s. 623 of the Code, to review the *ex-parte* order of the 28th August, and that such order had been made without jurisdiction, and ought to be reviewed. *Held* that the decree of the 18th March, being final

CIVIL PROCEDURE CODE, s. 623—
(continued.)

and unappealable, and no application for review of judgment having been granted within the meaning of s. 630 of the Code, the application for stay of execution did not fall within s. 545 or s. 546, nor did s. 647 apply to it nor any other provision of the Code. *Held* that, having regard to the circumstances that the order of the 28th August was made without jurisdiction, and upon an *ex-parte* application of which the opposite party had no notice, and interfered perhaps indefinitely with his right to obtain the money in Court under the final and unappealable decree in his favor, as to which no application for review had been granted, and that the application for review of judgment was made after the statutory period of ninety days had expired, and contained no explanation of the delay, sufficient reason for reviewing the order of the 28th August had been shown. **AMIR HASAN KHAN v. AHMAD ALI.**

[VI-293]

(10.) ———— *Application for execution is time-barred.*] A decree-holder applied to the Subordinate Judge for execution. The application was granted *ex-parte* and the decree sent to the Collector for execution. Subsequently, and without applying for a review of the order granting execution, the judgment-debtor filed an objection in the Court of the Subordinate Judge that the decree was time-barred. The Subordinate Judge considered the objection, but disallowed it. The judgment-debtor then appealed to the District Judge, who found that the decree was time-barred. The decree-holder then appealed to High Court. *Held*, that though the procedure in the first instance was irregular, inasmuch as the Subordinate Judge should not have entertained the judgment-debtor's application at all, yet the finding of the lower appellate Court was correct and could not be disturbed. **THAKUR DAS AND ANOTHER v. GOBIND SINGH.**

[XI-147]

(11.) ———— .] It is the duty of a Court to which an application to execute a decree is presented to satisfy itself, whether or no such application is barred by limitation. If the Court on such an application omits to decide the question of limitation, or decides it against the judgment-debtor and in his opinion wrongly, the judgment-debtor may either appeal or can apply under s. 623 of the Code of Civil Procedure for review of the Court's order, and this whether notice of the application for execution had been issued to him or not. A Court in executing a decree should look to the substance rather than to the form of application presented to it. Where an application was made by a judgment-debtor objection to execution of a decree on the ground that it was barred by limitation, previous objections to execution having been disallowed. It was *held* that the relief prayed for being one which could

CIVIL PROCEDURE CODE, s. 623—
(continued.)

only be granted by way of review the application should be treated as one for that purpose. **RAMU RAI AND OTHERS v. DAYAL SINGH.**

[XIV-131]

(1.) s. 624 ———— *Review to another Judge—Ground—(Act X of 1877.)*] *Held* that an application for the review of a judgment delivered by a Subordinate Judge who had retired after delivering it, to his successor in office, made upon a ground not falling within the exception mentioned in s. 624, Civil Procedure Code, should be rejected. **PANCHAM v. JHINGURI.** (W.A. 1882, p. 26) followed. **PERITION OF BHAGMANI KUAR v. RAM NARAIN AND OTHERS.**

[II-96]

(2.) ———— *(Act X of 1877.)*] *Held* that an application for review to a Judge, other than the one whose decree is sought to be reviewed, on the ground that he had omitted to try an issue essential to the right decision of the suit, upon the merits, could not be entertained under s. 623, Civil Procedure Code. It might have come within the meaning of "other sufficient cause" if the application had been to the same Judge. *Held* also that it was not a "clerical error" within the meaning of s. 623 of the Civil Procedure Code. **BIDDI CHAND v. ZULFIKAR ALI AND ANOTHER.**

[III-173]

(3.) ———— *Application to the survivor of a Bench of two Judges.*] Where, after the death of one member of Bench of two Judges, an application was made to the survivor to review their joint judgment on the plea that the appeal in which the judgment sought to be reviewed was passed had been at the time of presentation insufficiently stamped, and when the deficiency was supplied was beyond time, the Court under the circumstances declined to interfere, on the grounds, *inter alia*, that the objection of limitation was not taken at the hearing of the appeal and there was nothing to show that the Court would not at that time have granted an extension under s. 5 of the Limitation Act. **GANPAT RAI v. IDU AND OTHERS.**

[XI-65]

(1.) ———— *"Made"—(Act X of 1877.)*] The term "made" in S. 624 of the Civil Procedure Code does not mean "presented" but means and includes the hearing and determination of the application for review of judgment. *Held*, therefore, where an application for a review of judgment on the ground, not of the discovery of new and important matter or evidence as mentioned in s. 623 of the Civil Procedure Code, or of a clerical error apparent on the face of the decree, but on other grounds, was presented to the District Judge who delivered the judgment, and such Judge was transferred before he could entertain such application, that his

CIVIL PROCEDURE CODE, s. 624—
(continued.)

successor was not competent to entertain it.
PANCHAM v. JHINGURI AND OTHERS.

[II-26]

s. 625—Form of application—Decree. It is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment sought to be reviewed. **WAJID ALI SHAH v. NAWAL KISHORE,**

[XV-61]

s. 626—Succeeding Judge—Competency—Notice. It is competent to a succeeding Judge to hear and determine any application to review a judgment of his predecessor, provided that, such application having been presented to the Judge who passed the judgment, such Judge has ordered notice to issue to the opposite party. **ALLAHDIYA AND ANOTHER v. MUHAMMAD ALI KHAN AND OTHERS.**

[XII-103]

(1) **s. 629—Appeal.** No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment. **GOPAL DAS v. ALAF KHAN AND ANOTHER.**

[IX-151]

(2) ———— **Ground.** No appeal will lie from an order granting a review of judgment except under the conditions specified in s. 629 of the Code of Civil Procedure. **Bombay and Persia Steam Navigation Company, Ltd., v. The S. S. "Zuari" (I. L. R., 12 Bom., 171)** followed. **DARYAI BIBI AND ANOTHER v. BADRI PRASAD AND ANOTHER.**

[XV-151]

(3) ———— **Revision.** Where a Judge declines to deal with an appeal presented under s. 629 of the Civil Procedure Code from an order granting an application for review of judgment under s. 623, on the ground that the lower Court's order was passed under s. 103 and that no appeal would lie from such order, he refuses to exercise his jurisdiction, and such refusal may be dealt with by the High Court in revision under s. 622 notwithstanding that an appeal lies from the final decree. **KALAP NATH MAN TIWARI v. BINDHYACHAL MAN TIWARI AND OTHERS.**

[IX-179]

s. 633—Judgment—Rules framed by High Court. The intention of the Legislature as expressed in s. 633 of the Civil Procedure Code was that the High Court might frame rules as to how its judgments should be given, whether orally or in writing or according to any mode which might appear to it best in the interests of justice. The section does not merely give the High Court power to direct that judgments

CIVIL PROCEDURE CODE, s. 633—
(continued.)

shall be recorded in a particular book, or with a particular seal. Rule 9 of the rules made under s. 633, in March, 1885, is therefore not *ultra vires* of the Court, and it modifies the provisions of s. 574 in their application to judgments of the High Court. With reference to the terms of Rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgment of the Court below, to go through the formality of re-stating the points at issue, the decision upon each point, and the reasons for the decision.

Per **EDGE, C. J.,** Apart from rule 9, it never was intended that s. 574 of the Code should apply to cases where the High Court, having heard the judgment of the Court below and arguments thereon, comes to the conclusion that both the judgment and the reasons which it gives are completely satisfactory and such as the High Court itself would have given. Assuming the provisions of s. 574 to be applicable, a judgment of the High Court stating merely that the appeal must be dismissed with costs and the judgment of the first Court affirmed and that it was unnecessary to say more than that the Court agreed with the Judge's reasons, is a substantial compliance with those provisions. The judgment of the High Court in a first appeal was as follows :—"This appeal must, in my opinion, be dismissed with costs, and the judgment of the first Court affirmed; and I do not think it necessary to say more than that we agree with the Judge's reasons." The appellant applied for leave to appeal to Her Majesty in Council on the ground that the requirements of s. 574 of the Civil Procedure Code, had not been complied with. *Held* by the Full Bench that objection involved no substantial question of law, and that the application for leave to appeal must therefore be rejected. **SUNDAR BIBI v. BISHESHAR NATH AND OTHERS.**

[VI-302]

(1) **s. 643—Appeal.]**

See s. 244, No. (66).

(2) ———— **Revision—(Act X of 1877.)** *R* sued *S* in the Munsif's Court for the price of certain goods. The Munsif dismissed the suit and after his decision was affirmed in appeal, called on the plaintiff to show cause why he should not be prosecuted for an offence under s. 209, Procedure Code, and eventually made over the case to the Magistrate for inquiry. This is an application under s. 622, Civil Procedure Code, to revise the same. *Held* that the order could not be treated to have been passed by the Munsif under s. 643 as the case was not pending before him. It therefore could not be revised under s. 622. The order must be taken to have been passed under s. 471, Civil Procedure Code, and as the inquiry provided under that section need not be judicial the Court

CIVIL PROCEDURE CODE, s. 643—
(continued.)

could not revise it under s. 297, Civil Procedure Code. *PETITION OF RAM GOPAL v. SHEO KHATIK.*

[II-92]

(3). ———— (Act X of 1877).] The discretionary power of a Civil Court, to grant or withhold sanction to a criminal prosecution, is not subject to revision by the High Court under s. 622 of Act X of 1877. *In re PETITION OF MADHO PRASAD.*

[I-15]

s. 646 B.—*Reference.*] Before a district Court can make a reference under s. 646 B. of the Civil Procedure Code, it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it and that therefore the matter is one in which the interference of the High Court should be sought. The word "shall" in s. 646 B, clause (1), is not mandatory but directory. *MADAN GOPAL v. BHAGWAN DAS.*

[IX-75]

(1). s. 647.—*Stay of execution pending review.*]

See s. 623, No. (9).

(2). ———— *Applicability of ss. 98 and 99 to an application under s. 549.*] A petition was made under s. 549 of the Civil Procedure Code, praying that an appellant might be required to give security for the costs of the appeal. The ground upon which the petition was based was that the appellant was not pecuniarily in a position to pay the costs of the appeal if it should be dismissed. An order was passed directing the appellant to show cause why the prayer of the petitioner should not be granted. When the petition came on for hearing, no one appeared to support it or to show cause against it, and it was accordingly rejected. An application was subsequently made on behalf of the petitioner praying that the case might be restored to the register, on the ground that the counsel for the petitioner was absent on the occasion of the hearing for fifteen minutes only, and that, as no one on behalf of the appellant had appeared to show cause the petition should have been granted, and the absence of the petitioner's counsel was immaterial. *Held* that the matter was dealt with by s. 98 of the Civil Procedure Code, and that s. 647 of the Code, prescribing that the procedure laid down for suits should be followed as far as it could be made applicable in proceedings other than suits, made s. 99 the rule by which the Court was to be guided. *Held* also that although no general rule could be laid down that the absence of the counsel when a case has been called on, should be treated as by itself a sufficient reason for restoring to the register either a regular

CIVIL PROCEDURE CODE, s. 647—
(continued.)

suit or an appeal or a miscellaneous application, but each case of the kind must be dealt with according to its own particular circumstances. In the present case, taking the circumstances into consideration and absence of counsel for fifteen minutes was not enough to preclude the Court from restoring the petition to the register. S. 549 of the Civil Procedure Code was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance and an application should not be granted under the section of which the only ground is a statement that the appellant is not pecuniarily in a position to pay the costs of the appeal, if it should be dismissed. *Maneckji Limji Manchert v. Goolbhai (I. L. R., 3 Bom., 241)* followed. *Ross v. Jaques*, 8 M. & W. 13, (*Seshayyengar v. Jainulavadin (I. L. R., 3 Mad., 66)*) and *Jogindro Deb Roykut v. Funindro Deb Roykut (18 W. R., 102)* referred to. *LAKHMI CHAND v. GUTTO BAE.*

[V-127]

(3). ———— *Applicability of s. 25 to proceedings under Act VI of 1882.*] There is nothing in Act VI of 1882 or the High Court's Act (24 and 25, Vic. C., 104) or the Letters Patent which prevents the High Court from calling for the record of the proceedings in the winding up of a Company under the Company's Act and transferring these proceedings to its own file. Such a power is given to the High Court by s. 647 read with s. 25, C. P. C. *IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY LIMITED.*

[VII-7]

(4). ———— *Applicability of ss. 373 and 374 to execution proceedings.*] S. 647 of the Civil Procedure Code makes ss. 373 and 374 applicable to proceedings in execution of decree. *Kifayat Ali v. Ram Singh (I. L. R., 7 All., 359)* and *Pirjada v. Pirjada, (I. L. R., 6 Bom., 681)* followed. *Tara Chand Megraj v. Kashi Nath Trimlak, (I. L. R., 10 Bom., 62)* and *Ram Anandan Chetti v. Periatambi Shervai (I. L. R., 6 Mad., 250)* dissented from. A first application for execution of a decree was withdrawn by the decree-holder on account of formal defects, the Court returning the application, but without giving permission to the decree-holder to withdraw with leave to take fresh proceedings. *Held* that, with reference to the second paragraph of s. 373, read with s. 647 of the Code, the decree-holder was precluded from again applying for execution; but that, even assuming that permission to apply again could be inferred from the action of the Court in returning the application, s. 374 was applicable so as to make a subsequent application presented five years after the decree barred by limitation, with reference to art 179 of the Limitation Act. *SARJU PRASAD AND ANOTHER v. SIFA RAM.*

[VIII-1]

CIVIL PROCEDURE CODE, s. 647.—
(continued.)

(5)———*Applicability of Chapters VII and XIII to execution proceedings.*] The issuing of a notice under s. 248 of the Code of Civil Procedure, gives a fresh starting point for limitation under art. 179, cl. 5 of sch. 11, of the Indian Limitation Act, whether such notice was issued on a valid or on an invalid application for execution. Chapters VII and XIII of the Code of Civil Procedure cannot in view of s. 4 of Act No. VI of 1892, be applied to proceedings in execution of decrees. But a Court has power inherent if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application. Similarly, a Court has inherent power if such power is not conferred upon it by statute, to proceed forthwith to decide an application for execution of a decree on the materials before it when time has been granted to a party to perform any act necessary for the further progress of the application and that act has not been done. When an order is made striking an execution case off the file of pending cases or dismissing it on grounds other than a distinct finding that the decree is incapable of execution, that the decree-holder's right to get the decree executed is barred by limitation or by any other rule of law, or on some similar ground on which the application has clearly been dismissed on the merits, whether the word "dismissed" or the words "struck off the file" or any other similar words have been used in the order, the decree-holder is not barred by the force of any such order from presenting and prosecuting a fresh application for execution of his decree. *DHONKAL SINGH v. PHAKKAR SINGH AND OTHERS.*

[XIII-36]

CONSTRUCTION.

- (1) Bond.
- (2) Decree.
- (3) Sale certificate.
- (4) Sale-deed.
- (5) Other documents and terms.

(1) Bond.

(1)———*Rule of construing different bonds.*] The danger of deciding one case relating to a bond by the construction placed in another suit on another and different bond pointed out. *BHAGWANT SINGH v. DARYAO SINGH AND OTHERS.**

[IX-165]

(2)———*Hypothecation Charge.*]—A bond specified certain property as belonging to the obligors and contained the following provision:—"Our rights and property in the aforesaid taluka Rajapure shall remain pledged and hypothecated for this debt." *Held* that the terms of the bond were sufficiently clear and explicit to constitute a legal hypothecation of the

CONSTRUCTION.—(continued.)

shares and interest of which it recited in the opening that the obligors were owners. *BISHEN DAYAL AND OTHERS v. UDDIT NARAIN.*

[VI-216]

(3)———*Stipulation as to interest.*] This suit was based upon a mortgage bond, executed by the appellant in the favor of the respondent, containing these conditions amongst others:—(iv) that, if at any time during the period of the mortgagee's possession, the amount of interest at the stipulated rate (ten annas *per cent per mensem*) or any part thereof was not discharged from the usufruct of the mortgaged property or if the produce of the mortgaged property did not suffice to defray the Government revenue and the village expenses, and the mortgagees were compelled to pay the same or any part thereof out of their own pockets, then in that case the amount of unpaid interest should, at the end of every six months, that is to say, at the end of each harvest, as also the amount paid by the mortgagees on account of losses, from the date of payment, be added to the principal mortgage money, and compound interest be charged thereon, at the rate of two *per cent per mensem* until the whole mortgage money was paid: and (vi) that mutation of names should be effected by the mortgagor, and if he failed to effect mutation of names or interfered in any other way with the mortgagees in obtaining possession or if the mortgagor ejected the mortgagees after they had obtained possession, the mortgagees should be competent to realize the whole amount mentioned in the deed, with interest at one *per cent per mensem* from the date of the execution of the deed. The appellant did not give the respondent possession. The respondents accordingly sued him, claiming the principal sum, with interest at ten annas *per cent*, and also claiming compound interest at two *per cent*. *Held* that inasmuch as the respondents had not obtained possession and mutation of names had not been effected, the fourth condition in the mortgage-deed was not applicable and the interest ought to be calculated according to the sixth condition. *NAIR RAM v. TOFA RAM AND OTHERS.*

[I-108]

(4)———*Higher rate in case of default—Waiver.*] The only question in this suit is as to the rate of interest payable under the mortgage-deed which contained the following stipulation as to interests: "That the interest of the mortgage money is settled to be paid at 12 as. *per cent per mensem*, that the mortgagees shall not take the principal sum for two years. The mortgage is for a term of eight years. That the interest will be paid every year, that in case of default in the payment of interest the mortgagee shall have power to realize immediately after the default is made interest at Re 1-4 *per cent* and if they like they can obtain possession of the property. This suit was

CONSTRUCTION.—continued)

brought after the eight years had expired. *Held* that the mortgagees were entitled to 12 as. *per cent per annum* interest as they did not choose to enforce the other remedy provided for. **DIP SINGH AND OTHERS v. JASWANT SINGH AND OTHERS.**

[III-143]

(5).—[] This was a suit on a bond, dated 5th April, 1871. The terms of which in substance were, that the principal money was to be paid after 12 years, but that interest at 9 *per cent per mensem* was to be paid by yearly instalments; and in case of default of payment of the instalment of interest, then, *after one year*, the entire mortgage money was to carry interest at 18 *per cent per annum*. Plaintiff claimed interest at 18 *per cent* from 1877 to 1883 on the ground that default having taken place in that year he was entitled to it. It is admitted that defaults had taken place several times before and yet the plaintiff continued to receive interest at 12 *per cent* without enforcing the penalty. *Held* that the repeated action of the plaintiff in accepting the lower rate of interest notwithstanding repeated defaults amounted to waiver which precluded the plaintiff from falling back upon the penal terms of the bond. **RADHA MOHAN v. CHEDA LAL AND ANOTHER.**

[IV-293]

(3).—[] By a deed of usufructuary mortgage, dated in 1875, a sum of Rs. 30,000, with interest at Re. 1 *per cent per mensem*, was advanced on the security of certain property, for a period of ten years. The deed contained various provisions for securing the payment of interest to the mortgagee, and, among these, a provision that he should have possession of the property and take the profits on account of interest, the profits being fixed at a certain amount yearly, leaving an agreed balance of interest to be paid yearly in cash. There was also a provision that in the event of possession not being given, the mortgagee might treat the principal money as immediately due, and recover it at once with interest at the rate of Re. 1-6 *per cent per mensem*. The mortgagee did not take possession of the mortgaged property and took no steps to obtain such possession, or to recover the money for nine years, during which no interest was paid. In November, 1884, the mortgagee brought a suit against the mortgagor to recover the mortgage money, claiming interest from the date of the mortgage-deed to the date of the suit at Re. 1-6 *per cent per mensem*. *Held*, that the fair inference of fact from the circumstances above described was that the mortgagee waived the provisions for securing and recovering the interest, and that the transaction must be looked as simply one of a loan for the specified period at the agreed rate, *i. e.* Re. 1 *per cent per mensem*. **GANGA SAHAI v. LOCHAN SINGH AND ANOTHER.**

[VI-50]

CONSTRUCTION —(continued.)

(7).—[] *B* had a bond against *A.*, dated 23rd June, 1874, and its terms were.—“The money should be paid within 6 months at 1 *per cent per mensem* and in case of default at 2 *per cent per mensem* from the date of the bond.” *A* brought this suit to compel *B* to take Rs. 1,000 principal and Rs. 1,125 interest at one *per cent* in fulfilment of the bond. *B* objected that the interest stipulated was 2 *per cent*. *Held* that *B* not having brought his suit within a proper time he must be deemed to have waived his right to recover interest at the increased rate. **SHEO BAKHSH SINGH AND OTHERS v. GULAB CHAND.**

[VI-135]

*Per contra***CHAMMI LAL AND ANOTHER v. GANESH KUAR.**

[III-35]

(8).—[] *Post diem*.] A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal v. Chajmal Das* (decided on 7th March, 1889) followed. *Chhab Nath v. Kampta Prasad* (I. L. R., 7 All., 333); *Baldev Panday v. Gokal Rai* (I. L. R., 1 All., 603) referred to. **BHAGWANT SINGH v. DARIO SINGH AND OTHERS.**

[IX-165]

MANSAB ALI v. GULAB CHAND AND ANOTHER.

- [VII-292]

(9).—[] Where in a mortgage-deed it was provided that the interest on the money lent was to be paid “*salana*” and there was also a subsequent stipulation to the effect that “the contract is for one year only”. *Held* that the former stipulation could not be construed as having the effect of extending the period limited by the latter. **ABDULLA CHAUDHRI AND OTHERS v. SAHAI PANDE.**

[XII-237]

(10).—[] The use of the term “*Sudi*” in a mortgage-deed held not to employ a covenant to pay *post-diem* interest there being a specific agreement to repay the mortgage-debt principal and interest in seven years. **RIKHI RAM AND ANOTHER v. SHEO PRASHAN RAM AND ANOTHER.**

[XVI-78]

(11).—[] The terms of the bond sued upon were as follows:—“We, *N* and *R*, do hereby declare that we have borrowed Rs. 250 from obligee, with interest at the rate of Rs. 2 *per cent*, to be paid up in two months, for purchasing a garden.....And in satisfaction of the said debt we mortgage the said garden, and promise and write that after paying the principal with interest at the stipulated period

CONSTRUCTION.—(continued.)

we would redeem the said property. In case of default, the creditor is at liberty to realize the whole amount of principal with interest from us and our mortgaged property, and we will have no objection. *Held* that interest *post diem* must be paid as interest and not as damages. **JAGARNATH DAS v. RAM DIHAL AND ANOTHER.**

[V-124]

(12) ———— *Acknowledgment.* The defendants executed a mortgage-bond in favour of the plaintiffs on the 7th February, 1880. The bond provided that the principal together with interest at the rate of R. 1-6 *per cent per mensem* should be paid at the expiration of a year from the date of execution. There was no provision in the bond for the payment of *post diem* interest. The money was not paid on the due date. The plaintiffs on the 19th June, 1888, sued to recover the principal amount due under the bond together with interest at the rate mentioned therein up to the date of suit. They produced certain letters admittedly written on behalf and by the authority of the defendant, which they alleged, amounted to acknowledgments of the defendant's liability to pay *post diem* interest. It did not, however, clearly appear that these letters referred to or constituted any agreement to pay *post diem* interest and the plaintiffs took no steps to procure the production, or give secondary evidence of the contents of their own letters to which those produced were replies. *Held* that though the letters produced by the plaintiffs must be taken to be binding on the defendant, they in themselves, constituted no acknowledgment of the plaintiff's liability to pay *post diem* interest, and if such interest was claimed by way of damages the claim was barred by limitation. **MATHURA DAS AND ANOTHER v. BHAWANI GHULAM PAL.**

[XI-126]

(2) Decree.

(13) ———— *Reasonable construction to be adopted.* In construing a decree the terms of which are ambiguous such construction must if possible be adopted as will make the decree, a decree in accordance with law, and not a decree such as the Court making it had no power to pass. **AMOLAK RAM AND ANOTHER v. LACHMI NARAIN AND OTHERS.**

[XVII-9]

(14.) ———— *Decree against hypothecated property.—Decree against person.* A decree of the High Court directed that the plaintiffs should recover Rs. 14,029, with interest, "by sale of the hypothecated property," mentioning the same by name. *Held* that on a proper construction of the decree no other property of the judgment-debtor could be put up for sale in execution of the decree except the property mentioned, though its sale did not fetch the whole of the decretal money, because the decree was not against the persons of the judgment-debtor. **HAR NARAIN AND OTHERS, v. RAM DAT.**

[I-61]

CONSTRUCTION.—(continued.)

(15.) ———— *Pre-emption.* The appellant purchased (under a right of pre-emption) one-third of an estate which was hypothecated to the respondent. The respondent sued the mortgagor and the appellant, to enforce that hypothecation and obtained a decree in these terms:—"The claim is decreed against the above named defendant (appellant) and the property acquired by preemption"—*Held* that having regard to the terms of the decree, and to the equities of the case, the appellant was responsible only in respect and to the extent of that portion of the hypothecated property which had come to and was in his possession by purchase; and that it could not be executed against the person and other estate of the appellant. **ALLAH DIN KHAN v. MASRI BIBI.**

[I-85]

(16.) ———— *Decree directed that its amount should be recovered by the sale of the mortgaged property with the exception of the rights and interests therein of the defendant FA; that, in the event of the proceeds of such sale not being sufficient to satisfy the amount of such decree, such decree should be enforced against the person and other property of the mortgagors excepting FA; and that "the person and property of FA and only the person of MB should be exempted from liability to the decree." MB was not one of the mortgagors but a purchaser of the mortgaged property. The mortgaged property having been sold and found insufficient, the decree-holder applied to sell other property belonging to MB. MB contended that his property was exempted. *Held* that his person only and not his property was exempted. **KARIM-UNNISSA v. MUZAFFAR BEG.***

[I-160]

(17.) ———— *Terms of a certain decree.* The terms of a certain decree were as follows:—"That the plaintiff recover Rs. 704-5-3 the amount claimed and Rs. 10-11-9 on account of interest for the period of the pendency of the suit, in all Rs. 715-1 by sale of the property hypothecated in the bond." *Held* that the execution of the decree was by its terms limited to the hypothecated property. **SHEONARAIN AND OTHERS v. ISHRI PRASAD NARAIN SINGH.**

[III-148]

(18.) ———— *Decree in favor of LN in which they hypothecated two villages PB and PG. The plaintiffs to this suit, who were the representatives of LN, the mortgagee, brought a suit upon the bond and obtained a decree. To this suit and decree NR, the present defendant, in whose favor, MR and AP had subsequent to the mortgage in favor of LN, executed a deed of gift, was also a party. The decree in favor of LN was as follows:—".....The thing decreed in favour of the plaintiffs against the defendants:—Rs. 16,418-1-3 (principal and*

CONSTRUCTION.--(continued.)

interest) by enforcement of lien against *P B*..... and *P G*, by invalidation of the deeds of gift in favor of *N R*..... so far as they are against the enforcement of the decree." In execution of this decree the decree-holders attached the property hypothecated and also certain other property belonging to *M R* and *A P* and included in the deed of gift in favour of *N R*. *N R* preferred objections to the attachment of the non-hypothecated villages on the ground that the decree was passed for enforcement of lien against the hypothecated properties only. The objection was allowed, hence the present suit. *Held* that reading the decree in connection with other facts of the case and in particular with the plaint which shows that the plaintiff never claimed any money against all the defendants it was clear that it was a decree for the sale of the hypothecated property only and that there was no personal liability upon any of the defendants except to part with the hypothecated property. *Khub Chand v. Kalian Das* (I. L. R., 1 All., 240) referred to. *NAUBAT RAM v. RAM SARUP AND ANOTHER*.

[V-308]

(19)-----.] The obligee of a bond for the payment of money, in which immoveable property was hypothecated as collateral security, sued the obligor upon such bond claiming to recover the moneys due thereunder from the obligor personally and by the sale of the hypothecated property. He obtained a decree in such suit in these terms:—"That the claim of the plaintiff, with costs of the suit and future interest at eight annas *per cent per mensem* be decreed." *Held* by the majority of the Full Bench that such decree was not merely a money-decree, but was also one for the enforcement of a lien. *Janki Prasad v. Baldeo Narain* (I. L. R., 3 All., 216) distinguished by Stuart, C. J.

Per SPANKIE, J., and Straight, J.—That such decree was a mere money decree. *Mulug Fugger Buksh v. Lala Manohur Doss* (N.-W. P. H. C. Rep., 1870, p. 29) and *Thamman Singh v. Ganga Ram* (I. L. R., 2 All., 345) followed. *DEBI CHARAN v. PIRBHU DIN*.

[I-43]

(20)-----.] *B*, who had a hypothecation bond against one *X*, sued him claiming to recover the amount due thereon from *X* personally and by the sale of the hypothecated property. On the 7th March, 1865, he obtained a decree which recited the nature of the suit but omitted to state that the plaintiff claimed enforcement of lien and then continued as follows.—"Ordered that plaintiff's claim be decreed with costs." On the 7th August, 1869, *X* gave *A* a bond in which he hypothecated the same property. In 1875 the property was sold in execution of *B*'s decree and purchased by himself. In August, 1881, *A* brought this suit against *X* and *B* on his bond of 1869 claiming to enforce his lien on the property.

CONSTRUCTION.--(continued.)

Held that *B*'s decree of 1865 was a simple money decree and that he had purchased the property sold under a simple money-decree, consequently the property was liable to *A*'s lien. *Debicharan v. Pirbhu Din Ram* (3 All., 388, I. L. R.,) dissented from. *BHIKCHAND v. KASHMIRE MAL*.

[II-174]

(21)-----*Matruka*.] A decree under s. 88 of the Transfer of Property Act, 1882, after decreeing the sale of the mortgaged property, contained the following provision:—"If the said sum is not sufficient for satisfaction of the decree, that the defendant do pay the balance from the *matruka* of Kewal Singh, deceased," Kewal Singh being the original defendant to the suit, the father of the judgment-debtor, who with him formed a joint Hindu family. *Held* that the word "*matruka*" must be construed as meaning merely "assets" of the father, that is, property in which the judgment-debtor had possessed no interest prior to his father's death. *BALDEO SINGH v. JANKI PRASAD*.

[XVIII-44]

(22)-----*Mesne profits*.] A plaintiff in his suit made two claims first for a declaratory decree as to his right of his possession of certain lands, and, secondly for possession of other lands with mesne profits. The Court decreed both claims, but did not in its decree specifically allude to the claim for mesne profits. *Held* that decree-holder was competent to execute his decree in respect of the mesne profits also. *MAHADEO PRASAD v. MATHURA DAS AND ANOTHER*.

[XVI-54]

(23)-----.] A decree for possession of immoveable property was passed by the District Judge of Mirzapore on the 12th of November, 1887, in favor of a plaintiff declaring "that the plaintiff is also entitled to mesne profits." That decree was affirmed by an order of Her Majesty in Council, dated the 11th May, 1895, without variation in respect of the order as to mesne profits. Possession of the immoveable property to which the decree related was obtained by the decree-holder on the 30th of November, 1895. *Held* that the decree of the Privy Council was to be construed as a decree awarding mesne profits up to the date when possession was obtained and from the date of the institution of the suit. *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal* (L. R. 8 I. A., 197) and *Puran Chand v. Roy Radha Kishore* (I. L. R., 19 Calc., 132) referred to. *BIJAI BAHADUR SINGH v. BHUP INDAR BAHADUR SINGH*.

[XVII-62]

(24)-----*Interest*.] A decree for money directed that its amount should be payable "according to the terms of the judgment-debtor's written statement." In his written statement the judgment-debtor had promised to pay interest on the judgment-debt if the same were not

CONSTRUCTION.—(continued.)

discharged by a certain day. *Held* having regard to the decision of the Full Bench in *Debi Charan v. Pirbho Din* (I. L. R., 3 All., 388) that the judgment-debtor having failed to discharge the judgment-debt by such day, he was bound by the terms of the decree to pay interest on its amount. *RAMNANDAN RAI v. LAL DHAR.*

[I-70]

(25).———.] A certain decree was in the following terms. The plaintiff's claim for the amount together with costs, by enforcement of lien is according to the usual practice decreed. The decree-holder sought to recover in execution of this decree "future interest." *Held* that the terms of the decree were wholly inadequate to carry future interest: *JATAN v. BAHADUR SINGH.*

[III-128]

(26).———.] A decree was passed, on confession of judgment, in the following terms:—"Claim for recovery of Rs. 372-12-6, principal and interest under the bond of the 27th April, 1881, which became payable on the 27th June, 1881, and to recover costs and future interest; this case having been heard upon the 11th July, 1882, before the presiding officer, it is ordered and decreed that the decree for the amount claimed with costs be decreed." *Held* that the expression "amount claimed" must be construed as applying to the Rs. 375-12-6 principal and interest claimed, and was not applicable to a general and unascertained sum of future interest, and that the decree-holder was therefore not entitled to recover future interest from the judgment-debtor. *Debi Charan v. Pirbho Din Ram* (I. L. R., 3 All., 388) and *Ramnandan Rai v. Lal Dhar Rai* (I. L. R., 3 All., 775) distinguished. *Sheo Narain v. Ishri Pershad Narain Singh* (W. N., 1883, p. 148) referred to. *BENI DAYAL v. KUMAR CHAUDHRI.*

[IX-114]

(27).———. *Costs—Decree affirming that of lower Court.*] The defendant in a suit appealed from so much of the decree of the Court of first instance as related to the amount of costs payable by him to the plaintiff. The decree of the appellate Court directed that "the order of the lower Court be upheld, and appeal be dismissed: the appellant to pay the costs." *Held* that the amount of costs awarded by the Court of first instance, although they were not specified in the appellate Court's decree were recoverable in execution of that decree, inasmuch as those costs were the subject matter of the appeal, and the appellate Court, in affirming the decision of the first Court on that point, made them the substantive portion of its decree. *Shohrat Singh v. Bridgman*, (I. L. R., 4 All., 376) distinguished. *HIMAYAT HUSAIN v. JAI DEVI.*

[III-128]

CONSTRUCTION.—(continued.)

(28).———.] In this case *A's* suit against *B* was dismissed with costs by the Court of first instance but partially decreed by the lower appellate Court with proportionate costs and the High Court dismissed *B's* appeal with costs. *Held* that as the High Court had affirmed the decree of the lower appellate Court, *A* was entitled to recover the costs awarded to him by that Court though the High Court's decree did not specify those costs. *SHEO GHULAM AND OTHERS v. RADHAMOHAN.*

[III-245]

(29).———.] The original decree in a suit dismissed the suit with costs which were specified. On appeal the appellate Court directed that the original decree should be affirmed, and the appeal dismissed, and that the appellant should pay the respondents costs in the appellate Court, which were specified. The decree of the appellate Court did not contain any specification of the cost of the original Court. *Held* that the Court executing the appellate decree might execute it for the costs of the original Court looking to the decree of the Court to ascertain the amount thereof. *Shohrat Singh v. Bridgman*, (14 Moo. I. A., 377) referred to. *BIHARI LAL AND OTHERS v. KHUB CHAND.*

[III-202]

(30).———.] Under s. 440 of the Civil Procedure Code, the decree of a Court of first instance contained an order directing the next friend of a minor to pay the costs of the suit. On appeal, the decree was reversed. On second appeal, the High Court restored the first Court's decree, but its order directing that the respondent should pay costs did not specifically mention whether costs were to be paid by the next friend or by the minor. The decree-holder took out execution against the next friend, who objected, but his objection was over-ruled by the executing Court, and again on appeal. *Held* that the High Court's decree restoring that of the Court of first instance, must be construed as directing that the order as to costs was to be enforced in the same manner. *Held* also that as the orders of the lower Courts were made under section 244 of the Code, the High Court could not interfere in revision under s. 622, and that the orders were not open to revision under the ruling of the Privy Council in *Amir Hassan v. Sheo Bakhsh Singh* (I. L. R., 11 Calc., 6). *RAZA-UD-DIN v. AMIR SINGH*

[IX-173]

(31).———. *Instalment decree.*] A decree directed that "Rs. 200 should be paid within two months after date, and that thereafter annual instalments of Rs. 200 should be payable," and that, in default of payment of one instalment, the whole should be due. The judgment-debtors not having paid the second instalment within one year from the date of

CONSTRUCTION.—(continued.)

the decree, the decree-holders applied for execution of the decree for the whole amount. *Held* that it was intended by the decree that the second instalment should be payable in twelve months from the date of the payment of the first instalment, or, in other words, in fourteen months from the date of the decree, and the judgment-debtors had not made default by not paying that instalment within one year from the date of the decree. **MUKHTARI AND ANOTHER v. RAM KUMAR AND ANOTHER.**

[I-126]

(32).—Default—Option to execute.]

Where a decree for money is made payable by instalments with a proviso to the effect that on default being made in payment of the instalments, the decree-holder is entitled to execute the decree for the whole amount due, such a decree is to be construed as much as possible in favor of the decree-holder, and, unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second, or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due. **SHANKAR PRASAD v. JALPA PRASAD AND OTHERS.**

[XIV-115]

(33).—Ambiguous decree—Pleadings should be referred.] Where a decree is in its terms ambiguous it is competent to the Court executing it to refer to the pleadings in the suit in which such decree was passed to ascertain its precise meaning. *Muhammad Sulaiman v. Muhammad Yar* (I. L. R., 6 All., 30) distinguished. *Jawahir Mal v. Kastur Chand* (I. L. R., 13 All., 343) and *Robinson v. Dulcep Singh* (L. R., 11 Ch. D., 798) referred to. **LACHMI NARAIN v. JWALA NATH.**

[XVI-87]

(34).—Relief not specified—List annexed with plaint.] The plaintiff in a suit claimed possession of villages said in the plaint to be "detailed below." No details of the villages were given in the plaint itself, but a separate paper containing a list of villages was filed with the plaint. The plaintiff obtained a decree for possession of "all the villages claimed," but there was no indication in the decree what those villages were. *Held* that the Court executing the decree was not justified in reading the contents of the list of villages attached to the plaint into the decree, and awarding the decree-holder possession of the villages named in such list. *S. A. No. 310 of 1882 not reported decided the 11th August, 1882*, followed. *Debi Charan v. Pirbhui Din Ram* (I. L. R., 3 All., 388) referred to. **MUHAMMAD SULAIMAN AND ANOTHER v. MUHAMMAD YAR AND ANOTHER.**

[III-215]

CONSTRUCTION.—(continued.)

(35).—Plaint to be read into decree.] A decree provided that the whole of "the claim is decreed in favor of the plaintiff-appellant" but contained no specification of the relief granted. The plaintiff prayed for the separate possession of a share of undivided property. *Held* that though the decree should have contained in itself a specification of the relief granted, the absence of such specification was merely an irregularity and the decree was not incapable of execution, but the relief asked for in the plaint should be read into it. **KALP KUAR v. BISHESHAR KUAR.**

[X-75]

(3) Sale-certificate.

(36).—Sale of zamindari right—Killa.]

The appellant claimed a "killa" (fort) situated in a certain village by virtue of the purchase of the zamindari rights and interests in such land. The *killa*, it appeared, was an appurtenance to such zamindari rights. *Held* that the presumption was that the *killa* was included in the zamindari rights purchased until the contrary was shown. **IBU HASAN v. RAMZAN ALI AND OTHERS.**

[II-73]

(37).—Groves.]

The question raised by this appeal was, whether the sale of a "five *biswas* share" in a zamindari estate in execution of a decree transferred to the purchaser the judgment-debtor's interest in three groves. This interest was stated to be the right to the exclusive possession of one grove and a half share in the other two. The sale certificate showed that a five *biswas* share of the zamindari was sold to the plaintiff and the groves sued for are not mentioned in it. *Held* that the claim for exclusive possession of the grove was inconsistent with the title of the judgment-debtor, being the title of a co-sharer in an undivided zamindari. **HAR LAL v. HIMMAT RAI.**

[V-305]

(38).—Submerged land—Accretion.]

F owned a share in a village *M*, which in 1875, was divided into two separate *mahals*, *K* and *U*, and Government revenue was separately assessed on each *mahal*. In 1876 *K* was entirely submerged by the Ganges. On the 20th September, 1877, *F*'s share was sold in execution of a decree, and the auction purchaser was put in possession. In the sale certificate, the village *M* was named without specific mention of either of the *mahals*, and the Government revenue referred to was the amount assessed on *U* only. Subsequently the river receded, and part of *K* was again left dry and it was treated by the revenue authority as having accreted by alluvion to *U* in the proprietary possession of the auction purchaser. *Held* that, this view was erroneous inasmuch as before the auction-sale of 20th September, 1877, the two properties were separate, being separately assessed with revenue, and the incidents of the ownership of one could not affect

CONSTRUCTION.—(continued.)

the ownership of the other; and since there was no such rule of law as justifies the proposition that simply because two *mahals* are contiguous and one of them is liable to be submerged, therefore it is nothing more or less than an accretion to the other. *Held* also that inasmuch as the *mahal K*, being at the time under water, was not attached in execution of the decree against *F*, and was not advertized for sale, and the revenue assessed thereon was not referred to in the sale proceedings, and the sale certificate contained no reference to it as the property sold, the sale of the 20th September, 1877, did not convey any rights to the auction purchaser in respect of *K*. (*Mahadeo Dubey v. Bhola Nath Dichit*, second appeal No. 16 of 1884 from a decree of *F. S. Bollock, Esq.*, officiating District Judge of Allahabad, dated the 12th September, 1883, affirming a decree of Pandit Indar Narain, Munsif of Allahabad, dated the 16th July, 1883) referred to. **FIDA HUSAIN AND ANOTHER v. KUTUB HUSAIN.**

[IV-257]

(39) ————— [The rights and interests of certain judgment debtors in a *manza* consisting of two separate *mahals*, respectively known as the *Uparwar Mahal* and the *Kachar Mahal*, were brought to sale in execution of the decree. At the time of the sale, the *Kachar Mahal* was submerged by the river Ganges, and in the sale notification the revenue assessed upon the *Uparwar Mahal* only was mentioned, and there was no specific attachment of the *Kachar* or submerged land, but the property was sold as that of the judgment-debtors in the *manza*. Subsequently, the river having receded, the auction purchaser attempted to obtain possession of the *Kachar* land, but was resisted by the judgment-debtors on the ground that their rights and interests in that land had not been conveyed by the auction-sale, but only their rights and interests in the *Uparwar Mahal*. *Held* that either the whole rights of the judgment-debtors in both *mahals* were sold, or, if not, their rights in the *Uparwar Mahal*, with the necessary and contingent right to any lands which might subsequently appear from the river's bed and accrete to such *mahal*; and the mere fact of the mention in the sale notification of the revenue of the *Uparwar Mahal* did not affect what passed by the sale. *Held* also that the attachment of the judgment-debtor's entire proprietary rights in the *manza* included their interest in both *mahals*, and the sale certificate clearly showed that all their rights in the village were passed to the purchaser. (*Mahadeo Dubey v. Bhola Nath Dichit* (I. L. R. 5 All., 86, and S. A. No. 818 of 1885) referred to. *Fida Husain v. Kutub Husain*, (I. L. R. 7 All., 38) dissented from. **MUHAMMAD ABDUL KADIR v. KUTUB HUSAIN.**

[VI-327]

(4) Sale-deed.

(40) ————— [Covenant as to good title.] One *PL* sold to *JR*, for Rs. 300, two hypothecation

CONSTRUCTION.—(continued.)

bonds *A* and *C* and a simple bond *B*, with covenants to the following effect. "The evidence" "which I should have to produce for the purpose of obtaining the payment of the bonds" "and the maintenance of suit thereon shall be" "procured by me: should I fail in this respect or" "should the property hypothecated in the bonds" "be found to have been previously incumbered" "or should the vendee be impeded in the recovery of his money or should the hypothecated" "property be exempted from liability to the" "vendee's claim, or should any co-sharer put forward a claim to the property herewith sold, I" "shall be responsible and liable for costs incurred in Court and for all damage and loss, to" "the extent of the sale consideration with interest thereon at the rate of one per cent per mensem." Subsequently to the sale the vendor realized from the obligor under bond *C*, Rs. 43-2 on account of interest. All three bonds were put in suit by the vendee with the result that his claim under bond *B* was dismissed and those under *A* and *C* were reduced by the Court. The total amount which the vendee realized under the three bonds was Rs. 400. He could but did not appeal from the order dismissing his suit under bond *B*. Under these circumstances the heirs of the vendees sued the heirs of the vendors to recover Rs. 540-4-3 alleging that to be the amount of loss sustained by them from breach of this covenant by the vendor. *Held* that the plaintiffs were entitled to recover Rs. 43-2-0 realized by the defendants, after the sale had been effected, on account of interest, under bond *C*. The rest of their claim should be dismissed as not covered by the covenants contained in the sale-deed. **HARDEO AND OTHERS v. KISHEN LAL AND OTHERS.**

[I-90]

(41) —————.] *A* sold certain land to *B* and others. *C* and certain other persons brought a suit against *A* and *B* for a share of such land alleging that the same belonged to them. *A* did not defend the suit but *B* did and in the result *C* obtained a decree. Thereupon *B* brought this suit against *A* to recover the value of the share he had lost, and the cost he had incurred in defending *C*'s suit, basing his claim on a covenant contained in the sale-deed which ran as follows:—"If hereafter any co-sharer makes a claim I shall be responsible for the same and the vendees shall have nothing to do with it...and if any of the land is taken away then I shall pay to the vendees the value of such part." *Held* in revision that *A* was entitled under the covenant to get the value of the land he had lost, but not the costs of defending the suit brought by *C* for he had no business to do so without the consent of *B*. **PETITION OF BADLU AND OTHERS v. ULFAT HUSAIN.**

[III-35]

(42) —————.] An instrument of sale contained the following

CONSTRUCTION.—(continued.)

condition:—"Should any person claim as a co-sharer or proprietor of the property, and assert his claim against the purchaser or raise any dispute of any kind, or if from any unforeseen cause the purchaser be deprived of the possession of the property or any portion thereof, or his possession thereof is disturbed in any way, then I (vendor), my heirs and assigns, shall be liable for the purchase money, the profits of property, and the costs of litigation." The purchaser having lost the property, by reason of a person having a right of pre-emption having sued him to enforce such right and obtained a decree, sued the vendor to recover the cost incurred by him in defending such suit basing his claim upon the condition set forth above. *Held* that the suit was not maintainable as such condition referred to flaws or defects in the vendor's title and was not applicable to a loss accruing to the purchaser from his disqualification to buy. **GHULAM JILANI v. IMDAD HUSAIN.**

[II-67]

(43)———*Sale of money decree—Transfer of charge.*] The Collector in granting a lease to A of certain lands which he had taken under his direct management for arrears of revenue took from him as security for payment of the revenue a bond wherein certain lands of A were hypothecated. A made default whereupon the Collector sued him and obtained a money decree. This decree was purchased by B by a sale-deed which provided as follows:—"The remainder of the decree has been sold to B. The right to realize the money, which was enjoyed by me, would be enjoyed by the vendee, viz. he may execute the decree and realize the money from the judgment-debtor. B thereupon brought this suit to recover the money from A by attachment and sale of the lands hypothecated in the bond. *Held* that under the assignment all that the plaintiff acquired was the right of the Collector, the holder of a simple money decree, to enforce that decree and not his title to enforce the terms of the security by suit in a Civil Court. **HARSAHAI MAL AND OTHERS v. MAKUND RAM.**

[III-198]

(41)———*Sale of one bigha—Wrong boundary.*] A deed of sale purported to transfer 1 bigha of land of which the boundaries were described. It subsequently appeared that the boundaries included a larger area, viz. 1 bigha 2 biswas 7 dhurs. *Held* that the intention of the parties being to sell, whatever was included within the boundaries the whole would be taken to have been transferred. **ABDUL GHANI AND ANOTHER v. TAJAMMAL HUSAIN.**

[III-38]

(45)———*Gift—Hindu widow.*] One N, the sole owner of a certain village, had a son J. J had two wives. By his first wife he had a son

CONSTRUCTION.—(continued.)

U. J's second wife was G by whom he had a son whose widow is K, the defendant in the suit. J died, leaving U his son, G his widow, and K his son's widow, and on his death U inherited the village. Prior to the year 1874, U had made a gift to G of 105 bighas situate in the village. In 1874 the rights and interests of U in the village were sold by auction and purchased by T, the ancestor of the plaintiffs. G by a deed of gift conveyed the 105 bighas to K and ultimately died on 26th January, 1883. Plaintiffs then sued to set aside the gift and for possession of the land. The learned Judge found that the land was given to G in lieu of her maintenance which she was to hold rent-free for her life and that she had been in possession thereof for twenty years. Further that U had the right to resume the land and assess it to rent on the death of G, and that all the rights and interests of U, in the land were attached and sold in 1874. On second appeal it was contended that the interest of U in the land at the time of the sale of the village by auction was in the nature of a mere expectancy and therefore could not be sold and was not sold. *Held*, that U gave to G the usufruct of the land for her life in lieu of her maintenance. That after the gift the interest of U in the land was of the same character and carried with it the same consequences, as the reversion which the lessor would have for land leased for life or years analogous to the right which a mortgagor who had granted a usufructuary mortgage would have. That U had a vested right in the land which was capable of being sold, and that right passed to the auction purchaser at the sale of 1874. Counsel for appellant cited the following cases in the course of his argument:—*Koraj Koomar v. Komui Koomar* (6 W. R. C. R., 34); *Ram Chunder Tanta Das v. Dhurmo Narain Chukarbatty*, (15 W. R. F. B. R., 17); *Taffuzzool Husain Khan v. Raghunath Pershad* (14 Moo. I. A., 41). **KACHWAIN v. SARUP CHAND AND OTHERS.**

[VIII-200]

(46)———*Sale deed.*] A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were: *hath *** narvasi apne kibai katai karke zar-i-saman tamam wo kamal wasul pakar bakhsh diya aur hiba kardiya.* The deed was stamped as a sale-deed and was duly registered, but no possession was given under it and there was apparently no evidence external to the deed that any consideration had passed between the parties. *Held* that in the absence of any evidence external to the deed itself of the intention of the parties the deed in question must be taken to be a deed of sale.

Contra.—The lower appellate Court having found that no consideration had passed the deed must be considered as a deed of gift, though wearing the appearance of a sale-deed, and,

CONSTRUCTION.—(continued.)

possession not having been given, under Mohammadan Law the gift was invalid. *ANGAN LAL v. KHAWAJA MOHAMMAD HUSAIN AND OTHERS.*

[XI-159]

(47).—*Sale—Mortgage.* The plaintiff and defendants executed upon the same day two documents. The one purported to be a deed of absolute sale of a certain estate by the plaintiff to the defendants. The other was an agreement by which the defendants covenanted, upon payment of a certain sum by a specified date, to reconvey the property sold by the first mentioned deed. *Held* that evidence was admissible *dehors* the document to show that the intention of the parties was not to effect an out and out sale with merely a right of repurchase under certain conditions left in the vendor, but to constitute a mortgage by conditional sale or *bai-bil-wafa*. The mere fact of a deed of absolute sale being accompanied by another giving a right of repurchase will not, for that reason alone, constitute the transaction one of mortgage, but the intention of parties must be gathered from the terms of the deeds or from the surrounding circumstances or from both. *Alderson v. White* (2 *De G. and J.* 105); *Lincoln v. Wright* (4 *De G. and J.* 16); *Bhagwan Sahai v. Bhagwan Din* (1 *L. R.*, 17 *I. A.* 98); *S. C. I. L. R.*, 12 *All.*, 387); *Ali Ahmad v. Rahmat-ul-lah* (1 *L. R.*, 14 *All.*, 195); *Ramasyami Sastrigal v. Samitappa nayakan* (1 *L. R.*, 14 *Mad.*, 179); *Bapaji Apaji v. Sena Varaji Marvadi* (1 *L. R.*, 2 *Bom.*, 231); *Bhup Kumar v. Muhammad Begam* (1 *L. R.*, 6 *All.*, 37) and *Venkata Cheti v. Akku* (7 *Mad. H. C. Rep.*, 219) referred to. *BALKISHEN DAS AND OTHERS v. W. F. SEGGE.*

[XVII-109]

(5) Other documents and terms.

(48).—*Mortgage—Interest a charge on the property.* In Chait, 1275 *Fasli*, (March 1868) *M.*, having borrowed Rs. 11,200 from *S.*, gave him a mortgage by way of conditional sale of certain immoveable property for a term of 7 years, that is to say, extending over the years 1276, 1277, 1278, 1279, 1280, 1281, and 1282 *Fasli*. The sum payable as the interest of each of three years was fixed at Rs. 1,680. The mortgagee obtained payment of his interest for four years from 1276—1279 *Fasli* inclusive, by bringing suits against the mortgagor. The interest for 1280, 1281 and 1282 *Fasli* as well as the principal sum, remaining unpaid, the mortgagor sued for redemption of the mortgaged property on payment of the principal sum, and the interest of the last year, 1282 *Fasli* only, contending that the interest of the other years, 1280 and 1281 *Fasli*, was not secured on the mortgaged property, but was, under the terms of the instrument of mortgage, realizable by suit from his non-hypothecated property and person. *Held*, on the construction of the instrument of mortgage, that the mortgage was not redeemable on payment of the last year's interest only, but on pay-

CONSTRUCTION.—(continued.)

ment of the interest of the other years as well. *SARJU PRASAD v. MANSUR ALI.*

[III-27]

(19).—*Amount of share mortgaged.* One *BS* who possessed share in two *thokes* of *mauza* Raipur, viz. in one *thoke* $\frac{1}{2}$ of eleven *biswansis* and in the other two *biswansis*, gave a simple mortgage on ten *biswansis* of his share in Raipur by a deed which ran as follows:—“I, *BS*..... that until the repayment of this amount my ten *biswansis zemindari* share in *mauza* Raipur bounded as below shall remain hypothecated.” The question in this suit was whether the two *biswansis* share were intended to be mortgaged. *Held* that the intention was to mortgage all the interest of the mortgagor in Raipur, erroneously represented to be ten *biswansis*. *BHIK CHAND AND ANOTHER v. NIRPAT SINGH.*

[III-184]

(50).—*Government grant.* This was a suit by *TP* to eject *KA*, the occupant of a house, in village *K*, and for the recovery of rents. The suit was founded mainly on a *sarkhat* executed by the defendant whereby the plaintiff's title to the house as well as to the lands in the village was unconditionally admitted and recognized, and a promise to pay a rent of Re. 1 *per annum* was made. Plaintiff also alleged that the village *K* had been confiscated by Government and had subsequently been conferred upon him, and that the grant conveyed to him all the rights and interests of every person and set of persons in the village of every sort and description. The plaintiff however did not produce in the lower Courts any documentary evidence of the grant. The defence was, that the execution of the *sarkhats* had been obtained by duress, fraud and undue influence and that their rights and their ancestors, in the houses had never been forfeited or conferred upon the plaintiff. At the hearing of the case in second appeal the plaintiff produced the *sanad* making the grant to him, having been called upon to produce it. From this instrument it appeared that the proprietary right alone in the village had been conferred upon the plaintiff. *Held* that under all the circumstances of the case it must be held that the *sarkhat* had been executed under a mutual mistake of fact on the part of the parties and it was therefore void and without effect, and as the *sanad* gave the plaintiff no proprietary right in the ancestral houses of the inhabitants of the village, his suit must be dismissed. *KARIM ALI v. THAKUR PRASAD.*

[I-128]

(51).—*Wajib-ul-arz.* *Held* that a provision contained in a *wajib-ul-arz* that village cattle might graze on the waste lands of the village, could not be construed, in the absence of any definite covenant to that effect, as depriving the zemindar of his right to reclaim such waste lands. *RAM SARAN SINGH AND OTHERS v. BIRJU SINGH.*

[XVII-35]

CONSTRUCTION.—(continued.)

(52.) —————.] *A* and *B* were co-sharers in a *thoke* in which there were two tanks dug by their common ancestor, *B*, conveyed a part of his share in the *thoke* to *C*, who thereupon began to use the tanks for irrigation purpose. This was a suit by *A* against *C* to restrain him from doing so on the following grounds:— That the tank was the exclusive property of the family which was declared in the *wajib-ul-ars*, the *wajib-ul-ars* provided that the excavator of a tank should have the exclusive right of irrigating therefrom; and that the tank being joint undivided property of a Mitakshara family, a sale of it without the consent of others was invalid. *Held* that the right of *B* in the tank, was not distinct from or independent of his *zamindari* rights, nor can the *wajibulars* be interpreted in that way and the sale deed of *zamindari* rights conveyed the rights in the tank. *Held* also that as the shares of *A* and *B* were separate and distinct in the *thoke* the tank will also be considered to be in the same proportion. BINDESHARI PRASAD v. BHAUANI DIN AND ANOTHER.

[IV-211]

(53.) —————.] *Will.* One *DD*, a separated sonless Hindu, made a will in favor of his wife of which the material clause was as follows:—"After my death the said Musammat * * * is to be the person in possession and ownership in place of me, the executant, of all the bequeathed property aforesaid by right of this will." *DD* died leaving a widow and a daughter who was married to one *F*. The widow obtained possession of the property comprised in the will, on the death of *DD*. The daughter died in the life-time of the widow, who thereupon made a will leaving the property which had come to her from *DD* to *F*. On the death of the widow certain persons alleging themselves to be the nearest reversioners to *DD* claimed the property. *Held* that on the wording of the will and having regard to the surrounding circumstances of the case, the testator having no near male heirs, and the plaintiffs, if reversioners at all, being remote reversioners, the intention of the testator *DD* was to leave the property in question to his widow as her *stridhan* to descend to his heirs. *Kunjibhari Dhur v. Prem Chand Dutt* (I. L. R., 5 Cal, 684) dissented from. *Moulvie Mahomed Shumsool Hooda v. Shewuk Ram* (L. R. 2 I. A., 7) and *Hirabai v. Lakshmi Bai* (I. L. R., 11 Bom., 573) distinguished. JANKI v. BAIRON AND ANOTHER.

[XVII-4]

(54.) —————.] *Tamliknama.* This was a suit on two bonds, dated the 21st July, 1877, and 6th May, 1887, executed by *GB* in favor of the plaintiffs. The defendants were *DS*, *GB*'s brother, and *G* his widow. The question in this appeal was whether at the time of the execution of the bonds the property mortgaged therein was the property of *GB* or it

CONSTRUCTION.—(continued.)

had previously passed to *DS* under an instrument, dated the 23rd February, 1887, executed in his favor by *GB* and described as a *tamliknama*. The *tamliknama* ran as follows:—"that up to this time with the assistance of *DS*, my brother, I managed the business.....I therefore, with my free will and consent, make *DS*, my real brother, and who is my heir as well, the proprietor of all the *reasat* belonging to me, that is, I have removed my possession from my *zamindari* estate consisting of &c. from my other moveable and immovable properties, which are in my possession and have placed the same in the possession of *DS*....." This deed was not only duly signed, sealed, and witnessed but was also admitted by *GB* before the Sub-Registrar and was then formally registered. *Held* that the *tamliknama* covered the whole property belonging to *GB* and was therefore a bar to his executing the mortgages in suit. Plaintiff's suit was therefore rightly dismissed by the Court below. SHAM KARAN AND ANOTHER v. DAULAT SINGH AND ANOTHER.

[III-233]

(55.) —————.] *Lease—Termination.* In the absence of words to the contrary, a lease of *zamindari* rights for a term of years does not terminate before the expiration of the terms by the mere fact of the death of either the lessor or lessee. *Maharaja Tej Chaud v. Sri Kanth Ghose*, (3 Moo. I. A., 261) and *Raja Burdakanth Roy v. Aluk Munjooree Dasiah* (4 Moo. I. A., 321) relied on. On the question whether the lessees in this case were jointly as well as severally liable, *held* that the terms of the lease indicated that the liability of the lessees was intended to be several but equal in extent. BADRI NATH AND OTHERS v. BHAJAN LAL.

[II-216]

(56.) —————.] *Perpetual—Life interest.* The plaintiffs in this case claimed to set aside an instrument called an "*Istemrari Patta*" the terms of which were as follows:—"I have given a perpetual lease.....so long as the rent is paid I shall have no right to resume the lands. *Held* that the mere use of these words did not necessarily make it a perpetual lease with right of inheritance and that it was still open to the Court to find that it created only a life interest. GAYA JATI v. RAMJIAWAN RAM.

[VI-227]

(57.) —————.] *Vakalatnama.* A *vakalatnama* given for the purpose of authorizing the person to whom it was given to file an application to sue as a pauper, after various special powers, contained a power "to take any other proceedings which may be necessary." *Held* that this general power was sufficient to authorize the making of an application for leave to appeal as a pauper and to appeal. RUKMINA v. LOGMANI.

[XVIII-29]

CONSTRUCTION.—(continued.)^f

(58).—*Award.*] An award drawn by an unprofessional arbitrator in India is not to be construed according to the same principles as an award settled by counsel or a solicitor in England, but in accordance with what may reasonably be supposed under the circumstances of the case to have been the intentions of the arbitrator. Where an award, which was of the nature of a family settlement, between a father, mother and son, of certain property which had been given by the father to the mother in lieu of dower and then by the mother to the son, directed that a certain annuity should be paid out of the property to the father and mother "*ta hayat walidain*," it was held that the annuity was to be paid during the joint lives of the father and mother and also during the life of the survivor. *ABDUL MAJID KHAN v. KADRI BEGAM.*

[XVIII-34]

(59).—*Fasli year—Agricultural year.*] The appellant sued the respondents on an hypothecation bond, payable by annual instalments beginning at the end of 1275 *Fasli*. The bond was dated the 30th July, 1867. The suit was instituted on the 13th September, 1881. The lower Courts held that the suit, as regards the instalments for 1276 *F*, was barred by limitation, inasmuch as the agricultural year, as described in the Rent Act (X of 1859), ended in June, and therefore the instalment for 1276 *F* became due in June, 1869. Held that both the lower Courts had erroneously construed the bond. The bond distinctly made the instalments payable at the end of every *Fasli* years, and had no reference to the agricultural year. The *Fasli* year 1276 ended on the 20th September, 1869, and the claim, as regards the instalment for that year, was therefore within limitation. *YAD RAM v. AMIR SINGH AND OTHERS.*

[II-174]

(60).—[] The practice adopted by *Patwaris* in some parts of the North Western Provinces of applying the term "*Fasli* year" to the "*agricultural year*" as defined in Act No. XIX of 1873, s. 3, cl. 8, is erroneous. Where parties to a deed describe a date as being in such and such a "*Fasli*" year they must be taken, in absence of evidence of mutual mistake, to refer to the calendar *Fasli* year. In interpreting a document a clause which is inconsistent in any construction thereof with the remaining provisions of the document it must be rejected. *Yad Ram v. Amir Singh* (W. N. 1882, p. 174) and *Sheo Baran Singh v. Bisheshar Dayal Singh* (W. N. 1892, p. 236) referred to. *CHATAR BHUJ v. DWARKA PRASAD AND ANOTHER.*

[XVI-123]

(61).—*"Descendant."* By an agreement it was agreed that one *A* and "his descendants" should receive Rs. 30 annually out of the profits of certain villages from the obligors and

CONSTRUCTION.—(continued.)

their descendants." Held that the wife of *A* was not entitled to the grant and a transfer by her of the grant had no effect. *GOBIND KRISHNA v. MADHO.*

[III-218]

CRIMINAL PROCEDURE CODE.

(ACT V OF 1898).

s. 4 (m).—*Judicial proceeding*—(Act X of 1882).] The proceedings of a Magistrate under s. 88 of the Code of Criminal Procedure are not "*judicial proceedings* in the sense of s. 4 (m) of that Code. *EMPRESS v. SHEO DIHAL RAI.*

[IV-214]

s. 9—*Sessions Judge—Territorial jurisdiction* (Act X of 1882).] A criminal appeal was presented to the Session Judge of the Bijnour-Badaon division at Bijnour within the said Sessions division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. Held that the trial of such appeal at Moradabad was an irregularity but no failure of justice being shown to have been occasioned thereby was covered by s. 531, Criminal Procedure Code. *EMPRESS v. FAZL AZIM.*

[XIV-195]

s. 10—*District Magistrate—Territorial jurisdiction—Transfer*—(Act X of 1872).] Mr. *M* was appointed by the Local Government, under s. 37 of Act X of 1872, a Magistrate of the first class, under the designation of Joint Magistrate in the district of Meerut. He was subsequently appointed to officiate as Magistrate of the district of Meerut during the absence of Mr. *F* or until further orders. While so officiating he was appointed by a Government notification, dated the 10th July, 1880, to officiate as Magistrate and Collector of Gorakhpur "on being relieved by Mr. *F*." He was relieved by Mr. *F*. in the forenoon of the 23rd July, 1880; and in the afternoon of the day, under the verbal order of Mr. *F*, he proceeded to complete a criminal case which he had commenced to try while officiating as Magistrate of the district of Meerut. All the evidence in this case had been recorded and it only remained to pass judgment. Mr. *M* accordingly passed judgment in this case, and sentenced the accused persons to various terms of imprisonment. Held that Mr. *M* retained his jurisdiction in the district of Meerut so long as he stood appointed by the Government to that district and no longer, and the effect of the order of the 10th July, 1880, was to transfer him from the district of Meerut from the moment he was relieved by Mr. *F* of the office of Magistrate of that district and from that moment he no longer stood appointed to that district and could exercise no jurisdiction therein as a Magistrate of the first class; and that therefore the convictions of such accused persons had been properly quashed on the ground that Mr. *M* had no jurisdiction. *EMPRESS v. ANAND SARUP.*

[I-37]

CRIMINAL PROCEDURE CODE, s. 12—(continued.)

s. 12—Subordinate Magistrate—Territorial jurisdiction—Transfer—(Act X of 1882.) By an order of the Local Government Babu Dila Ram, a Magistrate exercising jurisdiction in the Meerut district, was transferred from that district "on the arrival of Kuar Kamta Parsad." *Held* that the effect of the order of transfer so expressed was that Babu Dila Ram ceased to have jurisdiction as a Magistrate within the Meerut district from the time when Kuar Kamta Prasad commenced work as a Magistrate in that district. *Empress of India v. Anand Sarup* (I. L. R., 3 All., 563) referred to. *BALWANT AND ANOTHER v. KISHEN*.

[XVI-195]

s. 28—Jurisdiction—High Court—Sessions Court—(Act X of 1882.) Subject to the other provisions of the Code of Criminal Procedure, s. 28 gives power to the High Court and the Court of Session to try any offence under the Indian Penal Code, and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. *EMPRESS v. KHARGA*.

[VI-254]

(1).—s. 35.—"At one trial"—Cumulative sentence, (Act X of 1872.) One T was tried on four separate charges by a Magistrate of the 2nd class and sentenced (each case being tried, on the 27th January, 1881) to an aggregate punishment of 20 months' rigorous imprisonment. The cases were referred by the Sessions Judge to the High Court for orders, with regard to s. 314 of Act X of 1872. *Held* that s. 314 did not apply, as the trials were separate. *Empress v. Daulatia*, dated the 8th March, 1880, followed. *EMPRESS v. THAKUR*.

[I-23]

(2).—"Distinct offences"—Conviction under ss. 411-75, P. C.—(Act X of 1882.) A person convicted under ss. 411-75, Penal Code, is not convicted of "distinct offences" within the meaning of s. 35, Criminal Procedure Code. *Empress v. Zor Singh* (I. L. R., 10 All., 146) explained. *EMPRESS v. KHALAK*.

[IX-152]

(3).—"Conviction under ss. 380 and 454, P. C.—(Act X of 1882.) Under ss. 35 and 235, Criminal Procedure Code, a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the ss. 379 and 380 and 454 of the Penal Code, for house breaking in order to the commission of theft and theft, the two offences forming part of the same transaction and being tried together. In such a case where the prisoner had been three times previously convicted:—*held* that the better course would have been to commit him to the Court of Session under ss. 454-75 of the Code. But a Session Judge trying such a case

CRIMINAL PROCEDURE CODE, s. 35 —(continued.)

under s. 379 or s. 380 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of 4 years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft. *Queen-Empress v. Ajodhia* (I. L. R., 2 All., 644) *Queen-Empress v. Sakharan Bhanu* (I. L. R., 10 Bom., 492) referred to. *QUEEN EMPRESS v. ZOR SINGH*

[VIII-5]

EMPRESS v. BANDHU AND OTHERS.

[III-228]

(4).—"Punishments to run concurrently—(Act X of 1882.) There is no provision in the Code of Criminal Procedure by which a Court is empowered, on convicting an accused person of two or more offences at the same time, to direct that the sentences imposed in respect of such offences shall run concurrently. *QUEEN-EMPRESS, v. ISHRI*.

[XVII-207]

(5).—"Conviction without sentence—(Act X of 1882.) The accused in this case was convicted by a Magistrate under ss. 170 and 384, Penal Code, and was sentenced to 9 months' rigorous imprisonment under each, the sentences to run concurrently. The Sessions Judge in appeal upholding both the convictions sentenced the prisoner to 9 months' imprisonment under s. 384 and recorded no sentence in respect of the other conviction. *Held* that there was no provision in law to justify the Magistrate in directing the sentences to run concurrently. Indeed s. 35, Criminal Procedure Code, renders such a course illegal. *Held* further that the omission, on the part of the Sessions Judge was illegal. Where there is a conviction there must be a sentence. *EMPRESS v. WAZIR JAN*.

[VII-274]

EMPRESS v. KALUA AND OTHERS.

[IV-219]

(6) s. 35 (a).—"Maximum punishment—Transportation—(Act X of 1882.) The appellant in this case was tried before the Sessions Judge on seven charges of offences under s. 328, Penal Code, all seven forming part of the same transaction and committed at one and the same time against seven persons. The Sessions Court Judge convicted him on all the seven charges and sentenced him to 5 terms of transportation for 7 years each (in all 35 years), no sentence being passed in respect of the other two. *Held* that though the joint trial and conviction were legal under s. 235 of the Code of Criminal Procedure, the sentence passed was illegal as under s. 35 of the Code of Criminal Procedure, the period could not exceed 14 years. The Sessions

CRIMINAL PROCEDURE CODE,

s. 35 (a)—(continued.)

Judge's opinion that the limitation applied to imprisonment only and not to transportation was wrong. *EMPRESS v. SAHTU*.

[IV-285]

s. 39—*Trying case as 2nd class and passing sentence as 1st class Magistrate—(Act X of 1882).* Held that with reference to the terms of s. 39, Criminal Procedure Code, a Magistrate of the second class, who has begun a trial as such and continued it in the same capacity up to the passing of sentence, and who prior to passing sentence, has been invested with the powers of a Magistrate of the first class, is competent to pass sentence in the case as a Magistrate of the first class. *EMPRESS v. PARSHAD AND OTHERS*.

[V-105]

s. 40—*Jurisdiction—Transfer.*

See ss. 10 and 12.

(1) s. 55—*Immediate re-arrest of person released—(Act X of 1872).* A who was released by an order of the High Court (see W. N. 1883, p. 204) was immediately re-arrested by the Magistrate under s. 55, Criminal Procedure Code. Held that as he was not voluntarily within the limits of the police station, s. 55, Criminal Procedure Code, had no application and the arrest was illegal. *EMPRESS v. AMIR KHAN*.

[III-223]

Compare:—

EMPRESS v. CHETTA AND ANOTHER.

[IV-85]

(2.)—*Bail—(Act X of 1882).* Where a person is arrested by the police under the provisions of s. 55 of the Code of Criminal Procedure, he should always be given the option of release on reasonable bail being supplied. IN THE MATTER OF THE PETITION OF DAULAT SINGH.

[XI-179]

ss. 69 & 70—*Substituted service (Act X of 1872).* This was an appeal by the Local Government from a judgment of acquittal. When the appeal was admitted, notice of its having been admitted was issued for service on S. The Magistrate of the district ordered the police to serve the notice on S and the serving officer made the following return:—"Notice was served on the father of the accused, who undertook to inform his son S." S did not appear on the day fixed for hearing the appeal. Held that, before the Court could proceed with the hearing of the appeal, it must have an affidavit from the person who was entrusted with the service of the notice on S, that he has made his best endeavours to effect personal service on him, and that he has been unable to do so either on the ground that he has evaded such service, or that he cannot be found. When such affidavit has been filed, this Court will

CRIMINAL PROCEDURE CODE,

ss. 69 and 70—(continued.)

consider whether substituted service should be permitted in accordance with the provisions of s. 154, Criminal Procedure Code. *EMPRESS v. SUNDAR*.

[II-170]

s. 83—*Applicability of section to warrants issued under Act XIII of 1859—(Act X of 1882).* Held that s. 83 of the Code of Criminal Procedure is applicable to warrants issued under Act No. XIII of 1859. *Queen-Empress v. Kattayan (I. L. R., 20 Mad., 235)* followed. *GAURI SHANKAR v. MATA PRASAD*.

[XVII-220]

s. 88—*Power of Court to investigate claims of third persons—(Act X of 1882).* There is no provision of law requiring a Magistrate who has attached property under s. 88 of the Code of Criminal Procedure to investigate the claims of third persons to the ownership of such property. *Queen-Empress v. Chumroo Rai (W. R. Cr. R., 35)* followed. *EMPRESS v. SHEODIHAL RAY*.

[IV-214]

(1)—*Chapter VIII—Object of chapter—(Act X of 1882).* Observations regarding the object of Chapter VIII of the Criminal Procedure Code, and the mode in which its provisions, and particularly s. 118 read with s. 110 should be applied. *QUEEN-EMPRESS v. HAMIDULLAH KHAN*.

[IX-114]

(2)—*Chapter VIII—Order without proceedings—(Act X of 1872).* One F was convicted by the District Magistrate of an offence under s. 379, Penal Code, and sentenced to two years' rigorous imprisonment and to pay a fine of Rs. 50, or in default to suffer further rigorous imprisonment for six months. The Magistrate further directed, but without taking any proceedings under Chapter XXXVIII of Act X of 1872, that, inasmuch as it appeared to him that F was by repute a thief and a person of notoriously bad character "at the expiry of the sentence now passed upon him he be brought in Court and enter into recognizances in Rs. 100 with two sureties in Rs. 100 each, for his good behaviour for a further term of one year, and in default should suffer rigorous imprisonment for a term not exceeding one year, or until he furnished the desired sureties." On appeal by F the Sessions Judge affirmed the conviction but set aside the latter portion of the order as illegal. The Magistrate being of opinion that the Sessions Judge was not competent to set aside such portion of the order and that such portion was not illegal the case was referred by the Sessions Judge to the High Court. Held that the Magistrate's order with regard to security was illegal. That that order, without any proceedings under Chapter xxxviii of the Criminal Procedure Code could not be treated as an order made under that chapter and as it was made

CRIMINAL PROCEDURE CODE,
s. 88—(continued.)

part and parcel of the sentence passed under s. 379, Penal Code, could under s. 280 of the Criminal Procedure Code be reversed by the Sessions Judge. *EMPRESS v. JEONATH.*

[I-154]

(1) s. 106.—*Offence involving breach of peace—(Act X of 1882).* The applicant in this case was charged with breaking open a locked shop belonging to the complainant. He was therefore convicted of criminal trespass, but the Magistrate took security from the applicant to keep the peace. *Held* that as he cannot be said to have committed a breach of the peace the order was illegal and must be set aside. *Queen v. Jhapoo* (20 W. R. Cr., 37.) distinguished. *EMPRESS v. KUNDAN SINGH.*

[V-303]

(2) s. 106 (2).—*Acquittal—Effect on bond—(Act X of 1882).* When a person who has been ordered to find security to keep the peace on conviction is acquitted on the appeal the order directing him to find security abates *ex facto*, and it is not competent to the appellate Court to order the security to be continued. *QUEEN EMPRESS v. CHAJJU MAL AND ANOTHER.*

[XV-141]

(3) s. 106 (3).—*Power of appellate Court—(Act X of 1882).* The Magistrate of the district when acting as an appellate Court is not competent to make an order under s. 106 of the Code of Criminal Procedure, requiring the appellant to furnish security for keeping the peace. *Aslu v. Queen-Empress* (1 L. R., 16 Cal., 779), followed. *QUEEN EMPRESS v. LACHMAN AND ANOTHER.*

[X-201]

QUEEN EMPRESS v. ISHRI AND OTHERS.

[XIV-202]

QUEEN EMPRESS v. PEMAN AND OTHERS.

[X-170]

EMPRESS v. GHONGHA SAHAI.

[IV-71]

Per contra.

EMPRESS v. KAMTA PRASAD.

[II-12]

(1) s. 107.—*Information—(Act X of 1882).* *Held* that a police report furnishing certain informations against the accused and praying that he might be called on to give security for good behaviour as he habitually committed extortion was not such information "as is contemplated by s. 107, Criminal Procedure Code." *EMPRESS v. BATUK AND ANOTHER.*

[IV-54]

CRIMINAL PROCEDURE CODE,
s. 107—(continued.)

(2) ————— (*Act X of 1882*).] *Held* that "information" of the kind mentioned in s. 107 must be clear and definite directly affecting the person against whom process is issued, and should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet. *IN THE MATTER OF THE PETITION OF JAI PRAKASH.*

[III-208]

See EMPRESS v. BABUA

[III-260]

EMPRESS v. ABDUL KADIR AND ANOTHER.

[VII-111]

(3) ————— (*Act X of 1882*).] Conversations out of Court with persons, however respectable, are not legal or proper materials upon which Magistrates should adopt proceedings under s. 107, Criminal Procedure Code. *EMPRESS v. BABBUA.*

[III-260]

(4) ————— (*Breach of peace—What amounts to (Act X of 1882).*) In this case (reported to the High Court by the Court of Sessions for order^s) the police furnished a report giving certain informations against the accused and praying that he might be called on to give security for good behaviour as he habitually committed extortion. The Magistrate on a perusal of the report held that on the information contained in it the accused could not be called on to furnish security for good behaviour, but that "as it was evident that there was apprehension of a breach of the peace" by the accused, proceedings should be taken under s. 107 of the Code of Criminal Procedure. The accused was therefore required to show cause and after an enquiry he was ordered to give security. *Held* that the order was bad because the evidence subsequently taken does not point to the likelihood of a breach of the peace. All it shows is, that the petitioners and other persons have quarrelled amongst themselves and committed assaults on each other about the right of serving pilgrims, but no *act* is shown to be in contemplation likely to occasion a breach of the peace. *QUEEN EMPRESS v. BATUK AND ANOTHER.*

[IV-54]

(5) ————— (*Exercise of lawful right—(Act X of 1882).*) A having been lawfully put in possession of certain land in execution of a decree against B, attempted to plough the land but was obstructed by B. Thereupon the police reported to the Magistrate that both parties were about to commit a breach of the peace for possession of the land and the Magistrate made an order directing both the parties under s. 107 to enter into recognizance to keep the peace. *Held* that the order could not be sustained, for the petitioner's (A's party) were only exercising

CRIMINAL PROCEDURE CODE, s. 107
—(continued.)

their lawfully acquired rights. Section 141 of the Indian Penal Code, paragraphs 4 and 5 explained. PETITION OF SYED HUSAIN AND OTHERS.

[IV-57]

EMPRESS *v.* ABDUL KADIR AND ANOTHER.

[VII-111]

(6) s. 107 (2)—*Jurisdiction*.—(Act X of 1882.) Section 107 of the Criminal Procedure Code does not empower a Magistrate to issue process under it to a person not residing within his jurisdiction. *In the matter of the petition of Jai Parkash Lal (I. L. R. 6 All. 26)* followed. *Rajendra Chunder Rai (I. L. R. 11 Calc., 737)* and *Dina Nath Mullick (I. L. R., 12 Calc., 133)* approved. IN THE MATTER OF THE PETITION OF ABDUL AZIZ.

[XI-182]

(7) s. 107—*Power of High Court in revision to order Magistrate to take security.*

See s. 439, No. (14).

(1) s. 110—*"Information"*—*Gathered out of Court*.—(Act X of 1882.) Conversations out of Court with persons however respectable are not legal or proper materials upon which Magistrates should adopt proceedings under s. 110, Criminal Procedure Code. EMPRESS *v.* BABUA.

[III-260]

Compare:—

EMPRESS *v.* AMIR KHAN.

[III-223]

(2.)—*For breach of peace—Proceeding under s. 110*.—(Act X of 1882.) A Magistrate is not competent upon information that suggests the likelihood of a breach of the peace to resort to s. 110, Criminal Procedure Code and it is altogether *ultra vires* for him to demand security for three years in such a case. EMPRESS *v.* BABUA.

[III-260]

(3.)—*"Within...local...jurisdiction"*—*Person detained under compulsion*.—(Act X of 1882.) The accused in this case were arrested by the police at Kasauli in the Punjab on a criminal charge and brought to Aligarh in custody. After several remands they were discharged on their own recognizance to surrender when called upon. They were subsequently ordered by an Aligarh Magistrate to give security for good behaviour for 3 years. *Held*, on a reference by the Sessions Judge that as the accused had not returned to the district of their own accord, but were in it under compulsion, they cannot be legally ordered to find security for good behaviour. EMPRESS *v.* CHETA AND ANOTHER.

[IV-85]

CRIMINAL PROCEDURE CODE, s. 110
—(continued.)

(4.)—*Detention pending enquiry—Legality*.—(Act X of 1882.) A was tried at Meerut for murder and acquitted. He was then sent to Delhi and there committed for trial for murder and acquitted. Then at the request of the Magistrate of Meerut in order that proceedings under s. 110, Criminal Procedure Code, might be taken against him, A was sent in custody to the Magistrate of Meerut and pending an inquiry by the police as to his character he was confined in the lock-up. Sometime after a Sub-Inspector was examined to supply the information required by s. 110, Criminal Procedure Code. That being done it was ordered that pending further inquiries A would not be released until he gave security in two sureties for Rs. 200 each. *Held* that the detention of A under the circumstances was illegal. EMPRESS *v.* AMIR KHAN.

[III-204]

(5.)—*Transfer*.—(Act X of 1882.) Proceedings under s. 110 of the Code of Criminal Procedure cannot be transferred to any Court outside the district within which such proceedings have been lawfully instituted. IN THE MATTER OF THE PETITION OF AMAR SINGH.

[XIII-183]

See

IN THE MATTER OF THE PETITION OF GUDAR SINGH.

[XVII-52]

(1) s. 112—*Omission to make order setting forth information—Irregularity*.—(Act X of 1882.) The omission on the part of a Magistrate calling upon a person to find security for good behaviour to make "an order in writing setting forth the substance of the information received etc." as required by s. 112 of the Code of Criminal Procedure is not in itself an irregularity which will vitiate the proceedings, but will become so only if a failure of justice has been thereby occasioned. QUEEN-EMPRESS *v.* BHAGWAN DAS.

[XI-40]

EMPRESS *v.* MUHAMMAD JAFAR AND OTHERS.

[I-33]

See also

GHOLAM HAIDAR *v.* GHOLAM KADIR.

[I-155]

EMPRESS *v.* DEBI.

[V-30]

EMPRESS *v.* NATHU AND OTHERS.

[IV-51]

EMPRESS *v.* MUHAMMAD ISMAIL.

[I-152]

CRIMINAL PROCEDURE CODE, s. 112—(continued.)

(2).—“*Substance of information*”—(*Act X of 1882*).] In proceedings under s. 110 of the Code of Criminal Procedure the order to show cause issued by the Magistrate stated that the Magistrate had received reliable information that the person to whom such order was addressed was an habitual cattle thief and receiver of stolen cattle. *Held* that this was a sufficient compliance with s. 112 of the Code. Ss. 107 and 110 contrasted. *Jaiprakash Lal (I. L. R., 6 All., 26)* and *Queen Empress v. Nathu (I. L. R., 6 All., 214)*, distinguished. IN THE MATTER OF THE PETITION OF KALA.

[XVI-73]

s. 114.—*Information—Nature of*—(*Act X of 1882*).] In ordering the arrest of a person under s. 114, Criminal Procedure Code, the Magistrate must act on recorded information; it is not enough for him to express a belief that such a course is necessary. Not only must he have “reason to fear the commission of a breach of the peace,” but “that such breach of the peace can not be prevented otherwise than by the immediate arrest of such person.” *EMPRESS v. BABUA*.

[III-260]

(1). s. 117.—*Enquiry—Nature of*—(*Act X of 1872*).] *Held* that where the Magistrate did not adjudicate upon the evidence before him, nor was there anything to show that the parties had an opportunity to show cause given them, the order of the Magistrate ordering recognizance to be executed was illegal and must be set aside. *GHOLAM HAIDAR v. GHOLAM KADIR*.

[I-155]

(2).—*Evidence—Nature of*—(*Act X of 1882*).] When the party to whom an order under s. 112 is directed appears in Court in obedience thereto, the enquiry must be conducted on the lines laid down in s. 117. It is not because a man has a bad character that he is therefore necessarily liable to be called upon for sureties for the peace or for good behaviour. There must be satisfactory evidence in the one case that he has done something, or taken some step, that indicate an intention to break the peace or that is likely to occasion a breach of the peace; and in the other, that he is within the category of persons mentioned in s. 110, the determination of which questions must always be guided by the considerations pointed out in *Empress v. Nawab (I. L. R., 2 All., 235)*. *EMPRESS v. BABUA*.

[III-260]

(3).—*Enquiry by one and order by another Magistrate (Act X of 1882)*.] A Magistrate ordered sixty-nine persons to show cause why they should not give security to keep the peace, it having been reported to him by the police and the Tahsildar of the par-

CRIMINAL PROCEDURE CODE, s. 117—(continued.)

gana in which such persons resided that they were likely to commit a breach of the peace at a religious procession which was about to take place and the holding of which was opposed to their religious tenets. After an inquiry, as against all the accused jointly, the Magistrate, on the evidence of the Tahsildar and a Sub-Inspector of police, ordered that ten of the accused, who were said to be the “ring-leaders” should enter into bonds with sureties and the rest should enter into their own recognizances to keep the peace for one year. *Held* that the very loose statements of the Tahsildar and the Sub-Inspector as to the large majority of the persons summoned were quite insufficient to justify the wholesale order for security passed by the Magistrate, that as the religious procession would have been over in a fortnight, it was a most excessive exercise of power to require all the parties to give security for one year and that the Magistrate should have dealt with the cases of the ten alleged “ring-leaders” first and should have required the Tahsildar and Sub-Inspector to give much fuller statements *seriatim* and particularly as to each individual man; and as to the remaining fifty-nine, there should have been some clear and distinct proof affecting each of them, and warranting the inference that such person was likely to commit a breach of the peace or to do a wrongful act likely to occasion a breach of the peace. *EMPRESS v. NATHU AND OTHERS*.

[IV-51.]

(4).—*Enquiry by one and order by another Magistrate (Act X of 1882)*.] The evidence necessary to support an order under s. 118, Criminal Procedure Code, for security to keep the peace need not invariably be as to overt acts on the part of the person against whom such order is made. *Empress v. Abdul Kadir (I. L. R., 9 All., 402)* referred to, *EMPRESS v. BARJORE SINGH AND OTHERS*.

[XV-241]

(5).—*Onus*—(*Act X of 1882*).] *Held* that the burden of proof does not lie on the person called upon to furnish security but upon the prosecution. It is not for him who is free and who has not transgressed the law to show why he should remain free. It is for him who wishes to take away that freedom to establish circumstances which operate to take away that freedom. *EMPRESS v. ABDUL KADIR AND ANOTHER*.

[VII-111]

(6).—*Enquiry by one and order by another Magistrate (Act X of 1882)*.] *Held* in revision that when enquiry under s. 117, Criminal Procedure Code, was made by one Magistrate and order for finding security for good behaviour was passed by another, the order was illegal and must be set aside. *EMPRESS v. RAGHU-NATH*.

[V-30]

CRIMINAL PROCEDURE CODE, s. 117—(continued.)

(7.)—“*Has taken action*”—*Transfer*—(Act X of 1882.) Where a Magistrate instituting proceedings against a person under s. 110, Criminal Procedure Code, has “acted” within the meaning of s. 117 of the Code no order can be made subsequently under s. 526 of the Code transferring the case from his Court. IN THE MATTER OF THE PETITION OF GUDAR SINGH.

[XVII-52]

See

IN THE MATTER OF THE PETITION OF AMAR SINGH.

[XIII-183.]

(8.)—“*Power to take action under s. 202, Criminal Procedure Code—Act X of 1882.*”] A Magistrate before whom an enquiry is pending under s. 117 of the Code of Criminal Procedure is not competent to take action under s. 202 of the Code after the person who was the subject of the enquiry has been called upon to show cause why security to keep the peace should not be taken from him. QUEEN EMPRESS v. KHURRAM SINGH.

[XVI-140]

(9) s. 117 (4). *Joint trial.*—(Act X of 1882.)] Held that a trial under s. 117, Criminal Procedure Code, stands upon a footing of its own, which is distinguishable from trials for offences. That separate proceedings should be taken against each person ordered to find security unless it is clear that there is such a connection between the parties as indicates the necessity of a contrary course, but that where this is not done, it amounts only to an irregularity. If the irregularity has prejudiced the accused, proceedings would be set aside. EMPRESS v. ABDUL KADIR AND ANOTHER.

[VII-111]

See

EMPRESS v. NAKCHED AND OTHERS.

[II-92]

EMPRESS v. BATUK AND ANOTHER.

[IV-54]

(1) s. 118.—*Observations on mode of applying section.*]

See Chapter VIII, No. (1).

(2.)—*Bond.—Responsibility for act of dependants.*—(Act X of 1872.) Held that a condition inserted in a bond for keeping the peace to the effect that the person executing it should be responsible for any breach of the peace by his servants and dependants was illegal. The Magistrate had no power to put him under any such obligation. EMPRESS v. MUHAMMAD ISMAIL.

[I-152]

CRIMINAL PROCEDURE CODE, s. 118—(continued.)

(3.) s. 118—*Proviso* (1).—*Security for larger amount* (Act X of 1882.)] Where Court has made an order calling upon persons to furnish security to an amount named in the order for keeping the peace it is competent to the same Court to enhance the amount of security required, provided that the persons from whom the security is demanded have an opportunity to appear and show cause against the order so made for enhancement of the security. QUEEN EMPRESS v. BARJORE SINGH AND OTHERS.

[XV-241]

EMPRESS v. MUHAMMAD ISMAIL.

[I-152]

Per contra

EMPRESS v. DEBI.

[V-30]

(4.)—“*Revision—Accused person*—(Act X of 1882.)] The term “accused person” as used in s. 437 of the Code of Criminal Procedure will include a person against whom proceedings under s. 110 and the following sections of the same enactment have been taken. QUEEN EMPRESS v. SHEO DYAL.

[XI-106]

(5.)—“*Supervision*—(Act X of 1882.)] In this case an order by a Magistrate of the first class under s. 110, Criminal Procedure Code, directing one D to execute a bond for good behaviour in the sum of Rs. 200, with sureties, for a period of one year, came before the High Court in revision. The High Court observed that it would be well if the Magistrate of the district were to exercise some supervision over the subordinate native Magistrates in respect of the amount of security demanded in such cases. EMPRESS v. DULLA.

[V-286]

s. 121.—*Forfeiture of bond*—(Act X of 1882.)] Where a person had been bound over by a Magistrate to keep the peace and was subsequently called upon to show cause why his recognizance should not be considered forfeited by reason of a breach of the peace committed by certain servants of his, to which breach of the peace he was alleged to be privy. Held that the denial of the obligor that he was in any way privy to the acts alleged against him was sufficient *prima facie* cause and the Magistrate was thereupon bound to take evidence before ordering the forfeiture of the obligor's bond. The record of a case to which the obligor was not a party and which was not tried before the Magistrate by whom the bond in question had been called for, was no evidence as to the obligor's liability in the matter then before the Court. IN THE MATTER

CRIMINAL PROCEDURE CODE, s. 121
—(continued.)

OF THE PETITION OF BALKARAN RAI AND ANOTHER.

[XI-183]

(1.) s. 122.—*Power to reject surety—Ground*—(Act X of 1882.) The object of requiring security to be of good behaviour is, not to obtain money for the crown by the forfeiture of recognizances, but to ensure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. *Narain Soobadhee* (23 W. R. Cr. R., 37) not followed. *QUEEN EMPRESS v. RAHIM BAKHSI*.

[XVIII-21]

(2.) ————— *District Magistrate*—(Act X of 1882.) Where a Magistrate subordinate to the Magistrate of the district had passed an order requiring a person to furnish security for good behaviour and stating the qualifications to be possessed by the sureties, it was held that the Magistrate of the district was not competent to reject a surety who was offered and who fulfilled the requirements laid down in the order of the Court demanding security. *QUEEN EMPRESS v. TONI*.

[XV-143]

(1) —s. 123—*Defective order*—(Act X of 1872.) In this case the Magistrate, having convicted the accused persons of assault and sentenced them for that offence, directed further that "both defendants should give a bond to keep the peace for twelve months." He did not direct for what sum such bond should be executed, or what imprisonment should be inflicted if the same were not given. Held that the Magistrate's order, so far as it related to the finding of security, was defective and could not be sustained. *EMPRESS v. SHEO BALAK AND ANOTHER*.

[I-86]

s. 123 (3)—*Order under Sub-section—Appeal*—(Act X of 1882.) Where on non-compliance with a provisional order under s. 112 Criminal Procedure Code, the proceedings were sent to the Sessions Judge under s. 123 of the Code that the order might be made absolute, and where the Judge made the order absolute in modified form, and the person affected thereby appealed. Held that the Sessions Judge was not competent to make over the appeal for hearing to the District Magistrate, it being virtually an appeal from an order of the Sessions Court. IN THE MATTER OF THE PETITION OF HARI DAS AND ANOTHER.

[XI-219]

CRIMINAL PROCEDURE CODE,
—(continued.)

ss. 123 & 124—*Appeal—Revision*—(Act X of 1882.) The applicant was ordered by a Sessions Judge on reference by a Magistrate, under s. 123 of the Code of Criminal Procedure to find security to be of good behaviour for a term exceeding one year or in default to undergo a term of rigorous imprisonment. He did not find the security required, and was in consequence committed to prison. After some months he made an application to the Magistrate of the district under s. 124 of the Code to be released. The Magistrate rejected that application on the ground that there was still an appeal from the order of the Judge under s. 123. On application to the High Court for revision it was held that no appeal lay from the Judge's order under s. 123 and as to the application to the Magistrate under s. 124, that the Court should not interfere, as the taking of any action on such an application was a matter entirely in the discretion of the Magistrate. *QUEEN EMPRESS v. CHHOTIA*.

[XIII-183]

(1) —s. 133—*Order prohibiting use of water from a well*—(Act X of 1882.) Held that an order directing a certain person to refrain from drinking the water of a certain well and to restrain others from doing so, was not an order which could lawfully be made under s. 133 of the Code of Criminal Procedure. *QUEEN EMPRESS v. SHEOAMBAR LAL*.

[XIII-145]

(2) ————— *Order to remove branches of a tree*—(Act X of 1882.) On a police report a notice was issued by a Deputy Magistrate to the accused to cut down the branches of a tree of his which overhung a certain house and were thus dangerous in affording facility to thieves. Held that the Magistrate had no jurisdiction to make the order under s. 133, Criminal Procedure Code. *EMPRESS v. HIRA LAL*.

[III-222-]

s. 139—*Jury—Verdict of majority*—(Act X of 1882.) K R having been ordered by a Magistrate under s. 133 of the Code of Criminal Procedure to remove an illegal obstruction, applied for a jury. Five jurors were chosen who having examined the place in dispute, proceeded without consultation to deliver separate and independent opinions. The verdict of the majority was in favour of upholding the Magistrate's order. The Magistrate however discharged his order. On reference by the Sessions Judge under s. 438 of the Code, it was held that the last order of the Magistrate should be set aside and the case remanded for consideration by a fresh jury. *QUEEN-EMPRESS v. KHUSHALI RAM AND OTHERS*.

[XVI-15]

CRIMINAL PROCEDURE CODE.— (continued)

s. 140—*Order made absolute—Finality—(Act X of 1882.)* When an order under s. 133, Criminal Procedure Code, has been made absolute under s. 140 its validity cannot be subsequently questioned. *Queen-Empress v. Naraina (I. L. R., 12 Mad., 425)* approved. *QUEEN EMPRESS v. BISHAMBAR LAL.*

[XI-169]

s. 143—*High Court's power of revision—(Act X of 1882.)* Held that orders passed under ss. 143, 144 and 176, Criminal Procedure Code, cannot be revised by the High Court. *QUEEN EMPRESS v. JAGAN SINGH.*

[XII-102]

(1.) s. 144.—*Order to rebuild a structure—(Act X of 1882.)* A District Magistrate has no power either under s. 144 of the Code of Criminal Procedure or in his executive capacity to make an order for the re-building of a structure on private land which has fallen into disrepair or been pulled down, neither has he power to make any order which would have the direct effect of interfering with the execution of a decree of a Civil Court. IN THE MATTER OF THE PETITION OF RAHMATULLAH.

[XV-96]

(2) ————*Order to stop the holding of market for indefinite period—(Act X of 1882.)* The Magistrate or Collector of a district has no power as an executive officer to stop the holding of a market within his district on a particular day when circumstances have not arisen such as would justify his taking action under s. 144, Criminal Procedure Code, and even when such circumstances have arisen the prohibition can not be for an indefinite period. *Ananda Chandra Bhattacharjee v. Carr Stephen (I. L. R., 19 Cal., 127)*; *Gopi Mohun Mullick v. Tara Moni Chowdhurani (I. L. R., 5 Cal., 7)*; *Bradley Farneson (I. L. R., 8 Cal., 580)*; *Shurut Chunder Banerjee v. Bama Churn Mookerjee. (4 C. L. R., 410)*; *Queen-Empress v. Lakhmi Das Makand Das (I. L. R., 14 Bom., 165)*; *Kedar Nath v. Rughonath (N.-W. P. H. C. Rep., 1874, p. 104)* referred to. MUHAMMAD BAKAR ALI v. HANWANT SINGH.

[XVII-59]

(3) ————*Order prohibiting slaughter of animals except in slaughter house—(Act X of 1882.)* This is a petition for the revision of an order of the Magistrate directing that without the permission of the Municipal Board the slaughter even of votive animals shall not take place except in the slaughter house. Held that so long as the Municipal Bye-laws are not altered the order of the Magistrate could not be questioned for it is prohibited generally by the Bye-laws. *ABDULLAH AND OTHERS v. NANA CHAND OTHERS.*

[V-258]

(4)—*High Court's power of revision.*

See s. 439, Nos. (15), (16) and (17).

CRIMINAL PROCEDURE CODE.— (continued.)

(5). ————*(Act X of 1872.)* Held that an order presumably made under s. 518, Criminal Procedure Code, by a Magistrate not empowered by law to make an order under the provisions of that section could be quashed by the High Court. *EMPRESS v. ABDUL RAHIM.*

[II-140]

(1) s. 145—*Tangible immoveable property—Share in undivided village—(Act X of 1882.)* This was an order passed by a Deputy Magistrate declaring one Bachhi to be in possession of a 3rd share of a certain undivided village under s. 145, Criminal Procedure Code. The share was claimed by another person to be in his possession. Held that as the village was undivided a 3rd share could not be regarded as tangible immoveable property and the provisions of Chap. XII of Act X of 1882 were therefore not applicable to the controversy. Further that there being no evidence of present and imminent danger of a breach of the peace the interference under s. 145, Criminal Procedure Code, was not justified. *BENI NARAIN v. ACHRAJ NATH.*

[III-163]

(2) ————*Collection of rents—(Act X of 1882.)* Held that a dispute regarding the collection of rents was a dispute concerning tangible immoveable property within the meaning of s. 145, Criminal Procedure Code. *Pramatha Bhusana Deb Roy v. Doorga Churn Bhattacharji (I. L. R., 11 Cal., 413)* followed. *DURGA KUAR v. PHULZARI LAL.*

[V-299]

(3) ————*Standing crops—(Act X of 1882.)* Standing crops are "tangible immoveable property" within the meaning of s. 145, Criminal Procedure Code. *GANGA PRASAD v. NARAIN AND OTHERS.*

[XIII-145]

(4)—*"Shall make.....so satisfied"—Essentials of preliminary proceedings—(Act X of 1882.)* In the record of the proceedings of the Magistrate taken under s. 145 of the Code of Criminal Procedure, there was no preliminary order in writing by him stating that he was satisfied that the dispute was likely to cause a breach of the peace. Neither did his final order disclose that he was so satisfied. Held that the first irregularity might have been cured by s. 537 of the Code of Criminal Procedure. *BAKSHULLAH AND ANOTHER v. LATAFAT-UN-NISSA.*

[IV-317]

(5) ————*(Act X of 1882.)* This was an application for revision of an order under s. 145 of the Criminal Procedure Code, an application for revision to the Sessions Judge having been rejected. Held that as the order in question (purporting to have been passed under s. 147 instead of s. 145) does not contain either

CRIMINAL PROCEDURE CODE.

s. 145—(continued.)

of the essentials of preliminary proceedings, namely (i) a statement that the Magistrate is satisfied that a dispute likely to induce a breach of the peace exists and (ii) the grounds upon which he is so satisfied, it was *ultra vires* and must be set aside. PETITION OF MAHABIR PRASAD.

EMPRESS v. LOCHAN.

[V-302]

[I-46]

(6) ———— *Order without taking evidence—(Act X of 1872).* Held that an order passed under s. 530 of Act X of 1872 declaring one of the parties entitled to retain possession without taking any evidence at all as to possession was illegal and must be set aside. GOBIND AND OTHERS v. JAGESHAR AND OTHERS.

[II-18]

(7) ———— *Possession—(Act X of 1882).* The possession which a Magistrate acting under s. 145 of the Code of Criminal Procedure has to find and support is possession at the time of the Magistrate's proceedings. Hence where a Magistrate decided a question of possession under s. 145 upon evidence taken six months previously. Held that such order was irregular and unsustainable. IN THE MATTER OF THE PETITION OF JAI LAL.

[XI-115]

(8) ———— (Act X of 1882).] Where certain villages were managed for the joint benefit of three persons, one of them being the *lambardar* of all the villages, but were not in the actual possession of such three persons or of any one of them. Held that for the purposes of s. 145 of the Code of Criminal Procedure, that one of the three who was *lambardar* must be deemed to be in possession. RAMDAI v. PARBATTI.

[X-178]

(1.) s. 146.—*Attachment—(Act X of 1882).* S. 146 of the Code of Criminal Procedure does not give jurisdiction to pass an order of attachment in a dispute between parties whose right would have to be determined by a Revenue Court. Cheda Lal v. Mul Chand (I. L. R., 14 All., 30) and Madayya v. Venkata (I. L. R., 11 Mad., 193) referred to. GANGA PRASAD v. NARAIN AND OTHERS.

[XIII-145]

(2) ———— *Profits—(Act X of 1882).* Where immoveable property has been attached by a Magistrate under the provisions of s. 146 of the Code of Criminal Procedure, pending the decision of a Civil Court in respect thereof the Magistrate is not entitled after the final decision of the Civil Court to retain in his hands the profits derived from such property during attachment. IN THE MATTER OF THE PETITION OF AVADH NARAIN LAL AND ANOTHER.

[XIII-100]

CRIMINAL PROCEDURE CODE,

—(continued.)

s. 161.—*Examination of witness by police—Mode of—Signature—(Act X of 1882).* It is not necessary that the statement of a witness recorded under s. 161 of the Code of Criminal Procedure, 1882, should be elicited and recorded in the form of alternate question and answer, in the same manner as statements or confessions recorded under ss. 164 and 364 of the Code. It is sufficient if such statement is substantially an answer to one or more questions addressed to the witness before the statement is made. It is not illegal, though unnecessary, for a police officer recording a statement under s. 161 of the Code of Criminal Procedure, 1882, to obtain the signatures of persons present at the time to authenticate the record of such statement. QUEEN-EMPRESS v. BHAGWANTIA.

[XII-141]

(1.) s. 162.—*Statement to police—Use against accused—(Act X of 1882).* A statement made by a witness under s. 161 of the Code of Criminal Procedure to a police officer investigating a case may be proved at the trial of such case to contradict such witness, the witness having been first cross-examined on the point in respect of which it is sought to contradict him. But where it appeared that, but for the principal witness for the defence having been discredited by means of proof of a previous inconsistent statement made by the said witness before the investigating officer, the accused would have been acquitted, it was held that this amounted to a using of such statements as evidence against the accused within the meaning of s. 162 of the Code of Criminal Procedure. Queen-Emress v. Sitaram Vilhal (I. L. R., 11 Bom., 657) approved. QUEEN-EMPRESS v. MADHO.

[XII-220]

(2.) ———— *When and how to be used in evidence—(Act X of 1882).* A police officer's notes of statements made to him in the course of an investigation and recorded by him under s. 161 of the Code of Criminal Procedure should, if used at all at the subsequent trial, be used only after proper proof of them and of the circumstances under which they were recorded, and under the direct sanction of the presiding Judge. Copies of such notes should not be given without question and as a matter of course to the accused or his counsel. QUEEN-EMPRESS v. NASIRUDDIN.

[XIV-57]

(3) ———— (Act X of 1882).] Though speaking generally statements, other than dying declarations, made to a police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favor of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness, having been

CRIMINAL PROCEDURE CODE, s. 162—(continued.)

cross-examined as to a statement, it may be shown by the evidence of the police officer that he did make a statement favorable to the accused, which the witness denies having made; and if the statement was at the time reduced into writing by the police officer, the officer would be allowed to refresh his memory by referring to it, but the written statement itself, when the statement has been reduced into writing (according to the section it must not be signed by the person making it) cannot be used as direct evidence of what was stated by the witness to the police officer. **QUEEN-EMPRESS v. TAJ KHAN AND OTHERS.**

[XIV-208]

(1) s. 164—*Confession*—(Act X of 1872).] Held that the Magistrate would have exercised a sounder discretion if he had taken the evidence of the witnesses for prosecution first, instead of hurrying the prisoner *fresh* from the hands of the police to give evidence against himself. **EMPRESS v. KURA.**

[II-166]

(2) ————— *Not recorded in manner provided—Admissibility*—(Act X of 1883).] A confession made in Court three weeks before the commencement of the enquiry and any evidence had been taken was in the following terms:—"My statement is this":—(After the statement in which accused admitted having killed one S, the confession proceeded as follows)—Question—"Have you made this statement voluntarily, without having been threatened intimidated or taught by any one?" Answer—"I have made the statement voluntarily. No one threatened me, or intimidated me, or taught me. I am in my proper senses. I have nothing else to say; nor was I punished before." The memorandum required by s. 164, Criminal Procedure Code, to be attached to the confession mentioned in that section was attached to this confession. The question was whether this confession was admissible in evidence against the accused, who had been convicted of the murder of one S. Held by Stuart, J., that the confession was admissible though not taken in the manner directed by ss. 164 and 364, Criminal Procedure Code.

Per STRAIGHT, J., that it was very doubtful whether the statement having been taken at a wrong stage of the case was not altogether inadmissible but that if the defect was cured by s. 533, Criminal Procedure Code, the Court would hesitate to hold that the accused was not prejudiced by the Magistrate's action. **EMPRESS v. BALJIT.**

[III-238]

EMPRESS v. GAJADHAR AND OTHERS.

[III-243]

(3) —————]
See s. 364, Nos. (3), (4) and (5).

CRIMINAL PROCEDURE CODE, s. 172—(continued.)

(1). s. 172—*Police Diaries*.—*General order to produce*—(Act X of 1882).] A Sessions Judge although he has power in any particular case which is before him to send for the police diaries, connected with the case, if he thinks it necessary to peruse them, has no authority to issue a general order that in every case committed for trial to the Court of Session, and in every criminal appeal, the police diaries should be submitted to the Court of Session simultaneously with the Magistrate's record of the case. Such an order is illegal. **QUEEN-EMPRESS v. MANNU.**

[XVII-174]

QUEEN-EMPRESS v. MOHAN.

[XIV-181]

(2). ————— *Proper use of*—(Act X of 1882).] The provision in s. 172 of the Code of Criminal Procedure that "any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial" does not authorize a Court in making a summary of their contents part of its judgment and apparently making the statements contained therein virtually evidence in the case. Statements contained in the police diaries may be used, *e. g.*, for the purpose of assisting the Court in the examination of witnesses, but no statements in the diaries can be used as evidence, if they can be used as such at all, unless and until they are brought upon the record and properly made evidence in the case. **QUEEN-EMPRESS v. NAND LAL AND OTHERS.**

[XIV-155]

EMPRESS v. GAYADIN AND OTHERS.

[III-145]

(3). ————— (Act X of 1882).] In this case the Court observed that the use of the police diaries for the purpose of corroborating or discrediting the witnesses for the prosecution was illegal. **EMPRESS v. CHUNNI.**

[III-37]

(4). ————— *Privilege*—(Act X of 1882).] The privilege given by s. 161 of the Code of Criminal Procedure does not extend to statements taken under s. 172 of the Code. *Sherru Sha v. The Queen-Emress* (I. L. R., 20 Calc., 642) followed. **QUEEN-EMPRESS v. RUDR SINGH AND OTHERS.**

[XVI-193]

(5). ————— *Proper use of—Privilege*—(Act X of 1882).] In no case is an accused person entitled as of right to a copy of any statement recorded by a police officer in the special diary prepared under the authority of s. 172 of the Code of Criminal Procedure. The special diary may be used by the Court to assist

CRIMINAL PROCEDURE CODE,

s. 172—(continued.)

it in the inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the crown and the accused; but entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained. The special diary may be used by the Court for the purpose of contradicting the police officer who made it but not for the purpose of contradicting any witness other than such police officer and the special diary may be used by the police officer who made it for the purpose of refreshing his memory. *Held* by the Full Bench that—If the special diary is used by the Court to contradict the police officer who made it, or by the police officer who made it to refresh his memory, the accused person or his agent has a right to see that portion of the diary which has been referred to for either of these purposes, that is to say, the accused person or his agent is entitled to see the particular entry which has been referred to and so much of the diary as in the opinion of the Court is necessary in that particular matter to the full understanding of the particular entry so used, but no more. The accused person or his agent is not entitled to see the special diary under any other circumstances. In all other respects, except in the cases mentioned, the diary and all entries in it are absolutely privileged. *Held* by the Full Bench (Banerji and Aikman, J.J., *contra*). A police officer investigating a case may lawfully reduce into writing in the special diary the full and unabridged statement made to him by a person whom he is examining or has examined under s. 161 of the Code of Criminal Procedure, and if he does so, his record of such statement is part of the special diary and is just as much privileged as any other entry in the diary.

Per BANERJI AND AIKMAN J.J.—Statements recorded under s. 161 of the Code of Criminal Procedure by a police officer making an investigation were not intended by the Legislature to be entered in the special diary, and if they are so entered do not form an integral part of the diary and are not privileged, but the accused person is entitled to see them. A mere summary, however, of facts ascertained by an investigating officer from persons examined by him, not being a report of their actual statements, may properly find a place in the special diary. The following cases were referred to. *The Empress v. Kali Churn Churnari* (I. L. R., 8 Cal., 154); *Kallu v. The Queen-Empress* (29, Panj. Rec. Cr. J. 55); *Queen-Empress v. Nasir-ud-din* (I. L. R., 16 All., 207); *Queen-Empress v. Thudboo Mahlon* (I. L. R., 8 Cal., 739); *In the matter of Mahmood Ali Hadji v. The Queen-Empress* (I. L. R., 16 Cal., 612 note); *Bikao Khan v. The Queen-Empress* (I. L. R., 16 Cal., 110); *Sheru Sha v. The Queen Empress* (I. L. R., 20 Cal., 642); *Queen-Empress v. Rudr Singh* (W. N., 1896,

CRIMINAL PROCEDURE CODE,

s. 172—(continued.)

p. 193) and *Reg. v. Uttam Chand, Kapur Chand* (11 Bom. H. C. Rep., 120). *QUEEN-EMPRESS v. MANNU.*

[XVII-174]

s. 176—*High Court's power of revision—(Act X of 1832).* *Held* that orders passed under s. 176, Criminal Procedure Code, cannot be revised by the High Court. *EMPRESS v. JAGAN SINGH.*

[XII-102]

(1) s. 177—*Venue.—Abduction—(Act X of 1882).* The facts of this case as stated for the prosecution were,—that a girl under 16 was by her own consent and that of her guardian taken by the accused from a certain village X (situate in Mirzapur district) to village Y (situate in Benares district). Here at Y plans were made to marry her against her will and she was taken with that view to another village Z, against her will. On these facts the accused were committed by the Magistrate of Mirzapore to the Session's Court of that district for the offence of abduction. The Sessions Judge reported the case to the High Court with the recommendation that the commitment should be quashed as no offence was committed within the jurisdiction of the Magistrate. *Held* that as the Magistrate had jurisdiction to deal with a charge of abduction from a place within the district of Mirzapore the commitment cannot be quashed. If that charge is not made good by the evidence it will be a ground for acquitting the accused. *EMPRESS v. DAWAN SINGH AND OTHERS.*

[IV-31]

(2)—*Instigation by letter—(Act X of 1882).* Where one person instigates another to the commission of an offence by means of a letter sent through the post the offence is completed so soon as the contents of such letter become known to the addressee and the offence is triable at the place where such letter is received. *QUEEN-EMPRESS v. SHEO DIAL MAL.*

[XIV-135]

(3).—*Kidnapping—Continuing offence—(Act. X of 1882).* *Held* that kidnapping was not a continuing offence, but is complete directly the minor has been taken from the keeping of the lawful guardian, and therefore the jurisdiction of the Court is determined by the place where the minor was first taken out of the keeping of the lawful guardian, a trial in another district is illegal and must be set aside. *EMPRESS v. BUDHA AND ANOTHER.*

[III-67]

QUEEN-EMPRESS v. RAM SUNDAR AND ANOTHER.

[XVI-191]

CRIMINAL PROCEDURE CODE,
s. 177—(continued.)

EMPRESS *v.* PRASADI.

[VII-139]

EMPRESS *v.* SURJA AND OTHERS.

[III-164]

See also

QUEEN EMPRESS *v.* RAM DEI AND OTHERS.

[XVI-96]

s. 179—*Venue—Where consequence follows*—(Act X of 1882.) *B.*, an employee of a company, the office of which was at Cawnpur, was charged with the offence punishable under s. 408 of the Indian Penal Code. The complainant, alleged that *B.*, being in charge on behalf of the company at a place in Bengal, of certain goods belonging to the company and being ordered to return the said goods to Cawnpur never did so, and failed to account for the goods or their value to the loss of the company. Held that on the statement of the case by the complainant the Courts at Cawnpur had jurisdiction to inquire into the charge, inasmuch as the consequences of *B.*'s acts, namely loss to the company, occurred in Cawnpur. QUEEN-EMPRESS *v.* O'BRIEN.

[XVI-191]

(1) s. 180—*Venue—Kidnapping—Wrongfully confining kidnapped person*—(Act X of 1882.) Ram Dei, Chajju, Piru and Kamar were committed by the Joint Magistrate of Muzaffarnagar to the Court of the Sessions Judge of Saharanpur. Upon the case which was before the Joint Magistrate it appeared that Ram Dei had committed the offence punishable under s. 366 of Indian Penal Code in the district of Bijnor and possibly the other three persons had committed the offence punishable under s. 368 of Indian Penal Code in the district of Muzaffarnagar; Chajju and Piru also possibly having committed the offence punishable under that section in Bijnor. Under the above circumstances the High Court, maintaining the order of commitment made by the Joint Magistrate, directed the case to be transferred for trial to the Court for the trial of sessions cases arising in the Bijnor district, namely to that of the Sessions Judge of Moradabad. *Reg. v. Samia Kaundan* (I. L. R. 1. Mad., 173) and *Queen-Empress v. Surja* (Weekly Notes, 1883, p. 164) not followed. *Queen-Empress v. James Ingle* (I. L. R., 16 Bom., 200) referred to. *Queen-Empress v. Thaku* (I. L. R., 8 Bom., 312) followed. QUEEN-EMPRESS *v.* RAM DEI AND OTHERS.

[XVI-96]

(2) ————— (Act X of 1882.) A certain girl was kidnapped from the lawful guardianship of her husband, at a village in the Mainpuri District, by *A* and was wrongfully confined with the knowledge that she had been

CRIMINAL PROCEDURE CODE,
s. 180—(continued.)

abducted or kidnapped by *B* and *C* at Aligarh. All the accused were committed to the Sessions Judge of Aligarh. On the report of the Judge it was held that the offence of kidnapping having been committed at Mainpuri, *A* should have been committed to the Sessions Judge of Mainpuri and *B* and *C* could be tried in the same Court under s. 186, Criminal Procedure Code. EMPRESS *v.* SURJA AND OTHERS.

[III-164]

(3). ————— *Receiving stolen property—In Gwalior*—(Act X of 1882.) Certain persons not being British subjects, were found in the Gwalior State in possession of property stolen in British India. Held that the British Courts had no jurisdiction to try the offenders under s. 412, Penal Code. EMPRESS *v.* KIRPAL SINGH AND OTHERS.

[VII-131]

(4). ————— *In Rampore*—(Act X of 1882.) The accused in this case had been committed by a Bareilly Magistrate to the Sessions Judge of Bareilly under s. 411, Indian Penal Code. It appeared that the property had been stolen in the Bareilly district, and was found in the Native estate of Rampore in the possession of the accused. Held (on a reference by the Sessions Judge) that as the offence charged was committed beyond the limits of British India, the committing Magistrate had no jurisdiction to enquire into the charges under s. 188 of the Code of Criminal Procedure and the Sessions Judge had no jurisdiction to try them without a certificate from the Political Agent of the estate; the commitment is therefore quashed. EMPRESS *v.* CHAN AND ANOTHER.

[IV-85]

s. 182—*Continuing offence—Kidnapping.*

See s. 177, No (3).

————— *Theft on journey*—(Act X of 1882.) One *B S*, a resident of Kamaun district, was travelling in the plains with *HS* accused, his servant, who had the charge of his money and other moveable property. On arriving at Bulandshahr district, *B S* demanded an account from *HS*, and found a considerable amount unaccounted for and certain moveable property missing. The same night *HS* disappeared. *BS* made a report to the police and returned to Kamaun. Subsequently *HS* was arrested in the Kamaun district but no property was found with him. Held that the Magistrate of Bulandshahr would have jurisdiction to try the case but as it had been represented to the Court under s. 526, Criminal Procedure Code, that it will tend to the general convenience of the parties and the witnesses, the trial should be held in Kamaun. EMPRESS *v.* HARAK SINGH.

[III-88]

CRIMINAL PROCEDURE CODE, (continued.)

(1). s. 183—*Venue—British subjects—Offence committed out of British India.*]

See s. 180 No. (4).

(2).—*Certificate of Political Agent—(Act X of 1882).*] The absence of the certificate of the Political Agent required by s. 183 of the Code of Criminal Procedure is an absolute bar to the trial of a case to which the provisions of the section apply. *QUEEN-EMPRESS v. RAM SUNDAR AND ANOTHER.*

[XVI-191

EMPRESS v. CHEFA AND ANOTHER.

[IV-85

s. 190 (a)—*Complaint—Who can make—(Act X of 1882).*] The complaint upon which under s. 191 (c), Criminal Procedure Code, a Magistrate can take cognizance of an offence, may be made by any member of the public acquainted with the facts of the case not necessarily by the person aggrieved by the offence to which the complaint relates. *In re Ganesh Narayan Sathe (I. L. R., 13 Bom., 600)* followed. *FARZAND ALI v. HANUMAN PRASAD.*

[XVI-149

s. 191—*Transfer—(Act X of 1882).*] Where a Magistrate was found to have taken cognizance of an offence under clause (c) of s. 191, Criminal Procedure Code. *Held* that he had no power, an application being made under the last clause of the section above named to refuse to transfer the case. *EMPRESS v. R. HAWTHORNE.*

[XI-102

(1). s. 192—*Transfer—Evidence—(Act X of 1882).*] A Magistrate to whose Court a case under s. 355 of the Indian Penal Code had been transferred at a stage when all the evidence for the prosecution had been taken did not resubmit the witnesses for the prosecution but proceeded to act on their evidence as if it had been taken before himself. *Held* that whether such procedure amounted to an irregularity or illegality or not it was sufficiently prejudicial to the accused to warrant the conviction being quashed. *QUEEN-EMPRESS v. BASHIR KHAN AND ANOTHER.*

[XII-19

QUEEN EMPRESS v. RADHE AND OTHERS.

[X-7

(2).—*Formal order—Irregularity—(Act X of 1882).*] The accused in this case was charged with offences under s. 193 and 204, Penal Code. He was convicted under s. 193 and the trial of the other charge was stayed under s. 240, Criminal Procedure Code. The conviction under s. 193 was set aside in appeal and the trial on the charge withdrawn, *viz.* 204 was recommenced but before another Magistrate. The case was ultimately transferred to the District Magistrate. It did not clearly

CRIMINAL PROCEDURE CODE, s. 192—(continued.)

appear whether upon the revival of the charge any formal order for transfer was made by the District Magistrate. *Held* that as both the second Magistrate and the District Magistrate had undoubted jurisdiction to try the case the irregularity could not have the effect of rebutting the proceedings. *EMPRESS v. RAGHUNANDAN LAL.*

[IX-8

(3).—*Transfer—(Act X of 1882).*] When a Criminal case is transferred by an order of the High Court from a Court subordinate to a District Magistrate to the Court of a District Magistrate, if it is intended that the District Magistrate shall have power to transfer the case to a Subordinate Court, that intention will be expressed in the order of the High Court. If no such intention is expressed, it will be understood that, in the case of a transfer from a Court subordinate to a District Magistrate to a District Magistrate's Court, that District Magistrate's Court is expected to try the case itself, but when the transfer is from the Court of one District Magistrate to the Court of another District Magistrate, it will be understood that, unless the contrary is directly expressed, the Magistrate of the Court to which the transfer is made has power and jurisdiction to apply s. 192, Criminal Procedure Code, and to transfer the case to the Court of any Magistrate subordinate to him who may be competent to try it.

QUEEN-EMPRESS v. MATA PRASAD AND OTHERS.

[XVII-59

(1). s. 195—*Sanction - Preliminary enquiry—(Act X of 1872).*] *Held* that in giving sanction under s. 468 of Act X of 72 (Criminal Procedure Code) it was not necessary for the Court to make a preliminary inquiry under s. 471 of the Code when it was sufficiently acquainted with the facts of the case. *Barhat Ullah Khan v. Rennie (I. L. R., 1 All., 17)* followed. *PETITION OF HARSUKH AND ANOTHER.*

[II-20

(2).—*Sanction—(Act X of 1882).*] In a suit on a bond, instituted in the Court of a Munsif, the question whether the defendant had executed the bond or not was referred to arbitration. The arbitrator decided that the defendant had not executed the bond, and that it was a forgery. The Munsif dismissed the suit in accordance with the award. The defendant then applied to the Munsif for sanction to prosecute the plaintiff without specifying in his application the offences in respect of which he desired to prosecute. The Munsif granted sanction, merely observing that there were sufficient grounds for sanctioning the prosecution, without giving any reason or specifying the offence or offences in respect of which sanction was granted. *Held* that as the Munsif himself had not determined the question of forgery in the suit, he should have made some

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

inquiry to satisfy himself that there were materials to justify a prosecution. IN THE MATTER OF THE PETITION OF PARSOTAM LAL.

[III-226]

IN THE MATTER OF THE PETITION OF NAROTAM DAS.

[III-225]

(3).———*Not to be granted as matter of course—(Act X of 1882).* A prosecution of a charge under s. 211 of the Penal Code, should not be granted under s. 195 of the Criminal Procedure Code, as a matter of course, but only when the complainant can satisfy the Court that the interests of justice require a prosecution and there is a strong *prima facie* case against the accused. *Held*, therefore, where S who had been tried before the Court of Session for an offence, and acquitted, applied to the Court, in respect of the criminal proceedings which had been instituted against him, for sanction to prosecute G for abetment of an offence under s. 211 of the Penal Code, and the Sessions Judge granted the sanction, and there was nothing on the record of the criminal case or of the Judge's proceedings to show on what grounds G was accused of abetting a false charge, or on what grounds the Judge gave the sanction, that before the Judge gave the sanction he should have satisfied himself by examination of S or other inquiry, whether S had sufficient grounds in fact, for accusing G, and whether there were good *prima facie* grounds for suspecting G of abetting a false charge, and permitting a prosecution. IN THE MATTER OF THE PETITION OF GAURI SAHAI.

[III-240]

(4).———*Notice—(Act X of 1882).* An order under s. 195 of the Code of Criminal Procedure sanctioning a prosecution for perjury is not bad by reason of notice to show cause not having been issued previously to the person against whom such order is made. *Krishnanund Das v. Hari Bera (I. L. R., 12 Calc., 58)*. If an order under s. 195 of the Code of Criminal Procedure lapses, not having been acted upon within 6 months, that does not bar the granting of fresh sanction on the same grounds if a sufficient reason for the delay be shown. *Darbari Mandar v. Jagoo Lal (I. L. R., 22 Calc., 573)* not followed. *Gulab Singh v. Debi Prasad (I. L. R., 6 All., 45)*; *Baldeo Singh v. Prasad (W. N., 1892, p. 245)* referred to. MANGAR RAM v. BEHARI AND ANOTHER.

[XVI-118]

(5). s. 195 (1)—(a)—*Complainant should be given opportunity to prove his case—(Act X of 1882).* A complaint of offences under ss. 323 and 379 of the Penal Code, was referred to the police for inquiry. The police reported that the charge was a false one, and thereupon

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

the Magistrate of the district passed an order under s. 195 of the Criminal Procedure Code, directing the prosecution of the complainants for making a false charge, under s. 211 of the Penal Code. *Held* that the order under s. 195 of the Criminal Procedure Code, should not have been passed until the complainants had been afforded an opportunity of proving their case, which had been thrown out merely on the report of the police. *The Government v. Karimdad (I. L. R., 6 Calc., 496)* referred to. EMPRESS v. GANGA RAM AND ANOTHER.

[V-323 & VI-93]

(6).———*Prosecution under s. 182, Penal Code—Sanction—(Act X of 1882).* A prosecution under s. 182 of the Penal Code may be instituted by a private person, provided that he first obtains the sanction of the public officer to whom the false information was given, or of his official superior. *Queen Empress v. Radha Kishan (I. L. R., 5 All., 36)* overruled. EMPRESS v. JUGAL KISHORE.

[VI-133]

See also

EMPRESS v. JAMNI.

[III-71]

(7).———*Subordination—District Magistrate—Police officer—(Act X of 1882).* Where a District Magistrate directed the prosecution under s. 211, Penal Code, of a complainant whose case had been heard and determined by a Magistrate of the first class. *Held* that the order of the District Magistrate must be taken to have been made by him as head of the police in respect of an offence committed before a police officer and as such was a good order. EMPRESS v. RAM KHILAWAN.

[X-167]

See

EMPRESS v. ZORAWAR.

[X-168]

(8).———*Bench of Honorary Magistrate—Police officer—(Act X of 1882).* *Held* that a sanction given by a Bench of Honorary Magistrates for the prosecution under s. 182 of the Indian Penal Code of a person alleged to have made a false report to the police was an illegal sanction, inasmuch as the police officer to whom the report was made was not subordinate to the Bench of Honorary Magistrates within the meaning of s. 195 of the Code of Criminal Procedure. QUEEN-EMPRESS v. BALDEO PRASAD.

[XV-152]

(9).———*Chairman, Municipal Board—Secretary—(Act X of 1882).* The chairman of a Municipal Board has power apart from and independently of the rest of the Board, to grant sanction for a prosecution for an offence

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

under s. 182 of the Indian Penal Code, committed in respect of the Secretary of the Board. In granting such sanction it is not necessary for him as a condition precedent to issue notice to the person against whom sanction is granted. **IN THE MATTER OF THE PETITION OF SHEO PRASAD.**

[XII-31]

(10) s. 195—(1)—(b) *Prosecution under s. 211, P. C.—Sanction—(Act X of 1882).* *R K* lodged a petition with the police authorities, alleging that one *Y R* and others had committed theft and stolen lot of property out of his house. The police on enquiry reported the charge to be a foundation-less one. Thereupon *R* instituted proceedings under s. 182, Penal Code. The Deputy Magistrate struck off the case on the ground that the prosecution should have been under s. 211 and not under s. 182. *Held* that the charge under s. 182 should have been altered under s. 211, Penal Code. *Held* further that as the charge did not result in proceedings being taken in any Court no sanction under s. 195 of the Criminal Procedure was necessary. **JAI NARAIN v. RAM KRISHNA.**

[V-95]

(11).—“Committed in... any Court”—*Document deposited under s. 83 of Act IV of 1882—(Act X of 1882).* *Held* that where a mortgage-deed is deposited in Court in pursuance of the procedure provided by s. 83 of the Transfer of Property Act, such document is neither put in evidence before the Court nor brought to the notice of the Court in the course of a judicial proceeding, so as to give the Court power to sanction, either under s. 195 or s. 476 of the Code of Criminal Procedure, the prosecution of a person suspected by the Court of having forged such deed. **ADHAR SINGH AND OTHERS v. AB-LAKH SINGH AND OTHERS.**

[XV-145]

(12). s. 195 (2).—*Court—Registrar—(Act X of 1882).* A Registrar acting under s. 73 of the Indian Registration Act, 1877, is not a Court within the meaning of s. 195 of the Code of Criminal Procedure. *Atchayya v. Gangayya (I. L. R., 15 Mad., 138)* dissented from. **QUEEN-EMPRESS v. RAM LAL AND OTHERS.**

[XIII-59]

(13).—(4).—*Nature of sanction—(Act X of 1882).* The applicant *TK* made a complaint under s. 342, Penal Code, against *B* and another, in the Court of a second class Magistrate who threw it out under s. 203, Criminal Procedure Code. He further directed that as the Superintendent of Police requested that the crime be struck off the register, the papers may be laid before the District Magistrate for orders. On the same day the District Magistrate passed the following order:—“The case will be struck

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

off. A charge under s. 211 will be made against *TK* and *RA*. The case will be made over for trial to *AA*, Deputy Magistrate.” *TK* and *RA* applied to the Sessions Court for revision of this order, but the application was rejected. Then they applied to the High Court. *Held* that whether the District Magistrate may be supposed to have been acting under s. 476 or 191 (c) of the Code of Criminal Procedure, his order cannot be sustained. He was not competent to act under s. 476, Criminal Procedure Code, as the matter was not brought under his notice “in the course of a judicial proceeding.” If the Magistrate acted under s. 191 (c) his order was bad, unless sanction was also given in the terms of s. 195, Criminal Procedure Code, but the Magistrate’s order does not comply with the terms of s. 195 as to the “nature of sanction necessary,” nor is it an order which, with nothing more than a police report before him, the Magistrate was justified in passing. The application must therefore be allowed. **THAKUR KANDU AND ANOTHER v. BILAR AND ANOTHER.**

[IV-290]

(14).—(Act X of 1882).] This was an application to the High Court to revoke the sanction to the prosecution of the applicants, who had given evidence in a sessions case, for giving false evidence.

STRAIGHT, J., observed that sanctions granted under s. 195, Criminal Procedure Code, should be drawn up with precision and particularity, so as to convey clearly to the mind of the Magistrate entertaining the prosecution the exact offence or offences he is authorized to investigate. In the present case the order of the Judge is too general in its terms, and does not in substance set out the allegation upon which perjury is assigned, the place where, or the time when, the false evidence was given or the section or sections of the Penal Code under which the prosecution is to proceed. I may add that its language is sufficiently wide and comprehensive to include those portions of the witness’s evidence which the Judge believed. I set aside the Judge’s order, leaving the respondents to make a fresh application for sanction, if so advised. In the event of their doing so and its being granted, the Judge will have it drawn up in advertence to the preceding remarks. **IN THE MATTER OF THE PETITION OF CHIMMAN AND OTHERS.**

[III-228]

See

PARGAN SINGH v. THAKURDIN.

[IV-276]

IN THE MATTER OF THE PETITION OF PARSO-TAM LAL.

[III-226]

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

IN THE MATTER OF THE PETITION OF NAROTAM DAS.

[III-225]

PETITION OF SHEORAJ SINGH.

[IV-87]

IN THE MATTER OF THE PETITION OF HARN DIAL.

[III-227]

PETITION OF DWARKA DAS.

[IV-56]

THAKUR KANDU AND ANOTHER v. BILAR AND ANOTHER.

[IV-290]

(15). ————— (Act X of 1882).
An application for sanction to prosecute for forgery or perjury must indicate precisely the document in respect of which forgery is said to have been committed, or must set forth in detail the statement alleged to be false showing the place where and the occasion on which such alleged false statements were made. BALWANT SINGH v. UMED SINGH.

[XVI-31]

(16). s. 195 (6). — Sanction by superior Court — Grounds — (Act X of 1882). Before a superior Court grants sanction for a prosecution under s. 195 of the Code of Criminal Procedure where such sanction has been refused by the Court before which the offence in respect of which sanction is sought is alleged to have been committed, it is necessary for such Court to satisfy itself that there are good grounds for holding the Subordinate Court was in error in refusing to grant sanction. KISHAN LAL v. SHEO DIAL.

[XIII-104]

(17). ————— (Act X of 1882).
One A sued M S for redemption, on payment of Rs. 33 as the amount due under the mortgage. M S set up a bond of Rs. 99, claiming that amount to be a charge tacked on to the mortgage. The plea as to the bond was disallowed by the Munsif as well by the Subordinate Judge in appeal, but neither of those Courts expressed any opinion as to the genuineness or otherwise of the bond. Having so far succeeded A made an application to the Munsif under s. 195, Criminal Procedure Code, for sanction to prosecute M S for offences against justice. The Munsif refused the application on the ground that there was no sufficient ground to grant permission as no Court had considered the document to be a forged one. On appeal the District Judge reversed the order of the Munsif and granted the application for sanction, being under

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

the impression that such sanction should be granted simply to try whether the accusation was true or false. Held that the view held by the Sessions Judge was wrong and as there was nothing on the record to show that the bond was a forged one the sanction granted by the Sessions Judge is set aside and revoked. EMPRESS v. MAHADEO SINGH.

[VII-142]

(18) s. 195 (6). — Expiry of six months — Fresh sanction — (Act X of 1882). Held that s. 195 of the Code of Criminal Procedure provides that no sanction is to remain in force for more than six months, but there is nothing to prevent fresh sanction being given. BUDHU MAL v. AJUDHIA PRASAD.

[IV-70]

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[III-86]

GULAB SINGH v. DEBI PRASAD.

[III-196]

(19) ————— (Act X of 1882).
If a person to whom sanction to institute a prosecution for offences under ss. 193 and 211 of Indian Penal Code has been granted, allows such order to become void through lapse of time, he cannot afterwards, without having substantial reason, get a fresh order for sanction in his favour. CHIDDU v. HAR DEO PRASAD.

[XI-40]

BALDEO SINGH AND ANOTHER v. PRASADI AND ANOTHER.

[XII-245]

(20) ————— (Act X of 1882).
A obtained sanction from the Munsif to prosecute B on a criminal charge under s. 195, Criminal Procedure Code. He instituted proceedings thereunder before the Assistant Magistrate and a warrant for the arrest of B was issued. B summoned A as his witness who did not appear on the day fixed and the Magistrate passed the following order. "Let the case be shelved for the present." Some time after A appeared and asked the Magistrate to proceed with the case. The Magistrate asked A to obtain a fresh sanction as more than six months had expired since the first sanction was obtained. A applied and the Munsif granted a second sanction but this sanction was revoked by the Session Judge in appeal. Held that in the present case there was no need of a fresh sanction as the case was still on the file of the Magistrate. S. 195 does not mean that the whole proceedings must be finished within six months. GULAB SINGH v. DEBI PRASAD.

[III-196]

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

(21) ————— *Sanction—Complaint—*
(*Act X of 1882*).] On the 2nd August, 1884, a Munsif, who was of opinion that in the course of a suit which had been tried before him, certain persons had committed offences under ss. 193, 463 and 471 of the Penal Code, and that the prosecution of these persons was desirable, made an order which he described as passed under s. 643 of the Civil Procedure Code and in which he directed that the accused should be sent to the Magistrate and that the Magistrate should enquire into the matter. In May, 1885, upon an application by one of the accused to the District Court to "revoke the sanction for prosecution granted by the Munsif" it was contended that the sanction had expired on the 2nd February, 1885, and had ceased to have effect. *Held* by the Full Bench that the Munsif's order whether it was or was not a sanction was a sufficient 'complaint' within the meaning of s. 195 of the Criminal Procedure Code, and that the limitation period prescribed by that section was not applicable to the case.

Per PETHERAM, C. J., AND STRAIGHT, J.—That considering that s. 643 of the Civil Procedure Code was closely similar to s. 466 of the Criminal Procedure Code, the Munsif's order might be taken as having been passed under the latter section.

Also *per* PETHERAM, C. J., AND STRAIGHT, J.—The words in s. 195 of the Criminal Procedure Code, "except with the previous sanction or on the complaint of the public servant concerned" must be read in connection with s. 476, which was enacted with the object of avoiding the inconvenience which might be caused if a Munsif or a Subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint on oath like an ordinary complainant in order to lay the foundation for a prosecution. The language of s. 476 indicates that where a Court is acting under s. 195, a complaint in the strict sense of the Code is not required, and that the procedure therein laid down constitutes the "complaint" mentioned in s. 195. *ISHRI PRASAD v. SHAM LAL*.

[V-267]

(22) ————— *Application to revoke sanction—*
Limitation—(*Act X of 1882*).] Act XV of 1877, schedule ii, No. 178, does not include applications made under the provisions of s. 195, Criminal Procedure Code. *QUEEN-EMPRESS v. AJUDHIA SINGH AND OTHERS*.

[VIII-92]

(23) ————— *Delay—*(*Act X of 1882*).] Sanction for prosecution of one M was given and his prosecution began on 21st July, 1886, after the complainant had been examined the accused was arrested, and brought before the Court, the witnesses for prosecution were examined, charges were framed and a date was

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

fixed for the examination of the witnesses for defence. After this stage of the trial M applied to the High Court for a revision of the order sanctioning the prosecution. *Held* that it was too late. *MATA BADAL v. MUHAMMAD RAZA KHAN*.

[VI-83]

(24) s. 195 (7).—" *Appeals ordinarily lie.*"—(*Act X of 1882*).] Except under very special circumstances an application to set aside an order under s. 195, Criminal Procedure Code, granting sanction to prosecute, should in the first instance be made to the Sessions Court and not to the High Court. *QUEEN-EMPRESS v. JANKI PRASAD*.

[VIII-132]

(25) ————— (*Act X of 1882*).] Where sanction to prosecute is granted in respect of perjury committed in the course of a civil suit, the valuation of such civil suit is immaterial to the question of the Court to which an appeal will lie from the order granting sanction. *GANGA DEI v. SHER SINGH*.

[XIV-201]

(26) ————— *Subordination of Courts—Assistant Collector, 1st class—Collector—*(*Act X of 1882*).] For the purposes of s. 195, cl. (b), of the Code of Criminal Procedure, an Assistant Collector of the 1st class sitting as a Court of Revenue is subordinate to the Collector of the district, notwithstanding that in the particular case in which the offence in respect of which sanction is necessary has been committed, the appeal would lie to the District Judge. *QUEEN-EMPRESS v. AJUDHIA PRASAD*.

[XV-121]

(27) ————— *Assistant Collector—District Magistrate—*(*Act X of 1882*).] The Court of an Assistant Collector is not subordinate to that of the Magistrate of the district, within the meaning of s. 195 of the Criminal Procedure Code. Where sanction to the prosecution of a person for the offence of using certain evidence known to be false was granted by a Court to which the Court in which such evidence was used was not subordinate, and such sanction did not specify the place in which and the occasion on which, such offence was committed, and the Court granting the sanction did not make any preliminary inquiry, although such an inquiry was "necessary" in the sense of s. 474 of the Criminal Procedure Code. *Held* that the indispensable preliminary conditions of s. 195 of the Code being wanting to the prosecution, the Committing Magistrate was incompetent to entertain the case, and the commitment was illegal, and should be quashed. *Held* also that the fact that there was not any evidence to connect such person with the use of such false evidence, was a defect in law

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

sufficient to justify the quashing of the commitment. IN THE MATTER OF THE PETITION OF NAROTAM DAS.

[III-225]

(28) ————— *Munsif—District Judge—High Court—(Act X of 1882).*] Held that a petition to revoke sanction granted by a Munsif should under s. 195 of the Code of Criminal Procedure be made to the District Judge and not to the High Court. PETITION OF CHAJMAL DAS.

[IV-57]

(29) ————— *Collector—Sessions Judge—(Act X of 1882).*] A suit for arrears of rent under s. 93, clause (a), Act XII of 1881 was heard by a Tashildar having the powers of and acting as an Assistant Collector. Application was made to him for an order sanctioning the prosecution of a witness for having given false evidence in the course of the trial of the suit. The Tahsildar referred the matter to the Magistrate of the district who was the Collector, and that officer made an order sanctioning the prosecution. From this order the witness applied to the Court of the District Judge to revoke the sanction. That Court being of opinion that the Court of the Collector was not subordinate to it in the matter within the meaning of s. 195 of the Code of Criminal Procedure, 1882, declined to interfere. The witness then applied to the Commissioner of the Division and that officer holding that he had no jurisdiction in the matter also declined to interfere. On application by the witness to the High Court for revision of the order of the Court of the District Judge. Held that the Court of a Collector when granting sanction for prosecution under s. 195 of the Code of Criminal Procedure, 1882, in respect of false evidence given in the course of the trial of a rent case from the final decision in which there was no appeal to the Court of the Judge of the district was still to be deemed subordinate to it, within the meaning of that section and the Court of the District Judge may be taken to be the Court to which appeals from the decisions of the Collector ordinarily lie. HARI PRASAD v. DEBI DIHAL.

[VIII-234]

(30) ————— *(Act X of 1882.)*] An Assistant Collector of the second class gave sanction, under s. 195 of the Criminal Procedure Code, for the prosecution under s. 193 of the Penal Code, of certain persons for giving false evidence in a suit for rent under s. 93 (a) of the N. W. P. Rent Act (XII of 1881). The accused persons applied to the Collector to revoke the sanction but he confirmed it. They then applied for revocation to the Sessions Judge, who doubted his jurisdiction to entertain the application as he was not satisfied that the Court of the Collector on appeal from the Assistant Collector of the second class, was a sub-

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

ordinate to the Court of the District and Sessions Judge within the meaning of s. 195 of the Criminal Procedure Code. Held that for the purposes of s. 195 the Collector was subordinate to the Judge, who had power to entertain the application, and, if he thought proper to do so, to revoke the sanction. HARI PRASAD v. DEBI DIHAL (I. L. R., 10 All., 582) referred to. QUEEN-EMPRESS v. NAJIB KHAN (W. N., 1889, P. 100) distinguished. QUEEN-EMPRESS v. ZAHURIA MAL AND ANOTHER.

[IX-206]

(31) ————— *Assistant Collector—Collector—District Judge—High Court—(Act X of 1882.)*] For the purposes of granting, refusing, or revoking sanction to prosecute under the provisions of s. 195 of the Code of Criminal Procedure the Collector and the Assistant Collector exercising jurisdiction under the North Western Provinces Land-Revenue Act (Act XIX of 1873) are not subordinate either to the District Judge or to the High Court. IN THE MATTER OF THE PETITION OF KADAM SINGH.

[XI-82]

(32) ————— *District Magistrate—Sessions Judge—(Act X of 1882.)*] A complaint against A having been dismissed he applied to the Magistrate before whom the complaint was laid under s. 195 of the Code of Criminal Procedure for sanction to prosecute the complainants. The Magistrate refused to give sanction but in appeal to the District Magistrate his order was reversed and sanction given. The complainants therefore applied to the Sessions Judge for revision, upon the ground that no notice to show cause against such sanction had been given to the accused. The Sessions Judge dismissed the application holding that he had no jurisdiction as the order of the Magistrate was passed in his appellate jurisdiction. Held that the District Judge had jurisdiction to entertain the application for revision, but that omission to give notice to the accused was not illegal so as to vitiate the sanction. EMPRESS v. GHASU ALI AND OTHERS.

[IV-271]

(33) ————— *(Act X of 1882.)*] A District Magistrate in passing an order, under s. 195 of the Code of Criminal Procedure, sanctioning a prosecution under s. 182 of the Indian Penal Code, is acting judicially and is therefore subordinate to the Sessions Judge for the purposes of s. 195. He is not acting as the official superior of the public servant before whom the offence under s. 182 of the Indian Penal Code was supposed to have been committed. QUEEN-EMPRESS v. ZORAWAR.

[X-168]

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

See

QUEEN-EMPRESS *v.* RAM KHILAWAN.

[X-167

(34).——Collector—District Judge—(Act X of 1882).] For the purposes of granting or revoking a sanction to prosecute under s. 195, Criminal Procedure Code, the Collector of a District is subordinate to the District Judge. *Hari Prasad v. Debi Dial* (I. L. R., 10 All., 222) followed. *Queen-Empress v. Ajudhia Prasad* (W. N., 1895, p. 121) considered. *SHANKAR DIAL v. A. M. VENAELES*.

[XVII-2

(35).——General powers of Sessions Judge under s. 435—(Act X of 1882).] The fact that a Magistrate is not subordinate to the Court of Session in the sense of s. 195 of the Criminal Procedure Code, does not affect the power of the Sessions Judge under s. 435 to revise any finding or order recorded by a Court inferior to him, such as an order of the District Magistrate refusing to grant sanction for the prosecution of certain persons. IN THE MATTER OF THE PETITION OF NAJIB KHAN.

[IX-100

(36). s. 195—Court to which application for sanction should first be made—(Act X of 1882).] A brought a charge against B under s. 409, Penal Code, before the Pargana Magistrate, but by the direction of the District Magistrate the case was tried by another Magistrate who convicted the accused, but the order was set aside in appeal by the Sessions Judge. B thereupon applied to the Sessions Court for sanction to prosecute A in respect of certain false statements made by A before the Magistrate. The Sessions Judge declined to give sanction on the grounds that it would more appropriately be given by the Magistrate. The Magistrate (who had tried the case) having been transferred B applied to his successor in office who refused to give sanction for want of jurisdiction. B then applied to the Magistrate in charge of the pargana who gave sanction. On appeal by A to the Sessions Judge that officer held that though the Magistrate had no authority to give sanction "the Sessions Court had" and therefore the objection was of no importance. *Held* that there was no legal sanction under s. 195, the Magistrate having no authority and the Sessions Judge not having given it in specific terms. *Held* further that the High Court could grant sanction and does hereby grant it. *PAR-GAN SINGH v. THAKURDIN*.

[IV-276

(37).——Duty of subordinate Court—(Act X of 1882).] Where sanction to prosecute has been granted under s. 195 of the Code of Criminal Procedure by a Sessions Judge it is not competent to the Magistrate before whom

CRIMINAL PROCEDURE CODE,
s. 195—(continued.)

proceedings based upon such sanction are taken to refuse to act upon such sanction on the ground of its insufficiency, *MUZAFFAR ALI KHAN v. TOTA RAM*.

[XIII-177

(38).——Sanction—Application—(Act X of 1882).] A sanction to prosecute under s. 195 of the Code of Criminal Procedure presupposes an application for sanction, and where no such application is made a Court ought not to take upon itself to grant sanction, but should take action in the manner provided by s. 476 of the Code. IN THE MATTER OF THE PETITION OF BANARSI DAS.

[XVI-82

(39).——Defective judgment—(Act X of 1882).] Where a person for whose prosecution sanction has been granted under s. 195 of the Code of Criminal Procedure applies under the same section to a superior Court to have such sanction revoked the superior Court in dealing with such application is exercising a judicial function and should exercise such function in a proper manner, *i. e.*, it should give its reasons for either confirming or revoking the sanction. On such an application as aforesaid in the Court of a Sessions Judge, the order of the Judge was:—"I decline to interfere on revision;—rejected." *Held* that this was not an order which complied with the requirements of the law and that it must be set aside. IN THE MATTER OF PETITION OF ZAFFARYAB ALI.

[XII-60

(40).——Application for execution of decree—Defective—Sanction—(Act X of 1882).] A and B obtained a joint decree. A alone applied for execution and did not mention the name of B as required by s. 235, Civil Procedure Code, clause (b). B applied for a sanction to prosecute A under s. 193 of the Penal Code (false evidence). *Held* that as the requirements of s. 235, clause (b) were not clear and specific enough to lay it down positively that when the clause speaks of parties it means *all the names*, no sanction could be granted. *EMPRESS v. BEHAU LAL*.

[VII-223

(41).——Changing order under section into one under s. 476—(Act X of 1882).] A Court entertaining an application under s. 195 of the Code of Criminal Procedure for revocation of a sanction granted for the prosecution of the applicant has no power to change the order against which such application is made into an order under s. 476 of the said Code. *In re Mathura Das* (I. L. R., 16 All., 80) referred to. IN THE MATTER OF THE PETITION OF Nihal Chand.

[XV-225

CRIMINAL PROCEDURE CODE, s. 195—(continued.)

(42).—*Magistrate applying for sanction to High Court—Procedure—(Act X of 1882).* The proper procedure for a Magistrate who may think it advisable to apply to the High Court for sanction under s. 195 of the Code of Criminal Procedure to prosecute witnesses in a criminal case for perjury is to cause a formal application to that intent to be presented to the Court through the medium of the legal remembrancer. *In re THE APPLICATION OF THE MAGISTRATE OF BASTI.*

[XIII-13]

(43).—*Appeal—Revision—(Act X of 1882).* The proceeding under s. 195 of the Code of Criminal Procedure by which an order granting or refusing to grant sanction to prosecute may be set aside is a proceeding in revision and not by way of appeal. *MEHDI HASAN v. TOTA RAM.*

[XII-242]

ZAHUR AHMAD v. MUHAMMAD HUSAIN AND OTHERS.

[XIII-147]

Per contra

GULAB SINGH v. SURAT RAM AND OTHERS.

[IV-293]

(1) s. 198—*Complaint—Defamation—(Act X of 1882).* A charge of defamation not contained in the complaint presented to the Magistrate, but added subsequently by the Magistrate upon statements made by the complainant in his examination under s. 200 of the Criminal Procedure Code, whether of his own accord or in consequence of suggestions from the Magistrate, is not a legal "complaint" made by an aggrieved person within the meaning of ss. 4 (a) and 198, so as to enable the Magistrate to take cognizance of the offence. *Empress v. Kallu (I. L. R., 5 All., 233)* referred to. *EMPRESS v. DEOKI-NANDAN.*

[VII-264]

(2).—*"Some person aggrieved"—Son—Mother—(Act X of 1882).* As regards his capacity to institute Criminal Proceedings under s. 499 of the Indian Penal Code, a son is not in the same position with respect to his mother as a husband is with respect to his wife. *MASURIA DIN v. JAGAN NATH.*

[XIII-207]

(1).—s. 199—*Complaint—Conviction under s. 451, house-trespass with intent to commit adultery—(Act X of 1882).* One SR prosecuted HL with an accusation of house-trespass with intent to commit theft. The accused stated that he had gone into the house to have the sexual intercourse with the wife of RS. The Magistrate thereupon convicted him under s. 451 house-trespass with intent to commit adultery. *Held* (on a reference under s. 438, Criminal Procedure

CRIMINAL PROCEDURE CODE, s. 199—(continued.)

Code) that it was irregular and to the prejudice of the accused to convict for a different offence to the one charged without proper opportunities to meet it. Also that in the absence of a complaint by RS the prosecution was very injudicious, the conviction and sentence are set aside. *EMPRESS v. HARCHARAN LAL.*

[VI-42]

(2).—*Complaint of rape—Conviction for adultery—(Act X of 1872).* Held that a Magistrate before whom a person had been charged of having committed rape could not, without the request of the husband, alter the charge and convict the accused for having committed adultery and the permission was not inferred in this case from the fact that the husband had by his petition and evidence supported the charge of rape. *EMPRESS v. RAM BAKSH.*

[II-165]

EMPRESS v. KALLU.

[III-1]

(3).—*Complaint under s. 498—Conviction under s. 497—(Act X of 1872).* On the complaint of the husband under s. 498, P. C., the prisoner was convicted of that offence. But it appeared from the evidence that the prisoner had not taken or enticed away the complainant's wife, but that during his absence she had gone to the house of the prisoner who had taken her in and kept her. The Sessions Judge in appeal was therefore of opinion that the conviction should have been under s. 497 and not under s. 498 and he substituted the conviction accordingly. The Court of Sessions subsequently referred the case to the High Court observing that the alteration by it of the conviction to one under a section relating to an offence triable by the Court of Sessions was an oversight and requesting that the order might be annulled and another order substituted. *Held* that the Sessions Judge's order was no doubt illegal. It was not possible however, to cancel it and direct the Sessions Judge to act and under the provisions of the second clause of s. 296 of Act No. X of 1872, and direct a committal, for the proceedings showed that no complaint under s. 497 of the P. C. had been instituted in the terms of the Criminal Procedure Code. The only possible procedure was to set aside the Sessions Judge's order, to quash the conviction and sentence and to leave the husband to his remedy by complaint under s. 497, P. C., or as otherwise advised. *EMPRESS v. BADAN.*

[I-112]

s. 200—"Examination"—*Attestation on oath—(Act X of 1882).* It is not a sufficient compliance with the provisions of s. 200 of the Code of Criminal Procedure where a complainant

CRIMINAL PROCEDURE CODE, s. 200—(continued.)

who has presented a written complaint, is merely called upon to attest the complaint on oath, no separate sworn statement of the complainant's being recorded by the Magistrate to whom the complaint is presented. *Queen-Empress v. Murphy* (I. L. R., 9 All., 666) distinguished. *KESRI v. MUHAMMAD BAKHSI*.

[XVI-35]

(1). s. 202—*Applicability of section to proceedings under s. 117.*

See s. 117, No. (8).

(2)——*Local investigation by police—(Act X of 1882).* In a case where serious charges are made against a police officer it is proper not to depute a superior police officer to hold the local investigation provided in Chapter XVI of the Code of Criminal Procedure. *JALALUDIN v. MUHAMAD KHALIL AND OTHERS*.

[IV-47]

(3)——*Vernacular record—(Act X of 1882).* On a complaint made before him of offences coming within ss. 330 and 348 of the Indian Penal Code, the Magistrate of the district made the following order; "ordered that the case be made over to Mr. Pike, Joint Magistrate, with a request that he will, after hearing the complainant and the evidence produced by him, duly summon the accused, if the case appears to be well founded, and dispose of the case." The Joint Magistrate proceeded to hear the complainant as directed by the order cited above; but made no vernacular record of the evidence. He moreover called certain witnesses for the prosecution in spite of the complainant's objecting to them that they had been bought over by the opposite parties. *Held* that the order of the District Magistrate was *ultra vires* according to the meaning of s. 202 of the Code of Criminal Procedure, and that the proceedings of the Joint Magistrate were irregular and illegal for want of compliance with the procedure laid down in ss. 202 and 356 and in Chapter XXI of the same Code. *MATAI LAL v. ANANT RAM AND OTHERS*.

[X-164]

(1) s. 203—*Dismissal of complaint without examining complainant—(Act X of 1882).* *Held* that a Magistrate had no authority to dismiss a complaint without examining the complainant and hearing the evidence he had to produce. *JALALUDIN v. MUHAMAD KHALIL AND OTHERS*.

[IV-47]

EMPRESS v. PURAN AND OTHERS.

[VI-307]

EMPRESS v. LALLU AND ANOTHER.

[I-23]

CRIMINAL PROCEDURE CODE, s. 203—(continued.)

(2)——*(Act X of 1882).* *Held* that a Magistrate should before dismissing a complaint under s. 203 have the complainant examined on oath. But that if the petition of complaint is sworn to, the requirement should be deemed to have been satisfied. The omission to examine can only amount to an irregularity which would be cured by s. 537. *Criminal Procedure Code. EMPRESS v. MURPHY*.

[VII-141]

(3).——*Second complaint on same facts—(Act X of 1882).* A Magistrate who has passed an order dismissing a complaint may at the instance of the complainant and without direction from any superior authority take cognizance of the same offence or of any other offence constituted by the same facts upon a second proper complaint being laid before him. *QUEEN-EMPRESS v. UMEDAN AND OTHERS*.

[XV-86]

EMPRESS v. PURAN AND OTHERS.

[VI-307]

EMPRESS v. INDARDAWAN.

[I-68]

s. 205.—*Personal attendance—Parda woman—(Act X of 1882).* *Held*, where a Magistrate had issued a summons to a *pardanashin* woman, alleged to be of good position, who was accused of an offence, that the Magistrate should have dispensed with the personal attendance of the accused and permitted her to appear by pleader, until such time as he had before him clear, direct, and reliable *prima facie* proof that the accused had a real charge to answer. *PETITION OF RAHIMA BIBI AND ANOTHER*.

[III-207]

s. 207.—*"Ought to be tried"—Commitment—(Act X of 1882).* In a riot between two factions the aggressors were accused under ss. 147 and 304 of the Penal Code and the other party under s. 143. The Magistrate committed both the parties to the Sessions Court. *Held* that though the Magistrate could and should have tried the party accused under s. 143 himself, his committal to the Sessions Court was not illegal and should not be set aside and that the Sessions Court had jurisdiction to try the accused. *EMPRESS v. BEHARJ AND OTHERS*.

[VI-256]

(1) s. 209.—*Magistrate, 2nd class—Case not exclusively cognizable by Court of Sessions—Discharge—(Act X of 1882).* A complaint of an offence made punishable by s. 392 of the Penal Code was brought in the Court of a Magistrate of the second class who had been invested with the powers described in s.

CRIMINAL PROCEDURE CODE,
s. 209—(continued.)

206 of the Code of Criminal Procedure. The Magistrate passed an order directing that the enquiry should be held in his Court and accordingly an enquiry was held under the provisions of Chapter XVIII of the Code of Criminal Procedure and the accused was discharged. *Held*—that powers conferred under s. 206 of the Code of Criminal Procedure convey authority to carry into effect any of the provisions of Chapter XVIII of the Code; that the procedure to be adopted under Chapter XVIII is not confined to cases exclusively triable by the Court of Session, but is also applicable to cases which, in the opinion of the Magistrate concerned ought to be tried by such Court; that the order of the Magistrate in the present case directing enquiry to be held in his Court must be taken to mean that, in his opinion, the case referred to was one which ought to be tried by a Court of Session; and that his order discharging the accused was therefore legal. **RAMSUNDAR v. NIROTAM AND OTHERS.**

[IV-205]

(2)—“*Sufficient grounds*”—*Power to weigh evidence—(Act X of 1872).*] The accused in this case were accused of murder. The Magistrate making the inquiry after examining the witnesses for the prosecution purporting to be eye-witnesses, was of opinion that the direct evidence had been fabricated and was false. He accordingly discharged the accused. In revision it was contended for the prosecution, that the discretion given to Magistrate under s. 195, Act X of 1872, did not extend to weighing evidence and that the expression “sufficient grounds” used in that section did not include the power of discrediting eye-witnesses. In short that the Magistrate was bound to commit the accused if the evidence produced by the prosecution is such that if it were believed it would end in a conviction. *Held* that the contention was unsound. **EMPRESS v. JUALA AND OTHERS.**

[II-223]

s. 210—*Charge—Evidence—(Act X of 1882).*] A Magistrate inquiring into a case under Chapter XVIII of the Code of Criminal Procedure is not empowered to frame a charge or make out an order for commitment until and after he has taken all such evidence as the accused may produce before him for hearing. **QUEEN-EMPRESS v. AHMADI.**

[XVIII-52]

s. 211—*Refusal to give list of witnesses—Power to summon afterwards—(Act X of 1882).*] If an accused person, on being called upon under s. 211 of the Code of Criminal Procedure to give orally or in writing a list of the persons whom he wishes to be summoned to give evidence on his trial, declines to give in such list, he cannot compel the Magistrate after commitment to issue any summonses for witnesses on

CRIMINAL PROCEDURE CODE,
s. 211—(continued.)

his behalf. Neither under such circumstances will the Sessions Judge be obliged to issue summonses for the attendance of such witnesses unless he is satisfied that their evidence may be material. **QUEEN-EMPRESS v. SHAKIR ALI AND OTHERS.**

[XVII-134]

(1) s. 212—*Commitment—Evidence—(Act X of 1882).*]

See s. 210.

(2)—*Power of Magistrate to examine witnesses—Defence reserved—(Act X of 1882).*] The fact that an accused person committed to a Court of Session by a Magistrate has reserved his defence does not preclude the Magistrate from acting under s. 212 of the Code of Criminal Procedure. **IN THE MATTER OF THE PETITION OF RUDRA SINGH AND OTHERS.**

[XVI-114]

(1) s. 215—*Ground for quashing commitment—Insufficiency of evidence—(Act X of 1882).*] This was a reference of the case of one S, committed for trial, on a charge under s. 411, Penal Code. The Sessions Judge was of opinion that the commitment should be quashed as there was no evidence that the accused received the property (potatoes) knowing it to be stolen property. The Session Judge observed as follows:—“I would ask the Honorable Court to quash the committal on the ground of insufficiency of evidence against the accused. The Magistrate himself characterises his conduct as nothing more than suspicious, and there is not the smallest proof that the accused S knew or had any cause to believe that the potatoes sold in every bazaar in the country by producers unknown to the purchasers, as in S’s case, were stolen property. *Held* that under the circumstances stated by the Sessions Judge the commitment is annulled, and S will be released. **EMPRESS v. SUMER.**

[IV-14]

(2)—*That joint commitment was illegal—(Act X of 1872).*] In this case the accused were jointly committed to take their trial before the Sessions Court on the following charges, *viz.*: SD, under s. 457, Penal Code, of seven distinct offences within one year; SD, R and M, under s. 411, Penal Code, for dishonest possession of and dealing with stolen property belonging to seven different persons; and SD, R and M under s. 413, Penal Code, for habitually receiving and dealing in stolen property. *Held* that the commitment was bad and must be quashed. **EMPRESS v. SHEODIN AND OTHERS.**

[III-39]

See

EMPRESS v. BEHARI AND OTHERS.

[VI-256]

CRIMINAL PROCEDURE CODE,
s. 215—(continued.)

(3) ————— *That a more serious offence was committed—(Act X of 1882).* *Z* was committed to the Sessions Judge for having caused grievous hurt to one *L*, a chowkidar, an offence punishable under s. 326, Penal Code. When the Court called *L* to give evidence, it appeared that he was dead. The Sessions Judge being of opinion that, as there was reason to think that the death of *L* might have resulted from the hurt, reported the circumstances to the High Court in order that the commitment should be quashed, and a fresh inquiry ordered under ss. 302, 304, 326, and 324, Penal Code. *Held* that the Judge was right and the commitment should be quashed. *EMPRESS v. ZAHARIA.*

[III-257]

(4) ————— *That Committing Magistrate had changed his mind—(Act X of 1882).* In this case the Assistant Magistrate committed the accused to the Court of Session. He after the commitment recorded that he had made further enquiry into the case and that if he had made this inquiry before the commitment, it would have furnished sufficient reasons for not committing the accused. *Held* (on reference by the Sessions Judge) that the High Court is unable to quash the commitment and the accused must be duly tried by the Court of Session. *EMPRESS v. MADARI.*

[V-53]

(5) ————— *Discharge by Magistrate after commitment—(Act X of 1872).* A Magistrate having committed a person for trial by the Court of Session on a charge of adultery, immediately afterwards, on the representation of the prosecutor that he wished to withdraw from the prosecution, discharged the accused. *Held* that the order of discharge was bad, as under ss. 196 and 197, Explanation, Criminal Procedure Code, a commitment once made can be quashed by the High Court only. *EMPRESS v. JANGBIR.*

[I-167]

(6) ————— *Release by Session Judge without trial—(Act X of 1872).* *Held* that the release by a Sessions Judge of a person committed to him for trial, without putting him on his trial and without taking his defence, on the ground that his complicity in the murder he was accused of, was entirely unproved and unlikely, was erroneous and must be quashed. *EMPRESS v. SUNDER AND ANOTHER.*

[I-60]

(1) s. 216—*Refusal to summon witness—(Act X of 1872).* On the 30th March, 1881 an accused person on his trial before a Magistrate asked that a certain witness might be summoned on his behalf. The Magistrate ordered a summons to be issued for the attendance of such witness on the 18th April, to which day the

CRIMINAL PROCEDURE CODE,
s. 216—(continued.)

further hearing of the case was adjourned. There was some delay in the service of the summons, and such witness did not attend on that day. The Magistrate refused on application by the accused for the issue of a second summons to such witness, with reference to s. 359 of Act X of 1872, on the ground that such application was not made in "good faith". *Held* that the provisions of s. 359 of Act X of 1872 were clearly inapplicable to the case as it stood before the Magistrate on the 18th April and he was bound to make a further attempt—the first attempt seemed to have been nominal merely—to secure the attendance of the absent witness. *EMPRESS v. RUKNUDDIN.*

[I-102]

(2) ————— *(Act X of 1882).* Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code each of the prisoners under s. 111 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists the name of a particular person was entered who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reason and was passed in the absence of the objector or of any person representing him and without notice to show cause being issued to him. The objector applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it. *Held* that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.

CRIMINAL PROCEDURE CODE, s. 216—(continued.)

Per STRAIGHT, J.—That, s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the Committing Magistrate. **IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT.**

[VI-260]

s. 217.—*Witness—Obligation of Magistrate to cause attendance—(Act X of 1882).* In this case the Court observed that there is no law which obliges the Committing Magistrate to cause the attendance of every witness examined by him before the Court of Sessions irrespectively of their evidence being material for the prosecution. All that is required by the law is that all the "necessary" witnesses should be summoned. It is for the Magistrate to judge as to the necessity of the witnesses for the prosecutor. The accused had it in his power to cause the witnesses who appeared for the prosecution, to be summoned, and the Judge can always require their attendance if he considers their evidence material. **EMPRESS v. NAIK LAL AND ANOTHER.**

[III-37]

(1) s. 221.—*Charge under s. 411—Penal Code—(Act X of 1882).* The charge upon which an accused person was sent for trial to the Court of Session alleged that the accused was, on a certain date and at a certain place specified, seized with a stolen she-buffalo belonging to the complainant, valued at Rs. 30, and that he had "committed the offence of retaining stolen property." *Held* that this was not a charge properly framed under s. 411 of the Indian Penal Code, under which it purported to be framed, or under any other section of that Code, such as would warrant the conviction of the accused by the Court of Session. **QUEEN-EMPRESS v. GADLU.**

[XVIII-70]

(2) ———— *Previous conviction—(Act X of 1882).* The accused was committed to the Court of Sessions under s. 379 Penal Code. The charge did not as required by s. 221, Criminal Procedure Code, state the fact, date, and place of the previous conviction severally. The Court of Sessions convicting the accused sentenced him to five years rigorous imprisonment under ss. 379 Penal Code. *Held* that the accused was not legally shown to be amenable to the terms of s. 75, Penal Code; the sentence was therefore reduced to two years. **EMPRESS v. HAIDAR.**

[III-110]

CRIMINAL PROCEDURE CODE, s. 221—(continued.)

(3) ———— *(Act X of 1872).* *M* was tried and convicted before the Court of Session of robbery, and having been previously convicted of an offence under Chapter XVII of the Penal Code, and s. 75 of the Code being applicable, was sentenced, with reference to s. 59 to transportation for a term of years. The Court (Straight, J.) observed with reference to the manner in which the previous conviction of the accused was set out in the charge, that it was unsatisfactory and vague. Care should always be taken to clearly and accurately state the previous conviction and something like the following form might be conveniently adopted:—"I further charge you with having on the ——— day ——— 18——, at ——— before ——— Session Judge or Magistrate (as the case may be) been convicted of an offence under section ——— of the Penal Code, and sentenced to rigorous imprisonment or transportation for ——— years." When the previous conviction has been put to an accused and he admits it, no further proceedings are necessary; but if he denies it, the certified extract from the records of the Court in which he was convicted should be put in evidence, proof should be given that he and the person named therein are one and the same, and the Court should record a specific finding upon the point. **EMPRESS v. MUNDAR.**

[I-144]

(4) ———— *(Act X of 1872).* *Held* that not setting out in the charge the particulars of the previous conviction (where it is sought to be proved against the accused for the purpose of affecting his conviction) though an irregularity was covered by s. 283, Criminal Procedure Code, if the charge gave the accused to understand that it was intended to prove the previous conviction against him and if the accused was undergoing the sentence under the previous conviction. **EMPRESS v. RAGHIB ALI.**

[I-32]

s. 225.—*Defective charge—Effect.*

See s. 221, No. (4).

See s. 226.

s. 226.—"Add to...charge"—*(Act X of 1882).* Three persons were jointly committed for trial before the Court of Session, two of them being charged with culpable homicide not amounting to murder of *J*, and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to *C* and convicted them upon both the original charges and the added charge. The assault upon *C* took place either at the same time as or immediately after the attack which resulted in the death of *J*. *Held* that the case did not come within the terms of s. 226 of the Criminal Procedure Code

CRIMINAL PROCEDURE CODE,

s. 226—(continued.)

and the adding of the charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things, but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised and witnesses might have been called for the defence, upon the added charge, the provisions of s. 537 were applicable to the case. *Held* also that the Sessions Judge had power, under s. 23 of the Code, to try the charge assuming that he had power to add it. *EMPRESS v. KHARGA*. [VI-254]

(1). s. 227—*May alter or add to any charge—Adding a perfectly distinct charge—(Act X of 1882).* *Held* that the Court was competent to add a fresh charge upon which the accused had not been committed. That the words "alter any charge" in s. 227 comprehended adding a charge perfectly distinct from those under which the accused has been committed. *EMPRESS v. GORDON*. [VII-155]

(2).—"Alter"—*Withdrawal—(Act X of 1882).* The word "alter" in s. 227 of the Code of Criminal Procedure includes also withdrawal by a Sessions Judge of a charge added by him to the charge on which the committal has been made. *DWARKA LAL v. MAHADEO RAI AND OTHERS*. [X-178]

(1). s. 234—"Of the same kind"—*Offences under ss. 193 and 471, P. C.—(Act X of 1882).* *Held* that the joint trial of an accused for offences under ss. 471 and 193, Penal Code, was illegal and must be quashed. *EMPRESS v. HAR-NAM*. [III-188]

(2).—"Distinct robberies"—*(Act X of 1882).* Two charges of robbery committed in respect of different persons and at different times and places though within the space of one year should be separately committed and tried. A joint commitment was therefore quashed as illegal. *Empress v. Murari (I.L.R., 4 All., 147)* followed. *EMPRESS v. DUKHI*. [III-107]

(3).—"Offences under ss. 401 and 411, Penal Code—(Act X of 1882). *Held* that offences under ss. 411 and 401, Indian Penal Code, could not be tried together. *EMPRESS v. BHIKARI AND OTHERS*. [III-179]

(4).—"Criminal misappropriation—(Act X of 1882). Where a Postmaster was accused of having on three different occasions within a year, dishonestly misappropriated moneys paid to him by different persons for money orders. *Held* that the offences of which such person accused being the dishonest misappropriations by a public servant of public moneys (for as soon as they were paid they ceased to be the property of the remitters) such offences were "of the same kind" within the meaning of s. 234 of the Code of Criminal Procedure and such person might, therefore under that section, be charged with and tried at one trial for all three offences. *Empress v. Murari (I.L.R., 4 All., 147)* observed on. *EMPRESS v. JUALA PRASAD*. [IV-321]

CRIMINAL PROCEDURE CODE,

s. 234—(continued.)

(5).—"Cheating—(Act X of 1872). *M.* was accused of cheating *G* on two different occasions and also of cheating *K* on a third occasion. The three offences were committed within one year of each other and *M* was charged and tried at the same time for the three offences. *Held* that such joinder of charges was irregular, inasmuch as the combination of three offences of the same kind, for the purpose of one trial, can only be, where such offences have been committed in respect of one and the same person, and not against different prosecutors, within the period of one year, as provided in the Criminal Procedure Code. *EMPRESS v. MURARI*. [I-156]

(6).—"Not exceeding three"—*Waiver—(Act X of 1872).* The accused was committed for trial before the Court of Session on four charges of criminal breach of trust between July 1879 and 1880, but no objection was taken by the accused either before the Magistrate or the Court of Session to the effect that he could not be charged and tried at the same time for more than three offences with reference to s. 453 of Act X of 1872. *Held* that the objection having been taken for the first time in the High Court without showing that the accused had been prejudiced thereby the conviction could not be set aside on that ground. *EMPRESS v. FAIZ ILAHI*. [I-68]

(1) s. 235—*Forming part of the same transaction—Seven offences under s. 328, Penal Code—(Act X of 1882).* The appellant in this case was tried before the Sessions Judge on seven charges of offences under s. 328, Penal Code, all seven forming part of the same transaction and committed at one and the same time against seven persons. *Held* that the joint trial was legal under s. 235, Criminal Procedure Code. *EMPRESS v. SAHTU*. [IV-285]

(2).—"Offences under ss. 380 and 454, Penal Code—(Act X of 1882). *Held* that the joint trial of offences under ss. 380 and

CRIMINAL PROCEDURE CODE,**s. 235—(continued.)**

454 was legal under s. 235, Criminal Procedure Code. *QUEEN-EMPRESS v. ZOR SINGH.*

[VIII-5]

(3) ————— *Offences under ss. 170 and 384, Penal Code—(Act X of 1882).]* The accused pretending to be a public servant extorted some money from the complainant. He was convicted by the Magistrate under s. 170 (personating a public servant) and s. 384 (extortion) and was sentenced to 9 months' imprisonment under *each*. *Held* (in revision) that the question, whether the Magistrate was right in convicting the accused both under s. 170 and s. 384, Penal Code, was a question of the rules of the Criminal Procedure Code, a question of Adjective Law. That there was nothing in the Criminal Procedure Code which can be understood to lay down the rule that a person guilty of one offence may not be at the same time guilty of another; on the other hand s. 235 of the Code goes to establish the contrary—s. 76 of the Indian Penal Code which belongs to the Substantive Law relates to sentences and not to convictions. *EMPRESS v. WAZIR JAN.*

[VII-274]

ss. 236 and 237—Cognate offences—Murder—Theft—(Act X of 1882).] Ss. 236 and 237, Criminal Procedure Code, refer to cognate offences such as theft and criminal breach of trust, and not to offences of so distinct a character as murder and theft. Where a prisoner, tried on a charge of murder only and acquitted of that offence, was convicted of and sentenced for theft, with reference to the provisions of s. 237 of the Criminal Procedure Code. *Held* that these provisions did not justify the Court, without adding a charge of theft under s. 227 of the Code, in so convicting and sentencing the accused, but that as the omission to frame a separate charge of theft did not appear to have caused a failure of justice, s. 537 applied, and it was not necessary to interfere. *QUEEN-EMPRESS v. NAROTAM.*

[VIII-95]

s. 237—Cognate offences—Offences under ss. 380 and 411, Penal Code—(Act X of 1882).] S. 237, Criminal Procedure Code, does not imply that a person charged and tried for dishonestly receiving stolen property may without altering the charge be convicted of theft in a dwelling house. The proper course is to alter the charge under s. 227. *EMPRESS v. KARIM BAKHS.*

[VIII-116]

(1) **s. 239—Joint trial of several persons—(Act X of 1882)—In the same transaction—Two distinct robberies—Irregularity.]** Where four accused were at one and the same trial tried for offences of murder and robbery committed in the course of one transaction and for another robbery committed two or three hours

CRIMINAL PROCEDURE CODE,**s. 239—(continued.)**

previously and at a place close to the scene of the robbery and murder. *Held* that the trial of these separate offences together, though an error or irregularity within the meaning of s. 537, Criminal Procedure Code, would not necessarily render the whole trial void. *EMPRESS v. MULUA AND OTHERS.*

[XII-95]

(2) ————— *Three distinct dacoities—(Act X of 1882).]* Some 15 persons were tried jointly by the Court of Session on the charge, that "they on or about the first day of November, 1881, on the high road between Rajapur and Gugraula, committed dacoity on the persons and property of X and his companions, Y and his companions, and Z and his companions, and in committing the said dacoity one of their gang voluntarily caused hurt to Kallu Chaukidar, and that they had thereby committed an offence under s. 394, Indian Penal Code." The Sessions Judge acquitted seven and convicted eight of the accused. *Held* (on appeal by the Local Government as well as by the accused) that three separate dacoities having been committed at different places and on three different sets of travellers a joint trial for all the offences was illegal and must be set aside and a new trial held for each of the three separate offences. *EMPRESS v. SERHA AND OTHERS.*

[III-12]

(3) ————— *(Act X of 1872).]* Z and twenty other persons, appellants, were tried on a charge under s. 401, Penal Code. He and six of the other persons were at the same time tried on a charge of dacoity (s. 395, Penal Code) "on the 18th August, 1881, at Lalpura." Another six of the other persons were at the same time tried on a charge of dacoity "on the 28th June, 1881, at Bhadawal." *Held* that it was incompetent and improper for the Sessions Judge to try the two cases of dacoity on different dates, in respect of different prosecutors, together with the charge under s. 401, Penal Code. The convictions and sentences are therefore quashed. *EMPRESS v. LEKHA AND OTHERS.*

[II-178]

(4) ————— *Six dacoities—(Act X of 1872).]* Six persons were committed for trial charged with having committed six dacoities between the 15th and 19th January. *Held* that the commitment must be quashed and separate trials held. *EMPRESS v. DALLA AND OTHERS.*

[II-180]

EMPRESS v. DUKHI.

[III-107]

(5) ————— *Offence under s. 174, Penal Code—(Act X of 1882).]* *Held* that the trial of several persons jointly under s. 174, Penal Code, for not attending the Court at the time appointed in

CRIMINAL PROCEDURE CODE,
s. 239—(continued.)

the summons was illegal and must be quashed.
EMPRESS v. DESIDIAL AND OTHERS.

[III-25]

(6) ———— *Offence under ss. 457 and 411, Penal Code—(Act X of 1882).* Held that two persons, one charged under s. 457 and the other under s. 411, Penal Code, for receiving part of the stolen property could not be committed and tried jointly. **EMPRESS v. JURAWAN AND OTHERS.**

[III-158]

(7) ———— *(Act X of 1872).* The accused were jointly committed to take their trial before the Court of Session on the following charges, *viz.*, *SD*, under s. 457, Penal Code, of seven district offences within one year; *SD, R* and *M* under s. 411, Penal Code, for dishonest possession of and dealing with stolen property belonging to seven different persons; and *SD, R* and *M* under s. 413, Penal Code, for habitually receiving and dealing in stolen property. Held that the commitment was illegal and must be quashed. **EMPRESS v. SHEODIN AND OTHERS.**

[III-39]

(8) ———— *Offences under ss. 454 and 411—(Act X of 1882).* *A, B, C* and *D* were jointly committed for trial on the following charges, *A* and *B* jointly with having committed house breaking by night, with intent to commit theft upon the premises of one *X* at a village called *M* on the 16th July, 1882, after having been previously convicted of an offence under s. 457, *C* and *D* with having received portions of the stolen property, but different properties were received by the two on different dates and at different places. Held that the joint commitment was bad. The trial should proceed as follows.

- (i) against *A* and *B* in one case.
- (ii) " *C* in another case.
- (iii) " *D* in another case.

EMPRESS v. DAYA RAM AND OTHERS.

[II-215]

(9) ———— *Offences under s. 147—(Act X of 1872).* In this case seven persons were jointly tried by a Magistrate for the offence of rioting. It appeared that Nos. 5, 6 and 7 claimed certain land which was in the possession of Nos. 1, 2, 3, and 4. The former endeavoured to stack fodder on the land. The latter resisted their doing so and a fight ensued between the two parties in which persons on both sides were injured. The Magistrate having convicted the accused persons, and his order having been affirmed on appeal, both parties applied to the High Court to revise the order of the Magistrate. Held that it was illegal for charges of riot against all the applicants to be disposed of indiscriminately in one and the same proceedings.

CRIMINAL PROCEDURE CODE,
s. 239—(continued.)

There was no common object within the meaning of s. 146 of the Penal Code, existing in the minds of the two sets of defendants. Where two factions or parties are charged with riot the proper course to pursue is to give each party or faction a separate trial, so as to enable its several members to be examined as witnesses in the case in which they are, so to speak, the complainants and prosecutors and the necessity for this is necessarily greater where a right of private defence of persons or property is asserted. **EMPRESS v. BAHADUR KHAN AND OTHERS.**

[I-28]

EMPRESS v. BANDHO SINGH AND OTHERS.

[I-28]

(10) ———— *Offences under ss. 147 and 325—(Act X of 1882).* In this case some ten persons were jointly tried and convicted under ss. 147 and 325, Penal Code, by the Sessions Judge. In appeal the High Court made the following observations. "If Magistrates think fit to commit and Judges to try ten or a dozen persons at the same time and in a single proceeding the best they can be expected to do is very clearly and explicitly to distinguish between the cases of the several prisoners and to point out how the evidence affect them individually. The evidence should not be treated in block. **EMPRESS v. GAYADIN AND OTHERS.**

[III-145]

(11) ———— *Offence under ss. 323 and 302, Penal Code.]*

See s. 226.

(12) ———— *Offences under ss. 147, 323 and 325, Penal Code—(Act X of 1872).* Seven persons jointly tried by a Magistrate were charged as follows:—Nos. 1, 2, 3, 4 and 5 with (i) rioting, (ii) voluntarily causing grievous hurt to No. 7 and (iii) voluntarily causing grievous hurt to No. 6; and Nos. 6 and 7 with (i) voluntarily causing grievous hurt to No. 4, (ii) voluntarily causing grievous hurt to No. 5, and (iii) voluntarily causing hurt to No. 2. It appeared that dispute had taken place between Nos. 1, 2, 3, 4, and 5, on the one side and No. 6 and 7 on the other, which resulted in a fight between the two parties in which Nos. 2, 4, 5, 6, and 7 were injured. The accused persons having been convicted by the Magistrate, and the Magistrate's order having been affirmed on appeal, Nos. 1, 2, 3, 4 and 5 applied to the High Court to revise the Magistrate's order. Held that it was altogether improper for the Magistrate to deal with a charge of riot against seven different persons in the same proceeding, and at one and the same time, when it was obvious upon the face of the evidence that there could not be a "common object" animating all of them. Equally irregular was it for him to

CRIMINAL PROCEDURE CODE,
s. 239—(continued.)

dispose of the cases under ss. 325 and 323 of the Penal Code in one trial. *EMPRESS v. LOCHAN AND OTHERS*,

[I-28]

(13).—*Offences under s. 191, Penal Code—(Act X of 1872).* Held that in all cases of giving false evidence, where more than one person is implicated, separate charge should be drawn up and separate trial held in respect of each separate person. That the rule applies with greater cogency where one of the accused is tried of abetment of the offence. *EMPRESS v. PIARI LAL AND OTHERS*.

[II-64]

(14).—*(Act X of 1872).* Held that in all cases of giving false evidence, where more than one person is implicated, separate charges should be drawn up and separate trials held. *EMPRESS v. CHAND KHAN AND ANOTHER*.

[I-83]

EMPRESS v. DIN DAYAL AND OTHERS.

[V-29]

EMPRESS v. ANANT RAM AND OTHERS.

[II-37]

EMPRESS v. RAHMAT KHAN AND OTHERS.

[II-44]

EMPRESS v. NIAZ ALI AND OTHERS.

[II-161]

(15).—*Offences under ss. 193, 195 and 211, Penal Code—(Act X of 1872).* Held that a joint trial of two or more persons for offences under ss. 193, 195 and 211, Indian Penal Code, was illegal and must be quashed. *EMPRESS v. CHANGU AND OTHERS*.

[II-124]

(16).—*Offences under ss. 193 and 465, Penal Code—(Act X of 1872).* LS sued one P on a bond. K, one of the marginal witnesses, deposed to the execution of the bond by P and D, the writer of the bond, deposed to the same fact. The Court trying the suit found that the bond was forged, and the persons named above were eventually jointly committed on charges under s. 465 and s. 193 of the Penal Code. PS and seven other persons, composing both parties to a riot, were jointly committed for trial on a charge of rioting with deadly weapons. The Court of Sessions reported these cases to the High Court in order that the commitments might be quashed and as regards the first case, that the accused persons might be separately committed, and, as regards the second case, that the two parties to the riot might be separately com-

CRIMINAL PROCEDURE CODE,
s. 239—(continued.)

mitted. The Court (Brodhurst, J.) quashed the commitments, and directed that in the first case, each of the accused, and in the second case, each of the two parties to the riot, should be committed and tried separately. *EMPRESS v. LALAK SINGH AND OTHERS*. *EMPRESS v. PULANDAR SINGH AND OTHERS*.

[II-160]

s. 240.—*Withdraw—Stay the enquiry—Acquittal—(Act X of 1882).* A Magistrate trying an accused person upon charges under ss. 193 and 204, Penal Code, convicted him under the former section and with regard to the latter observed that the facts appeared to him to constitute an offence under another section and he therefore directed the file to be laid before the District Magistrate with a view to having such offence enquired into. On appeal the conviction under s. 193 was set aside and subsequently proceedings under s. 204 were taken against the accused. Held that as the first Magistrate expressly refrained from dealing with and disposing of the charge under s. 204, Penal Code, and did not in terms acquit the accused upon such charge his action might be taken as a stay of the trial of such charge under s. 240, Criminal Procedure Code, and the subsequent trial was not barred by s. 403, Criminal Procedure Code. *QUEEN EMPRESS v. RAGHUNANDAN LAL*.

[IX-8]

(1) s. 247.—*Dismissal of complaint—Acquittal—(Act X of 1882).* Held that the dismissal of a complaint under s. 247 was an acquittal from which no appeal lies except under s. 417, Criminal Procedure Code. *QUEEN EMPRESS v. HARDEO SINGH AND OTHERS*.

[XI-120]

EMPRESS v. BHAWANI PRASAD AND ANOTHER.

[V-43]

(2).—*Adjournment—(Act X of 1872).* The hearing of a "summons case" by an Honorary Magistrate was adjourned, but the Magistrate did not inform the complainant where the case would be taken up again. He however issued summonses to the witnesses, among them the complainant, requiring them to attend before him "either at Aligarh or Talibnagar, on the 5th July, 1882". The complainant did not appear on the 5th and the Magistrate dismissed the complaint under s. 205 of the Criminal Procedure Code. Held that under the circumstances the Magistrate should have adjourned the hearing. *PETITION OF BANSIDHAR*.

[II-229]

(1) s. 250.—*Summons case—Warrant case—(Act X of 1882).* Held that s. 250, Criminal Procedure Code (repealed) related to summons

CRIMINAL PROCEDURE CODE,
s. 250—(continued.)

cases and not to warrant cases. IN THE MATTER OF THE COMPLAINT OF NIAZULLAH *v.* NAJJU AND OTHERS.

[III-130]

In re COMPLAINT OF PHULLU.

[I-99]

EMPRESS *v.* ANGNU.

[I-154]

EMPRESS *v.* JOKHAN AND OTHERS.

[I-161]

(2)———(Act X of 1882).] *Held* that where one of the offences complained of was riot, which is not a summons case, the Magistrate on acquitting the accused, was not competent to order the complainant under s. 250, Criminal Procedure Code, to pay compensation to the accused though the Magistrate treated the charge as a mere summons case under s. 426, Penal Code. *Sonu v. The Queen* (I. L. R., 6 Mad., 316) referred to. IN THE MATTER OF THE COMPLAINT OF HARBANS.

[V-45]

(3)———*Complaint—Of wrongful seizure of cattle—(Act X of 1882).*] A complaint of the wrongful seizure of cattle is not a complaint of an offence within the meaning of the Code of Criminal Procedure. Consequently on the dismissal of such a complaint it is not competent to a Court to act under s. 560 of the Code and award compensation to the persons against whom the complaint is made. *Pitchi v. Ankapa* (I. L. R., 9 Mad., 102); *Kottalanada v. Muthaya* (I. L. R., 9 Mad., 374); *Kala Chand v. Gudadhur Biswas* (I. L. R., 13 Cal., 304) and *Neda Ram Thakur v. Joonab* (I. L. R., 23 Cal., 248) referred to. MEGHAJ *v.* SHEOBHAI AND OTHERS.

[XVI-98]

(4)———(Act X of 1882).] One *I* preferred a complaint to the police that one *B* and four others had forcibly prevented him from driving to the pound certain cattle which had been trespassing on his land, thereby committing an offence punishable under s. 24 of Act I, 1871. The police, after making an enquiry, sent up the accused for trial before the Magistrate having jurisdiction in the matter. The Magistrate dismissed the complaint as being false and vexatious and under s. 250, Criminal Procedure Code, ordered the complainant to pay certain compensation to the accused. *Held* that the case not having been instituted "upon complaint," the order made under that section was illegal and must be set aside. ISHRI *v.* BAKSHI AND OTHERS.

[III-224]

EMPRESS *v.* DURGA AND ANOTHER.

[III-257]

CRIMINAL PROCEDURE CODE,
s. 250—(continued.)

IN THE MATTER OF NAIN SUKH.

[VIII-216]

KALKA *v.* BABU AND ANOTHER.

[V-258]

JUGMOHAN *v.* SHEOBALAK AND ANOTHER.

[II-116]

(5)———(Act X of 1872).] One *S* charged four persons with damaging his crops by pasturing sheep on them and with having forcibly rescued the sheep when he was taking them to the pound. The subordinate Magistrate trying the case dismissed the charge as untrue and vexatious and under s. 209 of Act X of 1872 awarded Rs. 5 to each of the accused persons. The Magistrate of the district being of opinion that there was evidence to show that damage was caused to the complainant and that the plaintiff had valid reason for charging the accused, reported the case to the High Court. *Held* that the Court agreed with the Magistrate in much of his estimate regarding the merits of this case and it did not find sufficient justification for an order under s. 209. *In re* COMPLAINT OF SARNAM.

[I-167]

(6)———*Applicability of section to proceedings under s. 110, Criminal Procedure Code—(Act X of 1882).*] The award of compensation under s. 560 of the Code of Criminal Procedure must be in respect of a frivolous and vexatious accusation of an offence of which the accused person has been discharged or acquitted. That section is not applicable to an application made to a Magistrate solely with a view to his taking proceedings under s. 110 of the Code. QUEEN EMPRESS *v.* LAKHPAT.

[XIII-114]

(7)———"The Magistrate"—"By whom the case is heard"—(Act X of 1882).] An order granting compensation to an accused under s. 590, cl. (1) of the Code of Criminal Procedure, must be made by the Magistrate who tries the case. It is not competent to a Magistrate who has heard nothing of the case except the complainant's pleas against the direction to pay compensation to make the order for compensation. IN THE MATTER OF THE PETITION OF MAHADEO TIWARI.

[XII-58]

(8)———"Acquittal"—*Dismissal of complaint for default—(Act X of 1882).*] The term "acquittal" implies that at least an inquiry to the extent required by s. 242 of the Code of Criminal Procedure should have been held. Therefore where a Magistrate, apparently without such inquiry having been made, and on account merely of the non-appearance of the complainant, passed an order purporting to be under s. 250 of the Code of Criminal Procedure

CRIMINAL PROCEDURE CODE.
s. 250—(continued.)

awarding compensation to the accused. *Held* that under such circumstances the awarding of compensation was due to a want of exercise of the discretion required by s. 250. **ABDUL GHAFUR v. LALTU.**

[XI-63]

(9).———(Act X of 1882).] *A* charged *B* with assaulting him. The Magistrate after examining the complainant summoned the accused. On the date fixed the parties appeared but the case was adjourned till next day, and on that day the complainant did not appear. The Magistrate thereupon struck off the case and fined the complainant under s. 250 of the Code of Criminal Procedure. *Held* that there was nothing illegal in the Magistrate's procedure or order. **IN THE MATTER OF THE COMPLAINT OF MUSAHIB KHAN.**

[IV-115]

(10).———*Composition—Compensation—(Act X of 1872).*] One *D S* made a complaint that one *D R* and certain other persons had committed offences punishable under ss. 426 and 447, Penal Code. The Magistrate to whom such complaint was made issued a summons as on a charge only under s. 447, Penal Code. The parties appeared on the day fixed for the hearing of the case, and the complainant filed a petition stating that the case had been compounded and asking permission to withdraw from the prosecution. The Magistrate refused to accept the composition, but he admitted it as a withdrawal of the complaint and without further inquiry awarded under s. 209 of the Criminal Procedure Code the accused persons Rs. 5 compensation. *Held* that the order of the Magistrate made under s. 209 of the Criminal Procedure Code, in a case which he had permitted to be withdrawn under s. 210 of the same was illegal. **DEBI SAHAI v. DALSINGAR RAI AND OTHERS.**

[I-155]

(11).———*Investigation—(Act X of 1872).*] *A's* *harinda* made a complaint against certain persons charging them under ss. 323 and 352, Indian Penal Code. The Magistrate hearing the complaint dismissed it as vexatious and order *A* to pay the accused Rs. 100 compensation. *Held* that the order under s. 209 was passed without a sufficient investigation of the complaint. **JUGMOHAN v. SHEOBALAK AND ANOTHER.**

[II-116]

(12).———*Fine exceeding sum awarded to complainant—(Act X of 1882).*] A Bench of Honorary Magistrate finding a complaint to be frivolous and vexatious ordered the complainant to pay a fine of Rs. 8 out of which Rs. 4 were to be given to the accused as compensation. *Held* that the Magistrate could not fine a sum over and above that which was ordered to be

CRIMINAL PROCEDURE CODE.
s. 250—(continued.)

paid as compensation. **IN THE MATTER OF THE COMPLAINT OF BEHARI.**

[V-44]

(13).———*Imprisonment in lieu of compensation—(Act X of 1882).*] Although compensation awarded under section 560 of the Code of Criminal Procedure is recoverable as if it were a fine, it is not competent to a Magistrate immediately upon ordering a complainant to pay compensation to direct that he should in default be sentenced to imprisonment. **QUEEN EMPRESS v. PUNNA AND ANOTHER.**

[XV-241]

(14).———(Act X of 1882).] It is not competent to a Court in awarding compensation under s. 560 of the Code of Civil Procedure against a complainant for making a frivolous and vexatious complaint to order at the same time that in default of payment of the compensation the person against whom the order is made suffer imprisonment. **Queen Empress v. Punna (I. L. R., 18 All., 96)** approved. **MANJHLI v. MANIK CHAND AND ANOTHER.**

[XVI-180]

(15).—s. 250 (3).———*Appeal—(Act X of 1882).*] *Held* that no appeal lies from an order made by a Magistrate of the third class dismissing a complaint under s. 247 and awarding to the complainant Rs. 5 as compensation under s. 250, Act X of 1882. **EMPRESS v. HARDEO SINGH AND OTHERS.**

[XI-120]

s. 253—*Discharge without examining all witnesses for prosecution—(Act X of 1872).*] *Held* that a Magistrate was not competent in a warrant case to discharge the accused without examining all the witnesses named for the prosecution. **Empress v. Himatulla (I. L. R., 3 Calc., 389)** and **Empress v. Kashi (I. L. R., 2 All., 447)** followed. **EMPRESS v. AJUDHIA AND ANOTHER.**

[II-179]

EMPRESS v. SHEO CHARAN AND OTHERS.

[I-145]

ss. 256 & 257—*Right of accused to recall and cross-examine witness for prosecution—(Act X of 1882).*] The provisions of s. 257 of Criminal Procedure Code do not apply and relate to the preceding section. S. 256 of the Code gives to the accused an absolute right at any time while he is making his defence to recall and cross-examine any witness for the prosecution present in the Court or its precincts. S. 257 refers to the resummoning for cross-examination of witnesses for the prosecution who are not present in the Court or its precincts. The accused has no absolute right to have these

CRIMINAL PROCEDURE CODE, ss. 256 & 257—(continued.)

witnesses summoned. The Magistrate is entitled to refuse to issue process, if he considers that the application is made for the purpose of vexation or delay, or for defeating the ends of justice, but he must record in writing his grounds for so thinking. *QUEEN EMPRESS v. RAM CHARAN LAL*.

[XV-40]

(1) s. 258—*Acquittal—Complainant evading examination—(Act X of 1872).* The accused in this case who was charged of offences under ss. 381 and 408, Penal Code, named the complainant as his principal witness. The Magistrate trying the case endeavoured in the first place to procure the attendance of the complainant and failing in this attempt, then endeavoured to procure his examination by the Political Agent at Jaipore, the complainant being a resident of Jaipore. The Jaipore Durbar however refused to allow him to be examined by that officer, but offered to examine him themselves. The Magistrate being of opinion that, if the evidence were thus taken, he would not feel satisfied that it was properly recorded. Under the circumstances he acquitted the accused. *Held* that the Magistrate should take measures for the examination of the complainant before the Durbar or if the accused did not desire this that he should pronounce judgment on the evidence upon the record. *EMPRESS v. DHAN KISHEN*.

[I-38]

(2) ———— *Where no charge framed—(Act X of 1872).* The accused were charged of offences under ss. 384, 342 and 511, Penal Code. After taking the evidence of the complainant and his witnesses, and examining the accused and taking the evidence of their witnesses the Magistrate acquitted the accused by an order which ran thus: "The case should be struck off the file, and the accused be considered acquitted." The Magistrate did not draw up a charge in writing against the accused. The complainant applied to the High Court to revise the order of the Magistrate on the ground that as no charge had been framed the order amounted to a discharge, which being against the weight of the evidence was improper. *Held* that the explanation to s. 220 being governed by explanation (i) to s. 216, Code of Criminal Procedure, an acquittal in the absence of a charge was not illegal and there having been no failure of justice the trial was good and sufficient. *PETITION OF HANUMAN v. AHMAD ALI AND OTHERS*.

[I-142]

(3).—s. 258 (2).—*Conviction—Sentence—(Act X of 1882).* In this case three persons, A, B and C, were tried together by the Sessions Judge, A under ss. 304 and 323, and B and C, under s. 323, Penal Code. All the accused were convicted. After recording the convictions the

CRIMINAL PROCEDURE CODE, s. 258 (2)—(continued.)

Judge observed:—"As A and B have already been over four months and a half in jail, the Court finds they have been sufficiently punished under s. 323, and directs their release and under s. 325, Penal Code, sentences C to one year's rigorous imprisonment, he having been on bail since the case began." C appealed to the High Court. *Held* (after dismissing the appeal of C) that with regard to A and B the Judge's order is technically incorrect. They having been convicted, it was incumbent on Judge to pass a formal sentence of but a single day's imprisonment. The order is amended accordingly. *EMPRESS v. KALUA AND OTHERS*.

[IV-219]

EMPRESS v. WAZIR JAN.

[VII-274]

s. 259.—*Absence of complainant—Discharge—(Act X of 1882).* One S lodged a complaint against K and A of offences under ss. 279, 426 and 447 of the Indian Penal Code. The Magistrate who tried the case discharged the accused on the ground that the complainant had failed to appear on a day to which the hearing of the case was adjourned. There was nothing to show that the Magistrate did not consider the charges as *prima facie* sustainable. *Held* that the case being a warrant case there was no necessity for the attendance of the complainant and the order of the Magistrate discharging the accused was illegal. *QUEEN-EMPRESS v. KURA AND ANOTHER*.

[XI-116]

(1). s. 260.—*Complaint charging offence not summarily triable—Ouster of jurisdiction—(Act X of 1882).* The complainant charged the accused under ss. 322, 382 and 448, Penal Code, but the facts stated in the complaint fell short of showing any such offence as is contemplated by s. 382. The Magistrate tried the case summarily and dismissed the complaint. It was contended in revision that the offence under s. 382 was not triable summarily and that therefore the Magistrate was wrong in trying the case summarily. *Held* that the mere circumstance of a complaint charging an accused person of offences not summarily triable did not oust the summary jurisdiction of the Magistrate under s. 260, Criminal Procedure Code. *EMPRESS v. JAGJIWAN AND OTHERS*.

[VII-280]

(2). ———— *(Act X of 1882).* *Held* that the mere circumstance that the complainant writes down a charge in his petition of complaint which may not be triable summarily, but which is not seriously prosecuted would not necessarily preclude the Magistrate from trying the case in summary jurisdiction upon a charge or charges triable by the summary procedure. *EMPRESS v. LACHMI NARAIN AND ANOTHER*.

[VII-103]

CRIMINAL PROCEDURE CODE,
s. 260—(continued.)

(3).—*Protracted trial—Summary jurisdiction—(Act X of 1882).* Where a case under s. 379 of the Indian Penal Code was tried under the provisions contained in Chapter XXII (of summary trials) of the Code of Criminal Procedure, but the proceedings in the case lasted from 20th March, to the 12th June, and in the course thereof a local inquiry had to be made; and when, moreover, the value of the property in question was said to be above Rs. 50. *Held* that this was not a case to which the procedure for summary trials should have been applied. *IN THE MATTER OF THE PETITION OF SHEO SAHAI BHAGAT AND ANOTHER.*

[XI-183]

(4).—*(Act X of 1882).* Where a Magistrate is empowered by law to try a case summarily the fact that the trial is a protracted one in no way affects his jurisdiction. *In re Sheo Sahai Bhagat (W. N. 1891, p. 183)* dissented from. *IN THE MATTER OF THE PETITION OF MANSA AND OTHERS.*

[XII-30]

(5).—*Summary trial—Offence under s. 47 of Act XXVI of 1870—(Act X of 1882).* One *H A*, a prisoner in the Gorakhpore jail, was employed in some brickfields outside the jail. While so employed he endeavoured to escape, but after he had gone some little distance was recaptured. Subsequently after a form of trial of a very summary nature *H A* was sentenced for this offence by the Inspector General of jails to receive thirty stripes apparently under s. 47 of Act XXVI of 1870. *Held* that even if the offence was triable by the Inspector General as a Magistrate it should have been tried as a warrant case and not summarily under s. 260, Criminal Procedure Code. *QUEEN EMPRESS v. HASAN ALI AND OTHERS.*

[XIV-173]

(6) s. 260 (m)—*Summary trial—(Act X of 1882).* There is no reason why the summary procedure prescribed by Chapter XXII of the Code of Criminal Procedure should not be applied to the trial of complaint under s. 22 of the Cattle Tresspass Act, 1871. *QUEEN EMPRESS v. JAWAHIR.*

[XVI-136]

s. 262 (2)—*Sentence in lieu of fine—(Act X of 1882).* In cases of simple imprisonment ordered as a process for enforcement of payment of fine, the rule of s. 262 of the Criminal Procedure Code, limiting the period of imprisonment in summary trials does not apply, as that section only refers to substantive sentences of imprisonment. *EMPRESS v. ASGHAR ALI.*

[III-207]

(1) s. 263.—*"Shall enter"—Failure to enter the particulars—(Act X of 1872).* The

CRIMINAL PROCEDURE CODE,
s. 263—(continued.)

accused were charged by the complainant of having thrown bricks in his house and ran at him. The Magistrate tried the case summarily, the terms of his sentence and finding being as follows. "This is a quarrel about a wall and the parties are much incensed against one another. I fine them one rupee each and bind them to keep the peace for six months." *Held* that the case had not been tried in accordance with law and conviction must be quashed and re-trial ordered. *EMPRESS v. CHOTEY LAL.*

[II-242]

(2).—*(Act X of 1882).* Certain persons were summarily tried and convicted of certain offences and also ordered under s. 106 of Criminal Procedure Code to give security for keeping the peace for six months or in default to suffer six months rigorous imprisonment. *Held* that, the fact that the decision of the Magistrate did not set out with clearness either the facts of the case or the nature of the evidence supporting it, was a good ground for ordering a new trial. *EMPRESS v. LACHMAN AND OTHERS.*

[VI-181]

(3).—*(Act X of 1882).* This is an application for revision of the order of conviction in a case tried summarily on the allegation that all the essential ingredients for the constitution of the offence have not been established by the evidence on record. *Held* that the Magistrate's remarks, contained in the column of "Finding and sentences" of register of summary trial being not sufficient to enable the Court in appeal to judge whether the prisoners have or have not been rightly convicted, the conviction must be set aside. *EMPRESS v. MOHAN AND ANOTHER.*

[V-213]

(4).—*(Act X of 1882).* This was a case of dishonestly receiving stolen property which had been summarily tried. The Magistrate recorded.—"There seems no doubt whatever of the truth of the case for prosecution." *Held* that it did not satisfy the requirements of s. 263, Criminal Procedure Code, viz. that in case of convictions the Magistrate must give a brief statement of his reasons therefor. *EMPRESS v. GIRWAR DIAL.*

[III-114]

s. 264.—*Substance of evidence—Failure to embody—(Act X of 1872).* This was a case tried summarily in which there was an appeal. The judgment of the Magistrate trying it did not, as required by s. 228 of Act X of 1872, embody the substance of the evidence on which the conviction was based nor the particulars mentioned in s. 227. His finding was that *A*, one of the two persons convicted by him, was convicted on

CRIMINAL PROCEDURE CODE,

s. 264—(continued.)

the statement merely of the other accused. The police papers, however, showed that there was other evidence against *A*. *Held* on a reference by the Sessions Judge that the conviction must be quashed and a re-trial ordered. *EMPRESS v. LALJI AND ANOTHER*.

[II-178]

s. 268—*Evidence taken in absence of assessor—Irregularity—(Act X of 1882).* Where in a trial for murder held with the aid of assessors the Court relied on a statement made by the deceased and the evidence necessary to prove such statement was not recorded till after the close of the trial and the discharge of the assessors. *Held* that this amounted to a material irregularity which was not covered by s. 537, Criminal Procedure Code, and the conviction was set aside and a new trial ordered. *QUEEN EMPRESS v. RAM LAL*.

[XIII-50]

s. 271 (2)—“*Pleads guilty*”—*What amounts to—(Act X of 1882).* The appellant has been convicted, without trial as on a plea of guilty for an offence under s. 211, Penal Code. When called on to plead in the Court of Session and he said, “I admit presenting the petition and even that it is untrue, but I did so under the influence of certain persons mentioned.” *Held* that the plea was not one of guilty and that the accused should have been tried in the ordinary way. *EMPRESS v. SUNDAR*.

[VI-66]

s. 284—“*From the person summoned*”—*Number of assessors—(Act X of 1882).* Out of six assessors summoned to appear at a Criminal Session, three absented themselves. Of the remaining three the Sessions Judge discarded two as not appearing sufficiently intelligent; and having appointed the third to act as assessor, sent for two persons, a Revenue Court muktar and a pleader, to fill up the other two places. These two last mentioned persons had not been summoned to act as assessors, nor did it appear that they were in fact competent to act as such. *Held* that under the above circumstances, there having been only one properly appointed assessor, all the proceedings conducted with his aid must be set aside and a new trial ordered. *QUEEN EMPRESS v. BADRI AND OTHERS*.

[XIV-207]

ss. 284 & 285—*Assessors—Presence of—(Act X of 1882).* During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on another assessor became too ill to take any further part in the trial and the third assessor was obliged to retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished. *Held*

CRIMINAL PROCEDURE CODE,

ss. 284 & 285—(continued.)

that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provision of s. 268 of the Code of Criminal Procedure) been held before a Court not having jurisdiction. *QUEEN EMPRESS v. MUHAMMAD MAHMOOD KHAN*.

[XI-93]

(1) s. 286—*Duty of prosecution to examine—Witness examined below—(Act X of 1882).* At a trial before the High Court in the exercise of its original criminal jurisdiction it is not the duty either of the prosecution or of the Court to examine any witness merely because he was examined as a witness for the Crown before the Committing Magistrate, if the prosecution is of opinion that no reliance can be placed on such witness' testimony. All that the prosecution is bound to do is to have the witnesses who were examined before the Committing Magistrate present at the trial so as to give the Court an opportunity of examining, or the defence of cross examining them. *Dhunno v. Kazi (I. L. R., 8, Calc., 121)* and *Empress of India v. Kaliprosunno Doss (I. L. R., 14, Calc., 245)* approved. *The Empress v. Grish Chunder Talukdar (I. L. R., 5, Calc., 614)* and *The Empress v. Ishan Datt (15 W. R. Cr. R. 34)* dissented from. *QUEEN EMPRESS v. CHARLES SPENCER*.

[XII-110]

(2) ————*Witness entered in Calendar—(Act X of 1882).* In a trial before a Court of Session or a High Court it is entirely in the discretion of the Public Prosecutor conducting the case for the Crown to call or not to call any witness or witnesses whose names appear in the calendar as witnesses for the Crown. *QUEEN EMPRESS v. DURGA*.

[XIV-7]

(1) s. 287—*Retracted confession—Admissibility—(Act X of 1882).* Where a confession made before a Magistrate is on the face of it a confession which fulfils the requirements of the law, it is immaterial that such confession has been retracted before the Sessions Judge. Such a confession must be presumed to be genuine unless and until proof or at least reasonable probability of the existence of some invalidating cause is shown. *QUEEN EMPRESS v. BINDA*.

[X-173]

(2) ————*(Act X of 1872).* *Held* that the fact that an accused person, who has been examined by the Committing Magistrate, makes other and different statements in his examination by the Court of Session does not make his statements before the Committing

CRIMINAL PROCEDURE CODE,

s. 237—(continued.)

Magistrate no evidence. On the contrary, such statements are still evidence and may be used against the accused. *EMPRESS v. BHAGUA*.

[I-89]

EMPRESS v. MADAR AND ANOTHER.

[V-59]

(3) ————— *Value—(Act X of 1882).*

The accused in this case, while in the custody of the police made statements to the police in consequence of which they were forwarded to the Magistrate, who was to take up the case and who subsequently committed the case for trial. The Magistrate recorded their statements on the 21st and 25th August respectively. The police subsequently challaned the appellants and certain other persons. On the 6th September, the accused retracted their statements. On the 26th they were committed for trial. *Held* that the statements made by the accused though admissible must be looked with great care and suspicion. The Magistrates cannot be too careful in satisfying themselves that they had been made voluntarily. *EMPRESS v. CHITTAR SINGH AND OTHERS*.

[IV-84]

EMPRESS v. RAMANAND.

[V-221]

(4) ————— *(Act X of 1882).*

Held that some corroborative evidence was necessary to warrant a Court in convicting upon a retracted confession and a conviction without such evidence was illegal. *EMPRESS v. TIKA RAM*.

[VI-22]

(5) ————— *(Act X of 1882).*

Where a confession made by an accused person is retracted, such confession does not thereby become useless as evidence of the guilt of the accused, but the Court trying such accused person should consider whether his confession is probably true and not inconsistent with the evidence in the case which the Court believes to be true, and if that is so the Court should act on such confession notwithstanding its withdrawal. *Queen Empress v. Maiku Lal (W. N., 1897, p. 224)* referred to. *QUEEN EMPRESS v. NANNA AND OTHERS*.

[XVIII-69]

(1) s. 288—*How far evidence given at preliminary enquiry admissible—(Act X of 1882).* S. 288 of the Criminal Procedure Code, was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the Committing Magistrate's record, and to treat it as evidence before the Court itself. *Empress v. Aman-ulla (12 B. L. R., App. 15)* referred to. A Judge is bound to put to the witnesses whom he proposes to con-

CRIMINAL PROCEDURE CODE,

s. 288—(continued.)

tradict by their statements made before the Committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements, and so forth. In a case in which the Sessions Court had neglected to apply the above rules, Straight, J. quashed the conviction. *EMPRESS v. DAN SAHAI*.

[V-259]

EMPRESS v. JAWAHAR.

[VI-256]

(2) ————— *(Act X of 1882).*

Where two persons being charged with murder before a Magistrate, the Magistrate tendered a pardon to one of them and then before his examination was concluded withdrew that pardon, and, having tried the witness along with the other accused, committed both to the Sessions Court; and where, in the Sessions Court the person to whom pardon had been tendered being examined as a witness utterly repudiated the evidence which he had given before the Magistrate. *Held* that the Judge could not use the evidence given before the Magistrate, as above described by the person to whom pardon had been tendered as against the other accused on a trial before a Sessions Court. *Queen Empress v. Dan Sahai (W. N., 1885, p. 259)* referred to. *QUEEN EMPRESS v. NAGU*.

[XI-184]

(1) s. 289 (2)—“*There is no evidence.*”—*(Act X of 1882).* The words “there is no evidence” in s. 289, Criminal Procedure Code, cannot be extended so as to mean “no satisfactory, trustworthy or conclusive evidence,” but the third paragraph of the section means that if at a certain stage of a Sessions trial the Court is satisfied that there is not upon the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged, then the Court has power without consulting the assessors, to record a finding of not guilty. But where a Court so acts only because it considers the evidence for the prosecution unsatisfactory, untrustworthy or inconclusive, it acts without jurisdiction and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity which may or perhaps must have caused a failure of justice within the meaning of s. 537 of the Criminal Procedure Code. *In the matter of the petition of Narain Das (I. L. R., 1 All., 610)* referred to. *QUEEN EMPRESS v. MUNNA LAL AND ANOTHER*.

[VIII-129]

(2). ————— *(Act X of 1882).*

Held that where there is evidence against prisoners committed to the Court of Session but the Sessions Judge distrusts it, he should, not

CRIMINAL PROCEDURE CODE, s. 289—(continued.)

acquit them under s. 289, Criminal Procedure Code. It is not a case in which there is "no evidence" against them in the sense of s. 289. The expression "no evidence" implies that all the evidence, even if true to the fullest degree, would not constitute the offence charged. *EMPRESS v. NANHA.*

[VIII-153]

(1). s. 291.—*Refusal to give list of witnesses—Power to summon afterwards.*

See s. 211.

(2).—*Power of Sessions Court to summon witnesses.*

See s. 216, No. (2).

s. 292.—*Prosecutor's right of reply—Accused adduces evidence—(Act X of 1882).* In a Sessions trial evidence for the defence cannot be adduced until the close of the case for the prosecution, but counsel for the defence may, while a prosecution witness is under cross-examination, put documents to him, and if in so doing counsel reads or causes to be read to the Court such documents he thereby impliedly undertakes to put those documents in as evidence at the proper time. When such documents, as aforesaid, are filed in Court as evidence, or any other documentary evidence is put in by the defence, the defence has "adduced evidence" within the meaning of s. 289 *et seqq* of the Code of Criminal Procedure so as to give the prosecution a right of reply although no witnesses may be called for the defence. The above question, *viz.* whether the production of merely documentary evidence gives the prosecution a right of reply, may be considered while the case for the prosecution is going on. In the absence of any strong reason to the contrary a witness for the prosecution should not be examined at a Sessions trial unless his evidence has already been recorded by the Committing Magistrate, either in the ordinary course or under the special provisions of s. 219 of the Code of Criminal Procedure. *QUEEN EMPRESS v. G. W. HAYFIELD AND ANOTHER.*

[XII-63]

s. 307.—*Trial of European British subjects—Power of Magistrate to refer—Power of High Court—(Act X of 1882).* In a trial by the District Magistrate of a European British subject with the aid of jurors the Magistrate differed from the majority of the jurors and referred the case to the High Court under s. 307, Criminal Procedure Code. *Held* that the Magistrate had power, s. 8, cl. (b), Act III of 1884, read with s. 307 of the Code of Criminal Procedure, to submit the case to the High Court. *Held* further that the provisions of s. 307 are not curtailed or cut down by s. 418 or s. 423 of the Code of Criminal Procedure and that the

CRIMINAL PROCEDURE CODE, s. 397—(continued.)

High Court can disturb the verdict of the jury if it thinks proper to do so. *EMPRESS v. MCCARTHY.*

[VII-39]

s. 309.—*Memorandum of evidence—Opinion of assessors.*

See s. 356, No. (1).

(1). s. 310.—*Previous conviction—Use of—(Act X of 1882).* It is most important for the Judges to bear in mind that they are not to allow a previous conviction to influence the mind of themselves or the assessors in determining the guilt of a person on his trial unless it has been proved and is relevant under s. 54 (Evidence Act) and that such previous conviction is not to be put to the accused; and his plea taken to it, until after he has been convicted of the offence of which he is being tried, nor is it to be acted upon for the purpose of enhancing the punishment under s. 75 of the Penal Code, unless the accused has admitted it, or it is found proved against him as provided by paragraph (c) of s. 310, Criminal Procedure Code. *EMPRESS v. SUKHA.*

[VI-47]

(2).—*—(Act X of 1882).* In a trial before a Sessions Judge and a jury of an offence under s. 380 with section 75 of the Penal Code a witness was allowed to state that "he had heard that the accused was an old convict, and that he did no work in the village." It appeared from the mode in which the plea of the accused was taken both in reference to the substantive offence under s. 380 and in reference to the previous conviction under s. 75, that the jury were aware of the previous conviction before they gave their verdict. It was not attempted to use the previous conviction as part of the substantive proof on the charge under s. 380. *Held* that as the irregular statement of the witness that the accused was an old convict and the knowledge possessed by the jury before giving their verdict, might have improperly influenced the minds of the jury the safest course would be to set aside the trial and direct a new trial, in which the provisions of s. 310 of the Code of Criminal Procedure must be strictly observed. *QUEEN EMPRESS v. JHINGURI.*

[X-12]

ss. 320. & 332.—*Liability to serve as assessor—Penalty for non-attendance—(Act X of 1882).* It is contrary to the usage of the country and eminently undesirable that a gentleman of high position, such as an hereditary Raja, should be placed on the list of assessors and fined for non-attendance when summoned to serve as such. *IN THE MATTER OF THE PETITION OF RAJA BHUP INDRA BAHADUR SINGH.*

[XVII-157]

CRIMINAL PROCEDURE CODE, —(continued.)

(1). s. 337—*Tender of pardon—To what cases confined—(Act X of 1872).* Held that tender of pardon was confined by s. 347, Act X of 1872, to offences specified in column 7 of the 4th Schedule thereto annexed as triable exclusively by the Court of Session. *EMPRESS v. GOPAL.*

[II-240]

(2). ———— *Magistrate competent to tender—(Act X of 1882).* A dacoity was committed in the district of Muttra and was being enquired into in that district. Pending such inquiry, one PS appeared before the Magistrate of the neighbouring district of Etah and obtained from him a tender of pardon in respect of the said dacoity, on the strength of which pardon he was examined as a witness by the Magistrate of Etah district and made a statement implicating himself and others in the dacoity. Subsequently, on the case being committed to the Court of Sessions Judge of Agra, the tender of pardon made by the District Magistrate of Etah was ignored and PS was tried and sentenced for the dacoity. Held on appeal to the High Court, that the Magistrate of Etah district had no jurisdiction under the circumstances to make the tender of pardon which he did, and that his action in that respect was not covered by s. 529 of the Code of Criminal Procedure. *QUEEN EMPRESS v. CHIDDA AND OTHERS.*

[XVII-173]

(3). ———— *Protection afforded by—(Act X of 1882).* A prisoner charged before a Magistrate at Benares with offences punishable under ss. 471, 472, and 474 of the Penal Code, made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473, and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first mentioned had reference. Under s. 337 of the Criminal Procedure Code, the Magistrate at Calcutta tendered a pardon to the prisoner upon the conditions specified in that section and the prisoner accepted the pardon, and gave evidence for the prosecution. The Magistrate held that this evidence was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently the prisoner was committed by the Magistrate of Benares for trial before the Court of Session upon the charges under ss. 471, 472, and 474 of the Penal Code. He pleaded not guilty but did not in terms plead the pardon as a bar to the trial though he made some reference to the

CRIMINAL PROCEDURE CODE, s. 337—(continued.)

subject; and the Sessions Judge having made a brief inquiry as to the proceedings at Calcutta came to the conclusion that there was no sufficient proof of any conditional pardon, and convicted and sentenced the accused. Held that by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472 and 474, and was not liable to be proceeded against in respect of them, and that the trial and conviction were therefore illegal. Although s. 337 of the Criminal Procedure Code does not in terms cover a case where a Magistrate holding a preliminary inquiry for committal against several persons tenders a conditional pardon to one of them, examines him as witness and subsequently discharges all the accused for want of *prima facie* case against them, the words "every person accepting a tender under the section shall be examined as a witness in the case" mean that for all purposes (subject to failure to satisfy the conditions of the pardon as provided for by s. 339) such a person ceases to be triable for the offence or offences under inquiry or (with reference to s. 339) for "any other offence of which he appears to have been guilty in connection with the same matter," while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of law for the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit. *QUEEN-EMPRESS v. GANGA CHARAN.*

[VIII-239]

(1) s. 338—"At any time...before judgment"—(Act X of 1872). Held that the Court of Sessions had power to tender pardon and examine as a witness under s. 348, Criminal Procedure Code, an accused to whom pardon had been illegally tendered by the Magistrate, even after the trial before him had been commenced. *EMPRESS v. KASHIA AND ANOTHER.*

[II-241]

(2) ———— (Act X of 1882). In this case two persons were being jointly tried for murder before the Sessions Judge. After the case for the prosecution had been closed, the defence of the accused had been heard and the opinion of the assessors had been given, the Sessions Judge in order to complete the case against one of the accused offered a pardon to the other and examined him as a witness. Held that the procedure was irregular if not

CRIMINAL PROCEDURE CODE,

s. 338—(continued.)

positively illegal, but as the accused had not been prejudiced thereby, there being ample evidence besides, the sentence is not disturbed. *EMPRESS v. HULIA.*

[IV-147]

(3) ———— "*Supposed*" — (*Act X of 1882*).] A Court of Session, under s. 338 of the Code of Criminal Procedure, tendered a pardon to an accused person, charged jointly with two others for the same offence who had pleaded guilty. The tender was accepted, and such person was examined as a witness against the other accused. *Held* that the tender of pardon was not improperly made, and the evidence of the approver was admissible.

Per DUTKOT, J.—The word "supposed" in s. 338 must be taken merely as intended to exclude the case of a man who has actually been convicted of the crime, and not the case of a man who although admitted to be a party to the crime is unconvicted.

Per PETHERAM, C. J.—Where an accused person is not defended the Court should, in the interests of justice, test the statements of the witnesses for the prosecution by questions in the nature of cross-examination. *EMPRESS v. KALUA AND ANOTHER.*

[IV-314]

(1) s. 339—*Tender of pardon—Protection afforded by.*

See s. 337, No. (3).

(2) ———— *Withdrawal of pardon—Joint trial of approver with co-accused*—(*Act X of 1882*).] An accused person to whom a tender of pardon has been made and who has given evidence under that pardon against the persons who were co-accused with him, should not, if such pardon is withdrawn, be put back into the dock and tried as if he had never received a tender of pardon, but his trial should be separate from and subsequent to that of the person co-accused with him. *QUEEN EMPRESS v. MULUA AND OTHERS.*

[XII-95]

QUEEN EMPRESS v. PIARI.

[XI-182]

(3) ———— *Trial of approver before completion of original trial*—(*Act X of 1882*).] Where a pardon has been tendered to any person in connection with an offence he should not be tried for any alleged breach of the conditions of his pardon or for any offence connected with that for which he has received pardon until the trial of the principal offence and of any offence connected therewith has been completed. *QUEEN EMPRESS v. SUDRA.*

[XII-21]

CRIMINAL PROCEDURE CODE,

s. 339—(continued.)

EMPRESS v. RAMCHARAN.

[II-31]

(4) ———— *After trial*—(*Act X of 1882*).] A Magistrate of the first class inquiring into a charge of murder granted a conditional pardon to one *B* said to have been an accomplice in the murder and sent him as a witness to the Sessions Court. In the Sessions Court *B*'s evidence was considered to be false. After the trial the Magistrate of the district revoked the pardon granted to *B*, and committed him to the Sessions Court for trial. *Held* that the commitment was bad, inasmuch as the District Magistrate had no power after the trial was concluded to revoke the pardon. *QUEEN EMPRESS v. BHOLA.*

[XV-163]

(5.) ———— *Use of statement in evidence*—(*Act X of 1872*).] The accused in this case was offered and accepted a pardon and was examined as a witness by the Committing Magistrate. Before the Court of Session he retracted the statement made by him before the Committing Magistrate, asserting that he had been intimidated into making it by the police and that he knew nothing about the case. The pardon was accordingly withdrawn and his commitment was ordered. His evidence before the Committing Magistrate was used and acted upon by the Court of Session. *Held* that it was very doubtful whether s. 249 of Act No. X of 1872 was intended to be thus applied to the case of an approver who thus withdraws his statement, alleging that it was not a voluntary statement. But even if the section was applicable it would have been wiser to discard the statement of the accused. The case was not of a witness giving evidence inconsistent with or contrary to a former statement. On the contrary the accused admitted his deposition but declared that it was brought about by the coercion of the police. At any rate the proper course would have been to call his attention to the various passages of his deposition *seriatim* before using it to contradict him. *EMPRESS v. NAZZARA AND ANOTHER.*

[I-74]

(1.) s. 341—*Report to High Court—Time for*—(*Act X of 1872*).] *M.*, a deaf and dumb woman, was accused of abandoning her child and was committed for trial before the Court of Session. The Committing Magistrate was of opinion that she had understood the proceedings at the inquiry. The Sessions Judge, being of opinion that the accused could not be made to understand the proceedings, if she were tried, reported the case to the High Court for orders, under s. 186, Criminal Procedure Code. The Court directed that the Sessions Judge should proceed with the trial; and that, if he considered that the

CRIMINAL PROCEDURE CODE, s. 341—(continued.)

accused had not understood the proceedings and the trial resulted in her conviction, he should then report the case to the High Court. *EMPRESS v. MATHURIA*.

[I-15]

(2.)———“*Such order as the High Court thinks fit*”—(*Act X of 1872*.) One *M.*, a deaf and dumb woman, was convicted on a trial held by a Sessions Judge. The Sessions Judge did not pass sentence on the accused, but, under the provisions of s. 186 of Act X of 1872, forwarded his proceedings to the High Court for orders, on the ground that she was not able to understand them. The Committing Magistrate had been of opinion that she had understood the proceedings at the inquiry. The Court ordered that the inability of the accused to understand the proceedings, was not a ground for refraining from passing sentence on her. There was no reason to doubt the guilt of the accused or that she was criminally responsible for her act by reason of understanding the nature and consequences of her act. (The Court accordingly passed sentence). *EMPRESS v. MATHURIA*.

[I-54]

(1). s. 342—*Examination of accused—Impetitive*—(*Act X of 1872*.) Held that an accused person should be examined before he is called on for his defence, the terms of s. 250 of Act X of 1872 being in this respect mandatory. Of course in the event of non-response on the part of an accused the fact would be recorded and the Court would proceed with the trial. *EMPRESS v. BAIJU AND ANOTHER*.

[I-99]

(2.)———*Object*—(*Act X of 1872*.) Held that the examination of an accused person contemplated by ss. 342 and 364 of the Code of Criminal Procedure is for the purpose of enabling him “to explain the circumstances appearing in evidence against him” and not to empower a Judge before any evidence has been given to extract damaging admissions from him, upon which to build up the case for prosecution. *EMPRESS v. BUDHA*.

[IV-106]

QUEEN EMPRESS v. HARGOBIND SINGH AND OTHERS.

[XII-83]

(3.)———(*Act X of 1882*.) Held that where a Magistrate, before evidence taken for the prosecution, put questions to the accused of the nature of a cross-examination, such procedure was illegal, as it could not be said that the questions were put “for the purpose of enabling the accused to explain any circumstances appearing against him in the evidence,” within the meaning of s. 342 of the Code of Criminal Procedure. *QUEEN EMPRESS v. R. HAWTHORNE*.

[XI-102]

CRIMINAL PROCEDURE CODE, s. 342—(continued.)

(4.)———*Applicability of s. 364, Criminal Procedure Code*—(*Act X of 1882*.) On a certain day a confession by an accused person was recorded by a Magistrate, and on the next day the same Magistrate, having jurisdiction to do so, examined the witnesses for the prosecution and eventually committed the accused. Held, following *Empress v. Anuntram Singh* (I. L. R., 5 Cal., 954), that such confession, having been made to a Magistrate competent to hold, and who actually then was holding, an enquiry preliminary to committal, must be regarded as falling within s. 342 and as such governed by the reservations contained in s. 364, Criminal Procedure Code. Observations on ss. 342 and 364, Criminal Procedure Code. *EMPRESS v. YAKUB KHAN*.

[III-25]

(5) s. 342 (4).—*Petitioner for revision—Capability to take oath*—(*Act X of 1882*.) Held that a person seeking by an application in revision to get rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application, and consequently that if he did tender such an affidavit he could not be prosecuted for false statements which might be contained therein. *Queen Empress v. Subhayya* (I. L. R., 12 Mad., 451) referred to. IN THE MATTER OF THE PETITION OF BARKAT.

[XVII-23]

(1) s. 345.—*Compounding offences—Power of Magistrate*—(*Act X of 1882*.) Held that where a person is accused of two offences one compoundable and the other not and the complainant petitions to compound the former, the Magistrate has no option but to allow it to be compounded. *EMPRESS v. DORRIE*.

[IV-256]

(2.)———*Offences under ss. 323 and 342, Penal Code*—(*Act X of 1882*.) Held that offences under ss. 323 and 342 were compoundable and an application that they should be struck off because they had been compounded should not be refused. *EMPRESS v. KHUDA BAKHSH AND OTHERS*.

[III-245]

(3.)———*Offence under s. 323, Penal Code*—(*Act X of 1882*.) Held that an offence under s. 323 being compoundable the Magistrate had no power to refuse its being compounded. *EMPRESS v. RAM GOPAL*.

[VI-167]

(4.)———*Acquittal*—(*Act X of 1882*.) A charged *B* of an offence under s. 323 of the Indian Penal Code, but afterwards filed a *razinama* and the case was struck off. Some 5 months after he petitioned the District Magistrate to the effect that as the hurt inflicted came under the denomination of “grievous hurt” the offence was not compoundable. The

CRIMINAL PROCEDURE CODE.

s. 345—(continued.)

Magistrate thereupon ordered the case to be brought on the file. *Held*, in revision, that the Magistrate's order was illegal as the composition of an offence under s. 345 of the Code of Criminal Procedure had the effect of an acquittal. **EMPRESS v. UNKAR AND ANOTHER.**

[IV-13]

(1) s. 346.—*Transfer—“Subordinate Magistrate”*—(Act X of 1872.) A Magistrate of a division of a district made over, under s. 44 of Act X of 1872, a case of theft for trial to a Magistrate of the third class, who was on tour in his division, in the discharge of his public duties. The latter, who had jurisdiction, found the accused person guilty, and considering that he ought to receive more severe punishment than he was competent to inflict, under the provisions of s. 46 of the Act, submitted his proceedings to the former. The former thereupon, under the provisions of the same section, passed sentence on the accused person. *Held* that the latter Magistrate was subordinate to the former, within the meaning of s. 41 of Act X of 1872 and the procedure of the Magistrate was therefore according to law. **EMPRESS v. KALLU.**

[II-48]

(2) ————“Evidence”—*Previous conviction*—(Act X of 1882.) Proof of previous convictions against a person accused before a Magistrate is evidence which will justify such Magistrate in taking action under s. 346 of the Code of Criminal Procedure. **QUEEN EMPRESS v. CHANDRA BALLAB JOSHI.**

[XIV-200]

(1) s. 348.—*Previous conviction—Commitment*—(Act X of 1882.) *Held* that the facts that the property stolen was of small value (Re. 1-4) was no reason for not committing the accused to the Court of Session and exemplary punishment should not be given, if the prisoner had been convicted before for the same offence. **EMPRESS v. JHANDA.**

[VII-194]

(2) ————“Habitual offender”—(Act X of 1872.) Under s. 315 of the Criminal Procedure Code the prisoner was committed to the Court of Session on a charge of theft, on the ground that he was an habitual offender. He had previously been convicted of theft. It appeared in this case that he had been prowling about at night for something to steal, and finding some bamboos lying about in an exposed place, had stolen a bundle of them. The Sessions Judge was of opinion that there was no evidence that the prisoner was a habitual offender, and he should not have been committed, holding that the fact that he had once before committed theft did not constitute him an habitual offender. *Held* that when an old convict for theft is again found prowling about at night with intent to steal, and seems to be again under these

CRIMINAL PROCEDURE CODE.

s. 345—(continued.)

circumstances guilty of stealing, he has created against himself a presumption of criminal habit in the sense of s. 315 of the Criminal Procedure Code, which un rebutted would certainly justify a Magistrate in applying ordinarily the rule of that section. **EMPRESS v. BUDHA.**

[I-153]

(3) ————(Act X of 1872.) *Held* that where a person charged of an offence under s. 411, Penal Code, is found, during the trial, to have been once before convicted of an offence under s. 457, Penal Code, and punished, but there is no other circumstance against him and the Magistrate does not consider him to be a “habitual offender,” he is not bound to commit him to the Court of Session under s. 315, Criminal Procedure Code, as there is no presumption of law which lays down that a person who has once before been convicted should, in the absence of proof of other circumstances against him be necessarily dealt with as an “habitual offender.” **EMPRESS v. GIRDHARI.**

[II-215]

s. 349—*Transfer—Ground for*—(Act X of 1872.) A Magistrate of the third class, on the complaint of one P, proceeded, under the provisions of Chapter XVII of Act X of 1872, to try certain persons for theft. Being of opinion that the guilt of the accused was established, he submitted his proceedings to the Magistrate of the district, recommending that the accused should be fined Rs. 15 each or in default of payment be rigorously imprisoned for one month. The Magistrate of the district holding that the offence proved, if any, was criminal trespass, recorded an order dismissing the charge of theft, and directing that the complainant should pay a fine of Rs. 5 under s. 209 of Act X of 1872. *Held* that the proceedings of the District Magistrate were contrary to law, because s. 46 of Act X of 1872 only authorizes a reference to the superior Magistrate when the Subordinate Magistrate considers that the accused should receive a more severe punishment than he himself is competent to inflict which was not the case here. *In re* COMPLAINT OF PHULLU.

[I-99]

ss. 349 & 350—*Transfer—Evidence taken by one—Judgment by another Magistrate*—(Act X of 1882.) Section 350 of the Code of Criminal Procedure was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to have jurisdiction in that post, and is succeeded by another officer. A Subordinate Magistrate, having taken all the evidence for the prosecution and for the defence, sent the case to the Magistrate of the district, not on the grounds mentioned in s. 349 of the Code of Criminal Procedure, and the District Magistrate, observing that none of the accused asked to have the witnesses re-heard, gave judg-

CRIMINAL PROCEDURE CODE,
ss. 349 & 350—(continued.)

ment upon the evidence taken by the Subordinate Magistrate. The Sessions Judge refused to interfere in revision with the District Magistrate's proceedings, on the ground that they were covered by s. 350 of the Code. *Held* that this view was erroneous, that neither under s. 192, nor under s. 349, was there any transfer to the District Magistrate by his subordinate, that s. 350 was inapplicable, and that the order passed by the District Magistrate must be quashed. **QUEEN EMPRESS v. RADHE AND OTHERS.**

[X-7]

QUEEN EMPRESS v. BASHIR KHAN AND ANOTHER.

[XII-19]

s. 350.—Applicability of section to cases transferred under s. 528 (Act X of 1882).] A criminal case having been transferred under s. 528 of the Criminal Procedure Code, the Court to which it was transferred did not recall the witnesses or take any fresh evidence, but decided the case upon the evidence recorded by the Court originally trying it. *Held* that this procedure was illegal, that s. 350 of the Code did not apply, that the Court should have commenced the whole proceedings *de novo*, and that there must be a new trial. **QUEEN EMPRESS v. ANGNU AND OTHERS.**

[IX-130]

s. 355.—Memorandum of evidence.—Loss of record—(Act X of 1882).] After an appeal in a case tried by a Magistrate of the first class had been preferred to the Court of Session, the vernacular record of the case in the Magistrate's Court was not forthcoming. The Sessions Judge gave orders that the Magistrate should take the evidence *de novo* and that the English notes or memoranda of the evidence made by the Magistrate should be admitted and placed on the record. The Magistrate, instead of examining the witnesses again read to them the notes of the evidence he had made, and asked them if the substance of the statements originally made by them were correctly entered in those notes, and recorded their admissions that such was the case. *Held* that it would have been better had the Magistrate strictly carried out the Judge's instructions. But having regard to the exceptional circumstances which have arisen from the loss of the original vernacular record and to the very full and careful manner in which the Magistrate made his English memorandum of the evidence the Court did not think it necessary to order any further proceedings. **EMPRESS v. ASHIQ HUSAIN.**

[III-226]

(1). s. 356.—Memorandum of evidence—(Act X of 1882).] Four persons were tried before a Sessions Judge with three assessors on a charge of dacoity with murder under s. 396 of the Indian Penal Code, and were acquitted. An appeal was thereupon filed on behalf of Government against the acquittal. From the record of

CRIMINAL PROCEDURE CODE,
s. 356—(continued.)

the Sessions Judge it appeared that there was reason to believe that a certain amount of the evidence had not been taken down by the Judge at the time when it was given. The memoranda of the evidence given by some of the witnesses also were not signed by the Judge. It further appeared from the record of the opinions of the assessors that the assessors had found the accused persons guilty whereas it was otherwise manifest that they intended to acquit the prisoners. Under these circumstances it was *held* that the irregularities occasioned by want of compliance with the provisions of ss. 356 and 399 of the Code of Criminal Procedure were so serious that no order could be passed on the record as it stood but a new trial must be had. **QUEEN EMPRESS v. BARMAJIT AND OTHERS.**

[XI-145]

(2) ———— *Vernacular record.*]

See s. 202, No. (3).

(1) **s. 364.—Applicability of section to s. 342.]**

See s. 342, No. (4).

(2) ———— *Confession—How recorded.]*

See s. 164, Nos. (1) and (2).

(3) **s. 364 (1)—Confession taken in English—In the form of narrative—Admissibility—(Act X of 1882).]** A person accused under s. 302 of the Indian Penal Code made a confession before the Committing Magistrate. The Magistrate took down the confession in English and in a narrative form; but on being examined before the Sessions Court he stated that the confession had been elicited from the accused in the form of question and answer, and also that he had re-translated it word by word to the accused, who had acknowledged it to be correct and had made his mark at the end. The confession was attested by the Magistrate in the usual way. *Held* that the confession recorded in the manner above described was admissible in evidence. **QUEEN EMPRESS v. ANTA.**

[XII-60]

(4) ———— *At Magistrate's bungalow—On holiday—Admissibility—(Act X of 1882).]* Certain persons who had been arrested on a charge of dacoity made confessions before a Magistrate under the following circumstances. The confessions were made at the private house of the Magistrate in the presence only of the Magistrate and a Chaprasi. The day on which they were made was a close holiday and the Magistrate, being unable to procure the attendance of a Hindustani writer, took down the confessions in English. He then re-translated each of them into Urdu and it was admitted by the person making it to be correct. Each accused person was also examined as to the voluntary and uninfluenced character of his confession. *Held*, that these confessions recorded in the manner above described were properly

CRIMINAL PROCEDURE CODE, s. 364—(continued.)

recorded within the meaning of ss. 164 and 364 of the Code of Criminal Procedure and were admissible in evidence against the person making them. *QUEEN EMPRESS v. BACHANNA AND OTHERS.*

[XI-55]

(5) s. 364 (2).—*Signature of accused—Admissibility—(Act X of 1882).* A confession made by an accused person before a Magistrate was recorded by the Magistrate ostensibly under s. 364, Criminal Procedure Code, but the signature of the accused to the confession was not taken. In the Court of Session, however, the Magistrate was called as a witness and gave evidence as to the circumstances under which the confession was recorded. *Held* that the confession was admissible in evidence. *QUEEN EMPRESS v. CHEDDA AND OTHERS.*

[XVI-161]

(1). s. 366—*Order of acquittal before judgment—(Act X of 1882).* Where a person accused before a Sessions Court is acquitted the order directing him to be set at liberty must form part of the judgment of the Court and does not become operative until such judgment is pronounced in open Court. Where therefore in a Sessions trial two of several accused persons were acquitted by means of separate orders bearing date the 31st of October, 1891, and the judgment of the Court was dated the 6th of November, 1891. *Held* that the orders of acquittal so passed were illegal orders, and that the saving provisions of s. 537 of the Code of Criminal Procedure, 1882, could not be applied to them. *The Queen Empress v. Lord Penzance (Times L. R., Vol. III, 1886—87, pp. 461 and 579)* referred to. *QUEEN EMPRESS v. ABDUL MAJID KHAN AND ANOTHER.*

[XII-157]

QUEEN EMPRESS v. HARGOBIND SINGH AND OTHERS.

[XII-83]

(2) ————*Judgment of Sessions Judge—Delivery by Magistrate—(Act X of 1882).* The Sessions Judge in this case wrote a judgment convicting and sentencing the accused but having left the place where the trial had been sent, his judgment to be delivered and sentence passed by the Magistrate of the district. *Held* that the action of the Judge in sending his judgment to be delivered by the Magistrate was illegal. *QUEEN EMPRESS v. JIA LAL.*

[IX-181]

(1) s. 367—*Decision based on speculation—(Act X of 1882).* *Held* that decision must be based on evidence and not merely on speculations on theories as to the probabilities. *EMPRESS v. MAHESHU AND OTHERS.*

[VI-20]

CRIMINAL PROCEDURE CODE, s. 367—(continued.)

(2) ————*Defective judgment—(Act X of 1882).* In the case three persons, B, K and P, were convicted under s. 411 of the Penal Code. In a joint appeal to the Session Judge the judgment ran as follows:—"I do not find reasons to interfere on behalf of any of the appellants; the appeals are dismissed." *Held* in revision that having regard to the terms of ss. 367 and 424, Criminal Procedure Code, it was no judgment. At least there might have been something in the judgment to show that the Judge considered the appeals. *EMPRESS v. BHUJPAL AND OTHERS.*

[VI-289]

(3) ————*(Act X of 1882).* The judgment of the District Magistrate in a criminal appeal was as follows:—"Read proceedings, I see no reason for interfering with the decision or sentence. Appeal dismissed." *Held* that this was no judgment. *Kamuddin Dai v. Sonaini Mandal (I. L. R., 1. Cal., 449).* In the matter of the petition of Kamdas Maghi (I. L. R., 13 Cal., 110). *Empress v. Kam Narain (W. N., 1886, p. 177).* *Empress v. Bhujpal (W. N. 1886, p. 289)* followed. *EMPRESS v. SAMESHAR.*

[VIII-280]

(4) ————*(Act X of 1882).* A Magistrate having special powers under s. 34 of the Code of Criminal Procedure convicted one P B under ss. 471 and 476 of the Indian Penal Code, and sentenced him to four years' rigorous imprisonment. P B appealed to the Sessions Judge, and on that appeal the Sessions Judge recorded the following judgment:—"I have perused the record and see no cause for interference with the finding of the District Magistrate. As regards the sentence, it is not excessive, but, having regard to the great age of the appellant, I will reduce it to three years' rigorous imprisonment with three months' solitary confinement." *Held* that this judgment was in compliance with the provisions of s. 367 of the Code of Criminal Procedure, read with s. 424 of the same Code. *QUEEN EMPRESS v. PANDEH BHAT.*

[XVII-142]

(5) ————*(Act X of 1882).* On an application to the Sessions Judge for the revision of an order made under s. 195, Criminal Procedure Code, the order of the Session Judge was to the following effect:—"I decline to interfere on revision; rejected." *Held* that this was not an order, which complied with the requirements of the law and that it must be set aside. IN THE MATTER OF THE PETITION OF ZAFARYAB ALI.

[XII-60]

(1) s. 369—*Altering judgment—(Act X of 1882).* *Held* that the mere fact of an addition being made to a judgment after it has been signed and delivered, where such addition does

CRIMINAL PROCEDURE CODE,
s. 369—(continued.)

not materially prejudice the accused and has not occasioned a failure of justice, does not vitiate the whole judgment and justify an order for re-trial. *QUEEN EMPRESS v. HUSEN-UD-DIN.*

[XVIII-11

(2) ————— (Act X of 1882.)

A Magistrate convicted a person, sentenced him to one month's imprisonment, signed and pronounced his judgment in open Court, and shortly afterwards, on the same day, enhanced such sentence by one day, at the request of such person in order to make his order appealable. *Held* that the alteration of the sentence was illegal. *PETITION OF QURBAN ALI v. AZIZUDDIN.*

[III-16

(3) ————— *High Court's power to review its judgment—(Act X of 1882.)* The High Court has no power, under s. 369 of the Criminal Procedure Code, to review an order dismissing an application for revision made by an accused person, and the only remedy is by an appeal to the prerogative of the Crown as exercised by the Local Government.

Per BRODHURST, J.—The Legislature has not conferred in express words upon a High Court the power of reviewing its judgments in all criminal cases as it has done under the Civil Procedure Code in civil cases; and the provisions of s. 369 of the Criminal Procedure Code, so far as they affect the High Court apply merely to questions of law arising in its original criminal jurisdiction, and which are reserved and are subsequently disposed of under the provisions of s. 434 of the Criminal Procedure Code, and ss. 18 and 16 of the Letters Patent for the High Court of the North-Western Provinces. *Queen Empress v. Godai Raout* (5 W. R., Cr. 61) referred to. *EMPRESS v. DURGA CHARAN.*

[V-177

(1) s. 378.—*Procedure in case of difference of opinion—(Act X of 1882.)* *Held* when a sentence of death is referred to the High Court for confirmation and the Judges differ the matter should be referred to a third Judge, under ss. 378 and 429 and should not be decided, according to the opinion of the Judge for acquittal. *EMPRESS v. BUNDU AND ANOTHER.*

[VII-125

(2) ————— (Act X of 1882.) Observed (by Mahmood J. an *obiter dictum*) that as a matter of judicial etiquette when one Judge differs from his brother Judge on a pure question of the weight of evidence as to the propriety of a conviction the opinion of the Judge who is in favor of acquittal should, as a general rule, prevail. *EMPRESS v. DEBI SINGH.*

[VI-275

s. 291.—*Whipping—Time for inflicting—(Act X of 1882.)* J R was convicted on a

CRIMINAL PROCEDURE CODE,
s. 391—(continued.)

trial before a Magistrate of theft under s. 379, Penal Code, and was sentenced to rigorous imprisonment for two years, "and to receive thirty stripes on the day of his release from prison." *Held* that that portion of the Magistrate's order directing J R to be whipped on the day his sentence of imprisonment expired was altogether illegal and improper, and must be quashed. *EMPRESS v. JIWA RAM.*

[I-138

s. 395.—*Whipping—Fine in lieu of—Imprisonment—(Act X of 1882.)* A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping can not be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c. The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. *QUEEN EMPRESS v. SHEODIN.*

[IX-93

s. 399.—*Confinement in reformatory—Period of confinement—(Act X of 1882.)* A Magistrate, acting apparently with reference to s. 399 of the Criminal Procedure Code, sentenced a boy under 16 years of age to imprisonment and confinement thereafter in a reformatory for one year. At that time the local Government had not, under s. 2 of the Reformatory Schools Act, (V of 1876) brought the provisions of that Act into force in the N.W. P. *Held* that the sentence was illegal, and that it was also open to objection on the ground that, by order of the Government of India No. 173, dated the 14th March, 1889, a Magistrate administering the Reformatory Schools Act shall not send a boy to a Reformatory School, if under 10 for a less period than 7 years, and if over 10 for less than 4 years or until he should have attained the age of 18. *QUEEN EMPRESS v. HIRA.*

[IX-131

(1). s. 403.—*Acquittal—Dismissal of complaint under s. 203—(Act X of 1882.)* A complaint was made before a Magistrate of the first class of an offence punishable under s. 323 of the Penal Code. The Magistrate recorded a brief statement by the complainant, but did not ask him if he had any witnesses to call. An order was passed directing that "a copy of the petition of complaint should be sent to the police-station calling for a report on the matter," and on receipt of the report the Magistrate dismissed the complaint under s. 203, Criminal Procedure Code. There was nothing in the Magistrate's original order to show that he saw reason to distrust the truth of the complaint, nor did he direct any local investigation to be

CRIMINAL PROCEDURE CODE.

s. 408.—(continued.)

made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint. Subsequently to the dismissal of the complaint, the same complainant brought a fresh charge upon the same facts against the same persons in the same Court, and upon this charge, the accused were tried, convicted and sentenced. *Held* that the Magistrate in ordering a further inquiry, on receiving the complainant's second petition, did not act contrary to any provisions of the law, and that, considering the circumstances under which the first complaint had been dismissed, a further inquiry was necessary. *EMPRESS v. PURAN AND OTHERS.*

[VI-807]

EMPRESS v. INDAR DAWAN.

[I-68]

QUEEN EMPRESS v. UMEDAN AND OTHERS.

[XV-86]

(2).—(Act X of 1872.) The Magistrate of the district, before whom a complaint of an offence had been made, dismissed the complaint on the 15th October, 1880, under the provisions of s. 147 of Act X of 1872. On the 19th idem a second complaint of the same offence was made, which the Magistrate entertained. *Held* that there was nothing in the law to prevent the Magistrate entertaining the second complaint. *EMPRESS v. INDAR DAWAN.*

[I-68]

(3).—Order staying enquiry under s. 240.]

See s. 240.

(4).—Acquitted under s. 245 in warrant case—(Act X of 1882.) The complainant in this case charged the accused under ss. 323 and 379 (both warrant cases) before a third class Magistrate. The summons which Magistrate issued was to answer a charge under s. 426 (summons case). The offence for which the accused was tried was hurt. The Magistrate heard and took evidence produced by both the parties but without framing a charge. The final order he passed was that the complaint be dismissed and the accused acquitted under s. 245 of Criminal Procedure Code. *Held* that as s. 245 did not apply to warrant cases the so-called acquittal had no effect and the complaint was not legally disposed of by the Magistrate, that the order of the Magistrate if it operated at all operated as a discharge under s. 253 and new trial could be ordered by the District Magistrate under s. 437. *EMPRESS v. JADU AND ANOTHER.*

[VI-260]

QUEEN EMPRESS v. LAJJA RAM.

[VIII-96]

CRIMINAL PROCEDURE CODE.

s. 408.—(continued.)

(5).—Dismissal of complaint under s. 247—(Act X of 1882.) The prisoners in the case were accused of offences under ss. 323, 426 and 447, Penal Code, but on the day fixed for the hearing of the case, the complainant did not appear and the Magistrate ordered the charge to be struck off for default. On the next day the complainant appeared and put in a complaint charging the prisoners with offences under ss. 323 and 447, Penal Code, on the same facts as before. The Magistrate issued process, the prisoners were tried and two of them were convicted under s. 323 and sentenced to pay certain fines. *Held* (on reference by the District Magistrate) that s. 247, Criminal Procedure Code, was applicable to the case and the convictions and the sentences were illegal and must be set aside. *EMPRESS v. BHAWANI PRASAD AND ANOTHER.*

[V-43]

QUEEN EMPRESS v. HARDEO SINGH AND OTHERS.

[XI-120]

(6).—Order of discharge after taking evidence for defence—(Act X of 1882.) Where a Magistrate in a case under ss. 147 and 295, Penal Code, after hearing evidence on both sides and examining the accused persons, but without framing a charge, passed an order expressly purporting to be an order of "discharge" and not of "acquittal." *Held* that it was not necessary to regard such order as any thing else than what it purported to be, and consequently, it was within the power of the Sessions Judge to direct a re-opening of the proceedings in which the order above referred to had been made. *QUEEN EMPRESS v. KALLU AND ANOTHER.*

[XI-80]

(7).—Appeal—After application for revision decided—(Act X of 1882.) Where the High Court has heard an application for revision in a criminal case and passed orders thereon after going into the facts of the case and exercising its powers as an appellate Court under ss. 423 and 439 of the Code of Criminal Procedure, it cannot afterwards hear an appeal in the same case. The order passed on the application for revision is conclusive both as to the merits of the case and as to the quantum of punishment. *QUEEN EMPRESS v. KANHIA LAL.*

[X-225]

EMPRESS v. RAM DAS.

[III-1]

(8).—Acquittal—Where no charge framed.]

See s. 258, (2).

s. 404.—Appeal from acquittal—(Act X of 1882.) In a case under ss. 426 and 352 of the Indian Penal Code, before a Magistrate of the

CRIMINAL PROCEDURE CODE,
s. 417—(continued.)

[I-159

[II-64]

[XVI-73

[XIV-49]

[XI-170]

[VII-39]

[XV-68]

CRIMINAL PROCEDURE CODE,
s. 421—(continued.)

(2).—(Act X of 1882).] The powers conferred by s. 421 of the Criminal Procedure Code should be exercised sparingly and with great caution and reasons, however concise, should be given for rejecting an appeal under that section. Where a Sessions Judge rejected an appeal summarily under s. 421 of the Code, by an order consisting merely of the words " appeal rejected," and an application for revision of such order was made to the High Court nearly nine months thereafter, on the ground that the Judge was wrong in rejecting the appeal without assigning his reasons for so doing. *Held* that this objection, if taken within a reasonable time, would have been valid, but as the application for revision was made with very great delay, the Court should not interfere. **EMPRESS v. RAM NARAIN AND ANOTHER.**

[VI-177]

EMPRESS v. JUGAL KISHORE.

[III-145]

s. 422—*Notice of appeal*—(Act X of 1872).] The Magistrate of the district directed that an appeal to him should be heard in the month of January, the date for the hearing of the appeal being omitted. The appeal was heard on the 6th January and dismissed. The appellant had not received any information as to when his appeal was to be heard, and only arrived in the Magistrate's Court to learn that the appeal had just been dismissed and could not be re-heard. *Held* that the appellant should have been informed as to the date on which his appeal would be heard. The Magistrate must take up the appeal, fix a date for its hearing, and determine it, on the date so fixed. **EMPRESS v. WAZIR KHAN.**

[I-46]

(1).—s. 423—*Power of Court to deal with case of accused who has not appealed*—(Act X of 1882).] Both the parties to a riot were jointly tried together by a Deputy Magistrate. One of the parties only appealed to the District Magistrate who quashed the convictions and directed that each side should be tried separately. The Sessions Judge being of opinion that the District Magistrate's order as to the party who had not appealed was made without jurisdiction reported the case for the orders of the High Court. *Held* setting aside the order of the Deputy Magistrate and the Magistrate of the district that those persons, who had not appealed, should be tried by a competent Court according to law. **EMPRESS v. JAMIAL AND OTHERS.**

[III-163]

(2).—*Appellant must show ground for interference*—(Act X of 1882).] A convicted person appealing is not in the same position before the appellate Court as he is before the

CRIMINAL PROCEDURE CODE,
s. 423—(continued.)

Court trying him : he must satisfy the appellate Court that there is sufficient ground for interfering with the order of the conviction ; and if no such ground is shown, it is the duty of the appellate Court not to interfere. **EMPRESS v. SAJIWAN LAL.**

[III-72]

(3).—*" If he appears "*—*Disposal of appeal in the absence of accused*—(Act X of 1882).] *Held* by the Full Bench. (Mahmood, J., dissenting) that where an appeal, preferred under s. 420 of the Criminal Procedure Code, has been admitted by the appellate Court, and notice has been properly given under s. 422, and the record of the case has been sent for and perused under s. 423, the appellate Court is competent, under the last mentioned section, to dispose of the appeal though the appellant is not present and is not represented by a pleader. The only limitation placed by s. 423 on the powers of the appellate Court is that the Court before disposing of the appeal, must peruse the record and if the appellant is present or is represented by a pleader, the appellant in person must be heard, or the pleader must be heard.

Per Mahmood, J., *contra*, that the principles of *alibi alteram partem* and *ubi jus ibi remedium* and the provisions of s. 422 of the Code as to the notice of appeal, imply that, where an appeal is admitted and not summarily rejected under s. 421, the appellant must have a real opportunity of being heard ; that in the passage in s. 423 " after perusing the record and hearing the appellant or his pleader if he appears," the word " he " refers to the pleader and must not be read as " either of them ; " that, in any Court, the words " if he appears " make it a condition precedent to the disposal of an appeal under the section that the appellant is heard, or at least has the choice of appearing ; that the word " appears " refers to the personal appearance of the appellant ; and that an appeal which has been admitted cannot be disposed of unless the appellant is before the appellate Court, or can be heard within the meaning of s. 423.

Semble per MAHMOOD, J.—But the High Court in appeal is competent to send for a criminal to appear before it to explain a difficulty in his case. **EMPRESS v. POHPI AND OTHERS.**

[XI-48]

(4) s. 423 b. (1)—*Power of appellate Court—To order retrial*—(Act X of 1872).] The accused who were convicted of the offence of theft appealed to the lower Court. The Sessions Judge was of opinion that they ought to have been convicted of dacoity, and reported the case to the High Court. *Held* that the Sessions Judge ought to have annulled the conviction under s. 280 and ordered the re-trial of the case according to law. **EMPRESS v. RAM PRASAD.**

[II-112]

CRIMINAL PROCEDURE CODE, s. 423—(continued.)

(6). ————— (Act X of 1882).] *Held* that a Sessions Judge, to whom an appeal had been preferred from a conviction by a Magistrate was competent under s. 423 (b), Criminal Procedure Code, to order the re-trial of the appellants if he was of opinion that the proceedings of the Magistrate had been irregular. *EMPRESS v. BHAGWANI AND OTHERS.*

[III-99]

(6). ————— *To order re-trial and commitment—(Act X of 1872).*] The accused was convicted by a Magistrate of the first class of an offence under s. 448 and sentenced to three months' imprisonment. On appeal by him, the Sessions Judge being of opinion that the accused should have been committed to the Court of Session on a charge under s. 450 quashed the conviction and ordered the accused to be re-tried by a Court of competent jurisdiction. He was accordingly tried by the Joint Magistrate, committed to the Court of Session and convicted of offences under ss. 355 and 450, Penal Code. *Held* in appeal that the accused had undoubtedly committed the offence punishable under s. 448, and therefore the Magistrate was competent to convict and sentence him under that section; the Sessions Judge was consequently empowered by s. 284, Criminal Procedure Code, to annul the conviction and direct his retrial. He ought to have either enhanced the sentence or referred the case under s. 296, Criminal Procedure Code, to the High Court. *EMPRESS v. FAIAZ KHAN.*

[II-112]

(7). ————— (Act X of 1872).] The accused in this case was convicted of an offence under the first part of s. 211, Penal Code, and sentenced by the Magistrate to one year's rigorous imprisonment. The Sessions Judge on appeal annulled the conviction and directed the Magistrate to enquire into an offence under the last part of s. 211 which is exclusively cognizable by the Court of Session, and to commit the accused if there was sufficient evidence. *Held* that s. 280 of Act X of 1872 as amended by s. 28 of Act X of 1871 did not give the appellate Court power to annul the conviction and directed an enquiry into an offence cognizable by the Court of Session preliminary to commitment. *EMPRESS v. RATAN SAHAI.*

[I-62]

(8). ————— (Act X of 1872).] A and certain other persons were accused of robbing the complainant's master's field and of beating the complainant when he tried to prevent the robbery. A was convicted of causing grievous hurt under s. 325, Penal Code. The Sessions Judge on appeal set aside the order and directed A to be committed to the Court of Session after a fresh inquiry on charges under ss. 39f and 397, Penal Code. *Held* that the Sessions Judge was incompetent to quash the

CRIMINAL PROCEDURE CODE, s. 423—(continued.)

conviction under s. 284, Criminal Procedure Code. His proper course was to forward the record to this Court. *EMPRESS v. SHAHAMAT.*

[II-47]

(9). ————— *To order commitment—(Act X of 1882).*] The appellate Court referred to in s. 423 of the Criminal Procedure Code can, in an appeal from a conviction, only order an accused person to be committed for trial when it considers that the accused is triable exclusively by the Court of Session. The meaning of the word in s. 423 (c) of the Criminal Procedure Code, "or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial," is as follows:—If in an appeal from a conviction the appellate Court finds that the accused person who was triable only by a Magistrate of the first class, or by a Court of Session has, by an oversight or under a misapprehension, been tried, convicted and sentenced by a Magistrate of the second class, the appellate Court may in that case reverse the finding and sentence, and order the accused to be re-tried by a Magistrate of the first class or by the Court of Session; and, in like manner when the appellant, who was triable solely by the Court of Session, has been tried, convicted and sentenced by a Magistrate of the first class, the Sessions Judge, in disposing of the appeal, is empowered to reverse the finding and sentence, and to order that the accused be committed for trial. *EMPRESS v. SUKHA AND OTHERS.*

[V-298]

(10). ————— (Act X of 1882).] It is competent to a Sessions Judge acting as a Court of appeal under s. 423 of the Code of Criminal Procedure, 1882, having reversed the finding and sentence, to order the appellant to be committed for trial to the Court of Session. *Queen Empress v. Sukha (I. L. R., 8 All., 14)* overruled. *QUEEN EMPRESS v. MAULA BAKHS.*

[XIII-105.]

(11) s. 423, b (2). ————— *Alter the finding—(Act X of 1882).*] Where the Court of Session had tried, convicted and sentenced an accused person under s. 409, Penal Code, and the High Court was of opinion that the conviction was not sustainable under that section the Court refused to alter the finding under s. 423, Criminal Procedure Code, to a conviction for some other offence for which the accused had not been charged or tried. *EMPRESS v. IMDAD KHAN.*

[VI-7]

(12). ————— (Act X of 1882).] Under s. 423 of the Code of Criminal Procedure, the High Court on appeal has power to alter a conviction recorded against the appellant from s. 474 to s. 193 of the Penal Code. The exercise of the Court's discretion in this respect must be regulated by a consideration of the nature of the evidence in support of the charge

CRIMINAL PROCEDURE CODE,

s. 423—(continued.)

upon which the accused was convicted, and of the questions whether that evidence reasonably supports the particular finding to which it is proposed to alter the conviction, and whether the accused would be in any way prejudiced or injured by the alteration. *QUEEN EMPRESS v. AMRIT.*

[X-86

(13) s. 423 (b) (3)—*Solitary confinement*—(Act X of 1882).] Where the District Magistrate, in a criminal appeal from sentences of imprisonment, reduced the terms of imprisonment, but imposed terms of solitary confinement, and further ordered the convicts to give security for keeping the peace; *held*, that the imposition of solitary confinement, even though the term of imprisonment is lessened, is an enhancement of the sentence, and also that an order under s. 106 of the Code of Criminal Procedure for security to keep the peace can only be made by the Court which sentences the offender, and that consequently, both the orders above-mentioned were bad in law. *QUEEN EMPRESS v. PEMAN AND OTHERS.*

[X-170

(14) ————“*Not so as to enhance the same*” —*Fine—Imprisonment*—(Act X of 1882).] *Held* that the alteration by an appellate Court of a sentence of a fine of Rs. 50 to a sentence of 6 months' rigorous imprisonment was an enhancement of the sentence and as such prohibited by s. 423 of the Code of Criminal Procedure. *QUEEN EMPRESS v. LACHMI KANT.*

[XVI-58

(15) ————(Act X of 1882).] Where a District Magistrate acting as an appellate Court in a criminal case altered a sentence of four months' rigorous imprisonment, to one of three months' rigorous imprisonment, but imposed a fine of Rs. 10 or in default a further term of six weeks' rigorous imprisonment; *held* that as the latter sentence might involve an enhancement of the former it was in excess of the powers of the Magistrate having regard to s. 423 of the Code of Criminal Procedure. *QUEEN EMPRESS v. ISHRI AND OTHERS.*

[XIV-202

(16) ————(Act X of 1882).] A was convicted by the Deputy Magistrate to 15 days' rigorous imprisonment and a fine of Rs. 10 or in default to a further term of one week. In appeal the District Magistrate altered the sentence to a fine of Rs. 50 or in default to one month's rigorous imprisonment. *Held* that the Magistrate had actually enhanced the sentences which he had no power to do. *EMPRESS v. MEDA AND ANOTHER.*

[VII-100

(17) s. 423 (2)—*Misdirection to jury.*]

CRIMINAL PROCEDURE CODE.

s. 423—(continued.)

See s. 418 (1).

(18) ————*Verdict of jury—Power of High Court to disturb.*]

See s. 418, (2).

s. 424—*Defective judgment.*]

See s. 367, Nos. (2), (3) and (4).

s. 429—*Procedure in case of difference of opinion.*]

See s. 378 Nos. (1) and (2).

(1) s. 435—“*Inferior Criminal Court*”—*Power to revise order under s. 195—(Act X of 1882).*] The fact that a Magistrate is not subordinate to the Court of Session in the sense of s. 195, Criminal Procedure Code, does not affect the power of the Sessions Judge under s. 435, Criminal Procedure Code, to revise any finding or order recorded by a Court inferior to him, such as an order of the District Magistrate refusing to grant sanction for the prosecution of certain persons. *IN THE MATTER OF THE PETITION OF NAJIB KHAN.*

[IX-100

(2). s. 435 (4)—*Power of District Magistrate to order enquiry after refusal by Session Judge—(Act X of 1882).*] Where a Sessions Judge has passed orders under s. 437 of the Criminal Procedure Code a District Magistrate acting under the same section should not pass orders of a contrary kind, but if he thinks that the Judge's orders were wrong, he should submit them to the High Court through the medium of the Public Prosecutor. *Queen Empress v. Shere Singh (I. L. R., 9 All., 362)* referred to. Where a Sessions Judge had, under s. 437 of the Code of Criminal Procedure, refused to order further inquiry into the case of an accused person who had been discharged, the High Court set aside a subsequent order of the Magistrate of the district passed under the same section and ordering further inquiry into the same case. *QUEEN EMPRESS v. PIRTHI AND OTHERS.*

[X-99

(3). ————*Power of Session Judge to order enquiry after refusal by District Magistrate—(Act X of 1882).*] It is competent to a Sessions Judge acting under s. 437 of the Criminal Procedure Code to order further enquiry notwithstanding that the District Magistrate has refused to do so. *Queen Empress v. Pirthi (I. L. R., 12 All., 434)* distinguished. *QADIR BAKHS V. SHEIKH ABDULLAH.*

[XV-33

s. 436, proviso (a).—*Notice—(Act X of 1882).*] *Held* that it is an essential precedent condition to a valid order under s. 436, Criminal Proce-

CRIMINAL PROCEDURE CODE, s. 436—(continued.)

Code, that the accused should have an opportunity of showing cause against his commitment. An order made in disregard to that proviso is a bad order and can not be maintained. *ASIF KHAN AND ANOTHER v. FATHU*.

[VIII-236]

(1). s. 437—*Power to order further enquiry—District Magistrate*—(Act X of 1882.) Where a District Magistrate called for the record of a case in which a Magistrate of the first class had discharged certain accused persons, and directed another Magistrate of the first class to make further inquiry into the case, held, following *Nobin Kristo Mookerjee v. Russick Lall Laha* (I. L. R., 10 Calc., 268) and *Queen Empress v. Nawab Fan* (I. L. R., 10 Calc., 551) that the District Magistrate's order was *ultra vires* and illegal. *JHINGUR v. BACHU AND ANOTHER*.

[IV-286]

(2). ————— (Act X of 1882.) Held that when a Magistrate has discharged an accused person under s. 253, Criminal Procedure Code, the High Court or Court of Session, under s. 437, Criminal Procedure Code, has jurisdiction to direct further enquiry on the same materials, and District Magistrate may, under like circumstances, himself hold further inquiry or direct further inquiry by a Subordinate Magistrate. *Queen Empress v. Dorabji Hormasji* (I. L. R., 10 Bom., 131) referred to. *Empress v. Bhole Singh* (W. N., 1883, p. 150); *Queen Empress v. Hasnu* (I. L. R., 6 All., 367); *Chundi Churn Bhattacharjia v. Hem Chunder Banerjee* (I. L. R., 10 Cal., 207); *Feebun Kristo Roy v. Shib Chunder Dass* (I. L. R., 10 Cal., 1027); *Darsun Lall v. Jamuk Lall* (I. L. R., 12 Calc., 522) and *Queen Empress v. Amir Khan* (I. L. R., 8 Mad., 336) dissented from. *EMPRESS v. CHOTU*.

[VI-281]

(3). ————— *Sessions Court*—(Act X of 1872.) A and certain other persons were accused of an offence under s. 411. A was however discharged and the others committed to the Court of Session. The Judge in his judgment in that case made the following order:—"From the evidence before me it seems likely that A knew of the property being stolen and knew that it was in his house; under s. 296, Criminal Procedure Code, I order A to be tried and if cause found to be presumed guilty to be committed to the Court of Session." He was accordingly tried, committed and convicted. Held, following *Empress v. Kamchan Singh* (I. L. R., 1 All., 413), that the order of the Sessions Judge ordering the commitment and the subsequent proceedings in a case which was not a Sessions case were illegal and must be set aside. *Empress v. Bhup Singh* (I. L. R., 2 All., 571) distinguished. *EMPRESS v. MUHAMMAD BAKHSI*.

[II-105]

CRIMINAL PROCEDURE CODE, s. 437—(continued.)

(4). ————— *Power should be exercised with caution*—(Act X of 1882.) In exercising the powers conferred by s. 437, Sessions Judges and Magistrates should use them sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact. As to the mode in which their discretion should be regulated under such circumstances, the remarks of Straight and Tyrrell, JJ., in *Queen Empress v. Sayadin* (I. L. R., 4 All., 148) in reference to appeals from acquittals, are applicable. *EMPRESS v. CHOTU*.

[VI-281]

(5). ————— *Power to order prosecution of witness*—(Act X of 1882.) On appeal by a person convicted by a Subordinate Magistrate of an offence under s. 411 of the Penal Code, the Sessions Judge set aside the conviction, and proceeded to say that the District Magistrate should proceed against a certain witness who had given evidence against the accused in the Court of first instance. Held that neither s. 437 nor s. 476 of the Criminal Procedure Code, nor any other provision authorized the Judge to make such an order, and that it was *ultra vires* and illegal. *QUEEN EMPRESS v. NAIPAL*.

[IX-95]

(6). ————— *Reason should be recorded*—(Act X of 1882.) Where a District Magistrate, acting under s. 437 of the Code of Criminal Procedure, issued an order for the trial of an accused person who had been discharged under s. 253 without giving any reasons for the order and without sending notice to the discharged person: held that such an order was improper, inasmuch as the Magistrate was bound, not only to issue notice to show cause to the person against whom the order was made, but to record his reasons for making the order. *QUEEN EMPRESS v. LOKHIA*.

[X-147]

(7). ————— *Further enquiry—Fresh evidence*—(Act X of 1882.) A Deputy Magistrate having discharged a person accused of an offence, on the ground that the evidence was insufficient for conviction, the Magistrate of the district recorded an order stating, that in his opinion, the accused had been improperly discharged, and directing, under s. 437 of the Code of Criminal Procedure, that further inquiry should be made, and the accused called on to enter upon his defence. The accused was not called upon to show cause why a further inquiry should not be made, but a summons in the terms of s. 68 of the Code of Criminal Procedure was issued to him. On his appearance, he was tried by the Magistrate of the district, convicted, and sentenced. The witnesses for the prosecution were not re-called, but the Magistrate relied upon their evidence as recorded in the first trial, and also upon the statement of a witness for the defence

CRIMINAL PROCEDURE CODE,
s. 437—(continued.)

which was not receivable in evidence. *Held* that the proceedings of the Magistrate of the district were irregular—first, because notice to show cause why action should not be taken against him in the terms of s. 437 of the Code of Criminal Procedure was not served upon the accused person before proceedings ostensibly under that section were commenced; and secondly, because the subsequent proceedings of the Magistrate were not such as are contemplated by the provisions of s. 437, inasmuch as the conviction was practically based upon evidence which was not recorded in the course of a "further inquiry" before the Magistrate of the district, but upon evidence which was recorded by the Deputy Magistrate, and had been adjudicated upon by that officer; and such irregularities were fatal to the conviction. *EMPRESS v. HASNU.*

[IV-130]

(8).—*Power of Session Judge to order inquiry after refusal by District Magistrate.*
See s. 435, No. (3).

(9).—*Power of District Magistrate to order enquiry after refusal by Session Judges.*

See s. 435, No. (2).

(10).—*Subordination—District Magistrate—Magistrate, first class—(Act X of 1882).* A Magistrate of the first class is, within the meaning of s. 437 of the Criminal Procedure Code, "subordinate" to the Magistrate of the district, who is therefore competent to call for the record of the former, and to deal with it under s. 437. *EMPRESS v. LASKARI.*

[V-257]

(11).—*Accused person—Person ordered to find security—(Act X of 1882).* The term "accused person" as used in s. 437, Criminal Procedure Code, will include a person against whom proceedings under s. 110 and the following sections have been taken. *EMPRESS v. SHEODYAL.*

[XI-106]

(12).—*Discharge—Acquittal—(Act X of 1882).* Where a Magistrate in a case under ss. 147 and 295 of the Indian Penal Code, after hearing evidence on both sides and examining the accused persons, but without framing a charge, passed an order expressly purporting to be an order of "discharge" and not of "acquittal." *Held* that it was not necessary to regard such order as anything else than what it purported to be, and consequently, it was within the power of the Sessions Judge to direct a re-opening of the proceedings in which the order above referred to had been made. *QUEEN EMPRESS v. KALLU AND ANOTHER.*

[XI-80]

CRIMINAL PROCEDURE CODE,
s. 437—(continued.)

(13).—*Power to order further enquiry—Notice—(Act X of 1882).* Before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. *Queen Empress v. Chotu (I. L. R., 9 All., 52)* referred to. *QUEEN EMPRESS v. AJUDHIA AND ANOTHER.*

[XVIII-60]

EMPRESS v. CHOTU.

[VI-281]

QUEEN EMPRESS v. LOKHIA.

[X-147]

EMPRESS v. HASNU.

[IV-130]

(1). s. 438—*Report to High Court—Premature—(Act X of 1882).* In this case eight persons were charged before the Magistrate for certain offences. The Magistrate convicted six of them, discharged two and bound them all together with the complainant and a servant of his (who was no party to the proceedings) to keep the peace. In appeal by the six convicts, the Sessions Judge being of opinion that the sentences passed on four of the convicts was inadequate and that the order of discharge in respect of the two accused and the order to keep the peace in respect of the complainant and his servant were illegal, reported the case without disposing of the appeal to the High Court for orders under s. 438. *Held* that the action of the Sessions Judge in sending up the case for orders without disposing of the appeal was premature. *EMPRESS v. DURGA PRASAD AND OTHERS.*

[IV-130]

(2).—*For enhancement of sentence—(Act X of 1882).* *Held* on a motion of the Government advocate, appearing for the Local Government, for enhancement of sentence that it was within the province of the Magistrate of the district to report this case for the orders of the High Court under s. 438, Criminal Procedure Code. S. 438, Criminal Procedure Code, contains nothing to limit or qualify the power which it confers on a Court of Session or a District Magistrate or to suggest that the High Court should not consider a case so reported and pass orders accordingly. *QUEEN EMPRESS v. BABU.*

[XVIII-12]

(3).—*—(Act X of 1882).* *Held* that the inadequacy of punishment was a proper subject of revision by the High Court under s. 438 of the Code of Criminal Procedure. *EMPRESS v. HARDEWA.*

[VII-54]

(4).—*On report of jail daroga—(Act X of 1882).* A reference to the High Court under s. 438 of the Code of Criminal

CRIMINAL PROCEDURE CODE,
s. 438—(continued.)

Procedure should only be made for some reason specified in that section which appears from inspection of the record. Such a reference cannot be made on the mere report of a jail daroga. *QUEEN EMPRESS v. KUNJAL AND ANOTHER.*

[XI-80]

(5).—By District Magistrate—Against order of Sessions Judge—(Act X of 1882).] A Magistrate is not justified in referring under s. 438, Criminal Procedure Code, orders passed by the Sessions Judge on appeal, except in very special cases. *Queen Empress v. Shere Singh (I. L. R., 9 All., 362)* referred to. *QUEEN EMPRESS v. ZOR SINGH.*

[VIII-5]

EMPRESS v. GUMANI.

[II-135]

(6).—“Report...result of such examination”—(Act X of 1872).] In this case the Sessions Judge submitted the record, for the orders of the High Court, together with his “findings on the petitions filed for revision.” The Court observed that the Sessions Judge had improperly gone into the merits of the applications made to him. Under s. 295, Criminal Procedure Code, he was at liberty to call for and examine the record of any court subordinate to him for the purpose of satisfying himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Court. If he was of opinion that any judgment or order was contrary to law, or that the punishment was too severe or was inadequate, he might report the proceedings for the orders of the High Court under s. 296, or, if they applied, act under the second and third paragraphs of that section. But the Judge had no authority to hear the case as one judicially before him, and to send to this Court what he called his “findings” on the pleas of the petitioners. *EMPRESS v. MURLIDHAR AND ANOTHER.*

[I-76]

(7).—Power to admit fresh evidence in revision—(Act X of 1872).] The accused was convicted by a Magistrate under s. 19 of Act XI, 1878, on the information of one X. The accused applied to the Sessions Judge for revision on the ground that the evidence of X was not worthy of credit as he was at enmity with him. The Sessions Judge directed the petitioner to produce any evidence that he might have as to such enmity. The accused accordingly produced a bond given him by X. The Sessions Judge considering that enmity was proved referred the case to the High Court. Held that the procedure of the Sessions Judge was highly illegal. The

CRIMINAL PROCEDURE CODE,
s. 438—(continued.)

Sessions Judge in this case has usurped the powers of an appellate Court. *EMPRESS v. SANWALIA.*

[II-146]

(8).—Ground of reference—Evidence untrustworthy—(Act X of 1872).] Held that the circumstances that the Sessions Judge, in disposing of an appeal by one of two persons tried and convicted together, has discredited the evidence for the prosecution against him, does not authorize the High Court to declare the evidence untrustworthy as against the other and to acquit him, under the provisions of s. 297 of Act X of 1872. S. 296 allows a reference when the Court of Session is of opinion that the judgment or order is contrary to law, or that the punishment is too severe or inadequate, but not on the ground of the insufficiency or incredibility of the evidence. *EMPRESS v. KHUBI.*

[I-12]

(1) s. 439—Revision by Government—Not through the law officer—(Act X of 1882).] Held that the High Court could exercise the revisional powers given to it under s. 439, Criminal Procedure Code, on an application made by the Government in an official communication instead of through the law officer of the Crown. *Empress v. Fox (I. L. R., 2 All., 522)* followed. *EMPRESS v. MATADIN AND OTHERS.*

[VII-144]

(2).—Revision to High Court—Where Session Judge has concurrent jurisdiction—(Act X of 1882).] This case was triable exclusively by the Court of Session. The Magistrate tried it himself and discharged the accused. The complainant applied for revision to the High Court under s. 439. Held that the application to the High Court was premature. He should have applied to the Sessions Judge under s. 436. *EMPRESS v. PHUL KOERI AND OTHERS.*

[VII-105]

(3).—(Act X of 1882).] Held that it is not the practice of the High Court to entertain an application for revision, where the Sessions Judge has concurrent revisional jurisdiction, unless a similar application has first been made to the lower Court and has been rejected. *MATAI LAL v. ANANT RAM AND OTHERS.*

[X-164]

(4).—Power of High Court—To interfere with acquittal—(Act X of 1882).] The High Court has power under s. 439 of the Criminal Procedure Code, to revise an order of acquittal, though not to convert a finding of acquittal into one of conviction. In reference to orders of acquittal passed by a Court of Session in appeal, the High Court may, under s. 439, reverse such

CRIMINAL PROCEDURE CODE,
s. 439—(continued.)

order and direct a re-trial of the appeal, the proper tribunal to conduct which is the Sessions Court of appeal, or such other Court of equal jurisdiction as the High Court may entrust, under s. 526 of the Code, with the trial of the appeal. *EMPRESS v. BALWANT.*

[VI-322]

PETITION OF BANSIDHAR.

[II-229]

(5) ————— (Act X of 1882.)] Held that the High Court cannot interfere in the exercise of its revisional jurisdiction with a finding of acquittal made by a competent Court on the merits of the case tried by such Court. *BATAK v. NARAIN RAO.*

[III-222]

(6) ————— To order re-trial in case of discharge—(Act X of 1882.)] The High Court has power, under s. 439 of the Criminal Procedure Code, 1882, if it considers that an accused person has been improperly discharged, to order him to be committed for trial. *EMPRESS v. RAMLAL SINGH AND OTHERS.*

[III-186]

(7) ————— To alter conviction maintaining sentence—(Act X of 1882.)] Held that the High Court had power in revision to alter the finding of conviction maintaining the sentence. *EMPRESS v. JOTI PRASAD.*

[VII-95]

(8) ————— To interfere with conviction after sentence served out—(Act X of 1882.)] The High Court is competent, in the exercise of its powers of revision under s. 439 of the Code of Criminal Procedure, to interfere with a conviction, even though, in consequence of the expiry of the sentence, it may not be possible to interfere with the latter. *QUEEN EMPRESS v. SINHA.*

[IV-293]

(9) ————— To exercise appellate powers—(Act X of 1882.)] Held that the High Court could in a revision case under s. 439, Criminal Procedure Code, exercise the powers of a Court of appeal under s. 423, Criminal Procedure Code. *EMPRESS v. SHEO PRASAD AND ANOTHER.*

[III-61]

(10) ————— (Act X of 1882.)] The High Court in dealing revisionally with an appellate judgment of a Criminal Court will not, ordinarily speaking, enter into questions of fact; but it has the power to do so, and in dealing with such questions requires that

CRIMINAL PROCEDURE CODE,
s. 439—(continued.)

there should be distinct and definite findings of fact on which it can rely. Hence when the judgment of the appellate Court contained only findings to the effect that the evidence on both sides was unreliable; that there was a quarrel between the two parties, and a fight ensued in which both were injured; but did not specify any offence of which it found any one guilty, and left it to be inferred from the dismissal of the appeal what was the Court's determination as to the guilt of the appellant and the offence committed by him; the High Court on an application for revision went into the facts of the case and, under the circumstances acquitted the applicant. *QUEEN EMPRESS v. KALLU MAL.*

[XIV-207]

QUEEN EMPRESS v. ALA BAKHSI AND ANOTHER.

[IV-206]

(11) ————— To enhance sentence—(Act X of 1882.)] The High Court, in the exercise of its powers of revision, can enhance a sentence so as to alter its nature. *QUEEN EMPRESS v. RAM KURIA.*

[IV-252]

(12) ————— (Act X of 1882.)] Of certain persons concerned in a murder all but one were tried and sentenced to transportation for life. The remaining one (Durga) was not captured till about two years after the commission of the crime. He was tried, found guilty, and sentenced also to transportation for life. He appealed to the High Court, and the relatives of the deceased man also presented a petition praying that the prisoner should be punished with death. The Court (Edge, C. J. and Young, J.) in dismissing the prisoner's appeal, held that, while there was no reason why the death sentence should not have been passed upon the appellant, it was, nevertheless, unadvisable to act upon a petition presented by the relatives of the deceased person. In view of the gravity of the question at issue it was more fitting to leave it to the Government to move the Court to exercise its powers of enhancement. *QUEEN EMPRESS v. DURGA.*

[X-225]

(13) ————— To interfere on ground that sentence is inadequate—(Act X of 1882.)] Held that it was open to doubt if the High Courts are competent (in revision) to order the commitment and re-trial, under the same section of the Indian Penal Code, of an accused person who is undergoing a sentence that has been passed upon him by a Magistrate in accordance with law simply because the punishment awarded is inadequate. *Empress v. Sukha (W. N., 1885, p. 298)* followed. *EMPRESS v. IMAMI.*

[V-297]

**CRIMINAL PROCEDURE CODE,
s. 439—(continued.)**

(14).—*To order Magistrate to take security—(Act X of 1872).*] Certain persons were convicted by a Magistrate of the first class, of assault, an offence punishable under s. 352 of Act X of 1872. The case was brought to the knowledge of the High Court by the complainant preferring a petition to it, together with a copy of the Magistrate's order. This petition was laid before Straight, J., who, observing that the case was one in which the Magistrate should have taken security from such persons for keeping the peace, as provided by s. 489 of Act X of 1872, directed the Magistrate to summon such persons to show cause why they should not be required, under s. 491 of that Act, to enter into a bond to keep the peace. The Magistrate accordingly summoned such persons as directed, the summonses setting forth that they were issued "under the orders of the High Court." The Magistrate took evidence on behalf of such persons, and eventually made an order requiring such persons to enter into a bond to keep the peace. Such persons applied to the High Court to set aside the order requiring them to enter into a bond to keep the peace, on the ground that the Magistrate had not proceeded of his own motion, but under the order of Straight, J., which was made without jurisdiction. *Held* by Stuart, C. J., that, inasmuch as Straight, J., when he made his order, represented the full authority and jurisdiction of the High Court, such order was final, and the application could not be entertained. *Held* by Pearson, J., Spankie, J., and Oldfield, J. (Spankie, J., doubting whether such order could be questioned) that the order of Straight, J., was one which he was competent to make as a Court of Revision under s. 297 of Act X of 1872. *EMPRESS v. MUHAMMAD JAFAR AND OTHERS.*

[I-33]

(15).—*To revise order under s. 144—(Act X of 1872).*] *Held* that an order presumably made under s. 518 of Act X of 1872 by a Magistrate not empowered by law to make an order under the provisions of that section could be quashed by the High Court. *EMPRESS v. ABDUL RAHIM.*

[II-140]

(16).—*(Act X of 1872).*] One A (a-Christian preacher) petitioned the Magistrate to pass an order under s. 518, Criminal Procedure Code, directing certain Muhammadans not to molest him while preaching. The Magistrate declined to pass an order under that section but observed that "orders will issue to the *Kotwal* and the *Thanadar* of Colonelgunj not to allow any one to preach within 200 yards or hearings of the Christian preachers." *Held* on revision that the order of the Magistrate being extra judicial, the High Court had no

**CRIMINAL PROCEDURE CODE,
s. 439—(continued.)**

power to revise that order. PETITION OF SHERE ALI AND ANOTHER.

[III-25]

(17).—*(Act X of 1882).* The High Court cannot in the exercise of its revisional jurisdiction interfere with a memorandum issued by a District Magistrate for the instruction of his subordinates respecting the route to be followed by certain procession IN THE MATTER OF THE PETITION OF BHAGELU AND OTHERS.

[XI-178]

(18).—*(Act X of 1882).*] It is competent to a High Court to call for the record of any proceeding in an inferior Criminal Court, and, if it deem necessary or expedient, revise any order passed therein by such Court, whether such order be of a preliminary or final nature, with the exception of orders passed under ss. 143, 144 or 176 of the Code of Criminal Procedure, 1882. *Empress of India v. Nilambar Babu (I. L. R., 2 All., 276)* distinguished.—*QUEEN EMPRESS v. JAGAN SINGH.*

[XII-102]

(19).—*To revise order under s. 476—(Act X of 1882).*] Under the general revisional powers conferred by s. 439 of the Code of Criminal Procedure, a High Court has power to consider the propriety of an order which purports to be passed under s. 476 of the Code. *Queen Empress v. Rachappa (I. L. R., 13 Bom., 109)* dissented from. Where a defendant in a suit in the Court of a Munsif applied to the District Judge for sanction under s. 195 of the Code of Criminal Procedure to prosecute a witness who had given evidence in the Munsif's Court in support of a deed, produced as evidence before that Court which had been found by the Munsif to be a forgery, and the District Judge refused the application, but, purporting to act under s. 476 of the Code, himself order the prosecution of such witness. *Held* that the Judge's order was made without jurisdiction, the offence in respect of which the prosecution was directed having been neither committed before him nor brought to his notice in the course of a judicial proceeding. IN THE MATTER OF THE PETITION OF MATHURA DAS.

[XIV-9]

(20).—*(Act X of 1882).*] The High Court has power under s. 439, Criminal Procedure Code, to interfere in revision with an order passed under s. 476, but the power should be exercised only in very exceptional cases. *Queen Empress v. Narakka (I. L. R., 13 Mad., 144)* and *Abdul Khadar v. Meera Sahab (I. L. R., 15 Mad., 224)* referred to. IN THE MATTER OF THE PETITION OF SARJU UPADHIA.

[XVII-64]

CRIMINAL PROCEDURE CODE,
s. 439—(continued.)

(21).—*To revise order under s. 58 of Act VII of 1878—(Act X of 1872).]* No order confiscating forest-produce which is the property of Government in respect of which a forest-offence has been committed is necessary or can be made. All that need be done is to direct a forest-officer to take charge of such forest-produce. An order directing the confiscation of forest-produce not belonging to Government, in respect of which a forest-offence has been committed, can only be made at the time the offender is convicted. The High Court is competent under s. 297 of Act X of 1872 to revise an order made by a District Judge under s. 58 of the Forest Act, 1878, on appeal from the order of a Magistrate made under s. 54 of that Act, the jurisdiction of the High Court under s. 297 of Act X of 1872 not being expressly taken away by s. 58 of the Forest Act, 1878. *EMPRESS v. NATHU KHAN.*

[II-93]

(22).—*To revise an order of Commissioner of Kamaun—(Act X of 1882).]* The High Court for the North-Western Provinces has no jurisdiction to revise an order of the Commissioner of Kamaun refusing a certificate to practise as a mukhtar in the Criminal Courts subordinate to the Court of the Commissioner. *IN THE MATTER OF THE PETITION OF HAR CHANDRA LAL.*

[XII-236]

(23).—*To deal with case of accused who has not appealed—(Act X of 1882).]* Four persons were tried jointly and convicted by an Assistant Magistrate. One of them appealed to the Sessions Judge, but the sentences of the others were not appealable. The Sessions Judge acquitted the appellant, and in the course of hearing the appeal came to the conclusion that the convictions of the three other persons were wrong. He accordingly referred the case to the High Court for orders. *Held* that the cases of the three persons on whom unappealable sentences had been passed might be considered in revision under s. 439, Criminal Procedure Code. *QUEEN EMPRESS v. KARAM ALI AND OTHERS.*

[XI-149]

(24).—*(Act X of 1882).]* Three persons were jointly tried and convicted on the same evidence for an offence under s. 325 of the Indian Penal Code. Two of such convicts appealed to the Session Judge and were acquitted. The third did not appeal; but it was found that it was by mistake only that his name had been omitted from the memorandum of appeal and that the reasons for the acquittal of the others applied also to him. *Held* that under the circumstances it was competent to the High Court to acquit and order

CRIMINAL PROCEDURE CODE,
s. 439—(continued.)

the release of the third convict. *QUEEN EMPRESS v. RATAN SINGH.*

[XIII-51]

(25). s. 439 (2).—*Right of accused to be heard—(Act X of 1872).]* *Held* that the High Court was not bound to hear the accused person personally or even by an agent on a report by the Court of Session under s. 297 (Act X of 1872) that the accused had been improperly discharged by the subordinate Court. *EMPRESS v. COONEY.*

[I-63]

(26). s. 439 (5).—*Revision—Appealable order—(Act X of 1882).]* *Held* that an application for revision of an appealable order from which no appeal has been preferred can not be entertained. *EMPRESS v. MOHAR SINGH.*

[VI-295]

(27).—*(Act X of 1882).]* It is not an inflexible rule that where either Government on the one side or an accused on the other has a right of appeal, and does not exercise it, the powers of the High Court under s. 439 of the Code of Criminal Procedure cannot be exercised, but, in such cases, these powers should be sparingly used, and, save in very exceptional circumstances, not at all in reference to questions of fact. Where an application was made by the Local Government to the High Court for revision of an order of acquittal, under s. 439 of the Code of Criminal Procedure, nearly ten months after the Sessions trial, and upwards of twelve months after the commission of the alleged crime, and where there was, upon the face of the Judge's judgment, no error in law, and no appeal had been preferred upon a question of fact,—*held* that, under such circumstances, the Court did not feel called upon to enter into the case at large upon the merits, under a petition for revision. *EMPRESS v. ALA BAKHSI AND ANOTHER.*

[IV-206]

s. 447.—*Commitment—Court of Session—High Court—(Act X of 1872).]* Where a complaints of several offences was made against a European British subject, one of which was punishable with transportation for life, *held* that under s. 75 of Act X of 1872, the Magistrate, when committing the accused person for trial, should not have committed him to the Court of Session, but to the High Court. *EMPRESS v. THOMSON AND OTHERS.*

[I-150]

s. 466.—*Lunatic—Acquittal—(Act X of 1872).]* A person accused of an offence was found in the course of his trial to be of unsound mind. The Magistrate instead of proceeding under s. 436, Criminal Procedure Code, proceeded with the trial and finding that at the time

CRIMINAL PROCEDURE CODE, s. 476—(continued.)

of committing the offence he was of unsound mind, acquitted the accused. *Held* that the proceedings were irregular and must be set aside. *EMPRESS v. RATTI*.

[II-108]

(1). s. 476.—*Sanction under s. 195—Application for.*

See s. 195, No. (38).

(2).—*Altering order under s. 195 into one under s. 476.*

See s. 195, No. (41).

(3).—*Order under s. 643, Criminal Procedure Code—Sanction—Complaint.*

See s. 195, No. (21).

(4).—*“Committed before ... judicial proceeding.”—(Act X of 1882).* The applicant *T K* made a complaint under s. 342, Penal Code, against *B* and another in the Court of a second class Magistrate who threw it out under s. 203, Criminal Procedure Code. He further directed that as the Superintendent of Police requested that the crime be struck off the register the papers may be laid before the District Magistrate for orders. On the same day the District Magistrate passed the following order:—“The case will be struck off. A charge under s. 211, Penal Code, will be made against *T K* and *R A*. The case will be made over for trial to *A*, a Deputy Magistrate.” *Held* that if the order be taken to have been made under s. 476, Criminal Procedure Code, it was illegal as the matter was not brought under the notice of the District Magistrate “in the course of a judicial proceeding.” *THAKUR KANDU AND ANOTHER v. BILAR AND ANOTHER*.

[IV-290]

(5).—*(Act X of 1882).* *Held* that where a mortgage-deed is deposited in Court in pursuance of the procedure provided by s. 83 of Act IV of 1882, such document is neither put in evidence before the Court nor brought to the notice of the Court in the course of a judicial proceeding, so as to give the Court power to sanction, either under s. 195 or s. 476, Criminal Procedure Code, the prosecution of a person suspected by the Court of having forged such deed. *ADHAR SINGH AND OTHERS v. ABLAKH SINGH AND OTHERS*.

[XV-145]

(6).—*(Act X of 1882).* Where a District Magistrate directed the prosecution, under s. 211 of the Indian Penal Code, of a complainant, whose case had been heard and determined by a Magistrate of the first class, *held* that the order of the District Magistrate must be taken to have been made by him as head of the police in respect of an

CRIMINAL PROCEDURE CODE, s. 476—(continued.)

offence committed before a police officer, and, as such, was a good order. It could not be regarded as made under s. 476 of the Code of Criminal Procedure, that section only contemplating cases where an offence is committed before the Court passing the order, or is brought before its notice in a judicial proceeding. *QUEEN EMPRESS v. RAM KHILAWAN*.

[X-167]

(7).—*Prosecution of witness—Case sub-judice—Premature—(Act X of 1882).* In this case the Government pleader with the consent of the Sessions Judge withdrew, under s. 494, Criminal Procedure Code, from the prosecution of one *M.*, who was accordingly acquitted of murder. On the same date the Sessions Judge directed that an enquiry should be made by the Magistrate as to the guilt of six of the witnesses examined for the prosecution in that case, under ss. 193 and 194, Penal Code. Inquiries were accordingly made, the accused were committed to the Court of Sessions, were there convicted and sentenced to various terms of imprisonment. Against these convictions and sentences they appealed to the High Court. On the day for the hearing of these appeals the order of the Sessions Judge in the case, *Empress v. Madho (W. N. 1885, p. 94)* was set aside and a re-trial ordered on the ground that a Government pleader had not the power of a public prosecutor with regard to withdrawal under s. 494, Criminal Procedure Code. *Held* that under these circumstances the Sessions Judge's orders with regard to the present appellants were premature and should be quashed. *EMPRESS v. BENI*.

[VI-94]

(8).—*Preliminary enquiry—(Act X of 1872).* When a Magistrate takes action under s. 476 of the Code of Criminal Procedure it is not necessary to the validity of his order that he should hold a preliminary inquiry. *Baperam Surma v. Gouri Nath Dutt (I. L. R., 20 Calc., 474)* followed. *QUEEN EMPRESS v. MATABADAL*.

[XIII-146]

EMPRESS v. JUALA PRASAD AND ANOTHER.

[II-165]

Per contra

PETITION OF RAMESHAR.

[II-229]

(9).—*Dismissal of complaint under s. 203—Prosecution—(Act X of 1882).* Where as the result of police investigation it appears that a complaint made to the police of the commission of an offence punishable under the Indian Penal Code is false, it is not necessary that the complainant should be given any further opportunity of establishing the truth of his allegations before his prosecution under s. 182

CRIMINAL PROCEDURE CODE,

s. 476—(continued.)

of the Indian Penal Code is ordered. **QUEEN EMPRESS v. RAGHU TIWARI.**

[XIII-111]

See also

EMPRESS v. GANGA RAM AND ANOTHER.

[V-323]

(10).—*High Court's power of revision—(Act X of 1882).* Under the general revisional powers conferred by s. 439, Criminal Procedure Code, a High Court has power to consider the propriety of an order which purports to be passed under s. 476, Criminal Procedure Code. *Queen Empress v. Rachappa (I. L. R., 13 Bom., 109)* dissented from. **IN THE MATTER OF THE PETITION OF MATHURA DAS.**

[XIV-9]

PETITION OF RAMESHAR.

[II-229]

IN THE MATTER OF THE PETITION OF SARJU UPADHIA.

[XVII-64]

(1). s. 477—*"In the course of judicial proceeding"—Sessions case—(Act X of 1872).* A brought a suit against B in the Munsif's Court to have a bond purporting to have been executed by A in favor of B set aside as a forgery and obtained a decree. He then preferred a complaint in the Criminal Court charging B with forgery. The Magistrate, after making a preliminary inquiry, committed B to the Court of Session. The Sessions Judge, after taking the evidence for the prosecution, proceeded under s. 251, Criminal Procedure Code, and recorded a finding acquitting the accused. He also made the following observations in his judgment:—"The complainant A has perjured himself on more than one point.....I therefore order that he be committed to this Court under s. 471, Criminal Procedure Code." In revision it was held (i) that the order of the Sessions Judge was "a judicial proceeding" within the meaning of s. 297, Criminal Procedure Code, therefore open to revision (ii) that the order of Sessions Judge was bad as no preliminary inquiry was held as is contemplated by s. 471 as well as the Sessions Judge has not specified the points on which in his opinion, the petitioner has committed perjury, also that the order was made under s. 472, Criminal Procedure Code, which does not authorize the Court of Session to proceed in regard to offences not exclusively triable by the Court of Sessions. **PETITION OF RAMESHAR.**

[II-229]

(2).—*(Act X of 1872).* A man died leaving some money due to him in the hands of the telegraph authorities. P

CRIMINAL PROCEDURE CODE,

s. 477—(continued.)

wrote a letter to those authorities, claiming the money as the sole heir of the deceased. This letter was sent to the District Judge for verification and orders. P supported his claim before the Judge by the evidence on oath of C. C's evidence being, in the opinion of the District Judge, false, the District Judge, in his capacity as Sessions Judge, tried him for giving false evidence, and convicted him of that offence. **Held** that the District Judge had no jurisdiction under s. 477, Criminal Procedure Code, to try C. **EMPRESS v. CHAIT RAM.**

[III-227]

s. 480—*"Before the rising of the Court"—Irregularity—(Act X of 1882).* The procedure laid down in s. 480, Criminal Procedure Code, should be strictly followed. The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under s. 480. Where a Magistrate in whose presence a contempt was committed, took cognizance of the offence immediately, but, in order to give the accused an opportunity of showing cause, postponed his final order for some days. **Held** that such action, though it might be irregular, was not illegal, and as the accused had not been in any way prejudiced, was covered by s. 537, Criminal Procedure Code. **Held** also that, under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone his final order until the accused had had an opportunity of showing cause against it, and that he should have directed the detention of the accused, and dealt with the matter at once or before his rising. **EMPRESS v. FAIMBAR BAKHSI.**

[IX-128]

(1). s. 487—*"Try"—Appeal—(Act X of 1872).* **Held** that the expression "try" in s. 473, Criminal Procedure Code, corresponding with s. 487 of the present Code, does not apply to appeals and that it is competent for a Sessions Judge in appeal to hear a case which as an original Court he could not. **EMPRESS v. HARDIAL.**

[II-86]

(2).—*"Offence referred.....proceeding"—Sessions Judge—Sanction to prosecute—Appeal—(Act X of 1882).* A Court of Session is not precluded from hearing an appeal from a conviction for the sole reason that such Court has itself granted sanction for the prosecution of the appellant for the offence of which he has been convicted. **QUEEN EMPRESS v. UDE RAM.**

[XV-225]

(3).—*Order to prosecute—Trial—(Act X of 1882).* A Sessions Judge who has directed the trial of a

CRIMINAL PROCEDURE CODE,
s. 487—(continued.)

person for the offence of giving false evidence committed in the course of a judicial proceeding of a criminal nature before him cannot try the case himself. *Empress v. Ganga Din* (Weekly Notes, 1887, p. 139) distinguished. *QUEEN EMPRESS v. MAKHDUM.*

[XII-32]

(4). ———— *Secretary, Municipal Board—Joint Magistrate—(Act X of 1882).* The accused was a Municipal Muharrir. The Municipal Committee resolved to institute criminal proceeding against the accused and directed the Secretary (Joint Magistrate) to take the necessary steps. A copy of the resolution of the committee was forwarded by the Secretary to the Joint Magistrate who took proceedings accordingly and tried the accused himself. Held that the trial was not only illegal but a mere show. *EMPRESS v. BASANT RAI.*

[III-181]

(5). ———— *Order under s. 133—Trial for disobedience—(Act X of 1882).* Held that a Magistrate who makes an order under s. 133, Criminal Procedure Code, for the removal of a nuisance, can not himself try and convict the person to whom such order was directed and who has disobeyed it. *EMPRESS v. HIRALAL.*

[III-222]

(6). ———— *District Registrar—Session Judge—(Act X of 1882).* Held that where a District and Sessions Judge had in his capacity of District Registrar sanctioned the prosecution of a person for an offence under s. 82 of the Indian Registration Act committed before a Sub-Registrar, he was not thereby disabled from trying such person for such offence. The facts of this case sufficiently appear from the judgment of Aikman, J. *QUEEN EMPRESS v. KHOJI RAM.*

[XVI-181]

(7). *Disability of Judge to try certain offence.]*

See s. 556.

(1). s. 488 (1)—“*Wife*”—*Divorce—Iddat—(Act X of 1882).* Held that an order for maintenance of a Muhammadan wife under s. 488, Criminal Procedure Code, which was passed more than three months and thirteen days after a divorce by words which had not been repeated three times, was illegal. *EMPRESS v. MURAD.*

[VIII-116]

(2). ———— “*Means*”—(Act X of 1872).] Held that before an order is passed under s. 536 of Act X of 1872, directing a husband to make his wife a monthly allowance, it should be proved that the husband has sufficient

CRIMINAL PROCEDURE CODE,
s. 488—(continued.)

means to make the allowance. *PAYAGI v. DUDHNATH.*

[II-179]

(3). ———— *Amount of maintenance—Enquiry as to means—(Act X of 1882).* In this case P had been directed by the Magistrate under s. 488, Criminal Procedure Code, to pay his wife a sum of Rs. 5 a month as maintenance. Held that as the Magistrate's enquiry was defective in that he had not taken evidence as to the means and the case has not been carefully recorded, his proceedings must be set aside. *PARASRAM v. DURGA.*

[III-233]

(4). ———— *Means—Of wife—(Act X of 1882).* Held that in ordering a monthly allowance by a husband who had deserted his wife, the wife's means of earning money should not be taken into consideration. *GHURBIN v. GOBINDI.*

[VII-107]

(5). s. 488 (3)—*Cumulative sentence—(Act X of 1882).* Held that s. 488, Criminal Procedure Code, contemplates but one warrant and one punishment, and does not contemplate a cumulative warrant and cumulative punishment where default is made for more than one month. That the maximum amount of punishment is one month and may be of either kind. *EMPRESS v. NARAIN.*

[VII-54]

(6). ———— “*After execution of warrant*”—*Imprisonment—(Act X of 1872).* A husband was ordered to make his wife a monthly allowance for her maintenance. The wife subsequently complained to the Magistrate that the allowance had not been paid. The husband was summoned, and appeared, and paid the arrears into Court. The Magistrate, under s. 536 of Act X of 1872, convicted him of wilfully neglecting to pay the allowance and directed him to be imprisoned for a certain term. The case was submitted by the Sessions Judge to the High Court for orders. Held that the Magistrate could not, under s. 536 of Act X of 1872, order imprisonment unless he was compelled to issue a warrant for the levy of the amount due. *EMPRESS v. MUSTAFA.*

[I-19]

(7). ———— “*Proviso—“Cruelty”*”—(Act X of 1882).] The word “cruelty” in s. 488 of the Criminal Procedure Code is not necessarily limited to personal violence. *Kelly v. Kelly (L. R., 2 P. D., 59)* and *Tomkins v. Tomkins* referred to. *RUKMIN v. PEARE LAL.*

[IX-162]

(8). s. 488 (4)—“*Living in adultery*”—*Condemnation by panchayat—(Act X of 1872).* In this case an application by a Hindu wife for

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s. 488—(continued.)

maintenance under s. 536 of Act X of 1872, was dismissed by the Magistrate on the ground that a *punchayat* of the brotherhood had condemned her and that under the circumstances the husband was not bound under the Hindu law to maintain her. *Held* that the reasons given were not sufficient for dismissing the application. The Magistrate should have enquired and ascertained whether or not the wife was living in adultery and other questions mentioned in the section. *PETITION OF KASHI SHEODIALA.*

[I-62]

(9). ————— (Act X of 1872).] One *T* applied to the Magistrate that her husband might be ordered to make her a monthly allowance as he refused to maintain her. The husband admitted that his wife was not living in adultery, but wished to prove that her child was the result of an intimacy with another man. The wife was willing to live with her husband. The Magistrate held that the only ground which would disentitle the wife, under s. 536 of Act X of 1872, to receive an allowance would be "her living in adultery," and that, even if the husband could make out that the child was illegitimate that would not be sufficient to disentitle his wife to receive an allowance, as it did not amount to "living in adultery" as required by that section. The Magistrate accordingly ordered the husband to pay his wife a monthly allowance of Rs. 5. The Court declined to interfere, observing that it was not aware of any provision of Hindu law for the divorce of a wife. *EMPRESS v. NANDAN.*

[I-37]

(10). ————— (Act X of 1872).] One *B* applied to the Magistrate for an order directing her husband, *D*, a Hindu, to make her a monthly allowance for her maintenance. It appeared that *D* had refused to maintain his wife because she had given birth to a child of which he alleged that he was not the father. Co-habitation had taken place. It also appeared that his wife was living with her father, and was not living in adultery, and that she was willing to live with her husband. Under these circumstances the Magistrate made an order directing *D* to make his wife a monthly allowance. The Court observed that, failing proof that the wife was now living in adultery, or refused to live with her husband, facts whereof there was not a word of evidence, the Magistrate's order was proper. *EMPRESS v. DAULAT.*

[I-113]

(11). ————— *Wife returning to husband—Effect of—* (Act X of 1882).] In this case the petitioner *P K*, after she had obtained an order against her husband in 1881 under s. 488, Criminal Procedure Code, directing him to pay her Rs. 2 *per mensem* for maintenance and caused it to be executed several times, returned to live

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s. 488—(continued.)

with her husband. On her being again turned out by the husband she instituted the present proceedings for the payment of the arrears of her maintenance for certain months under the previous order. *Held* (in revision) that inasmuch as the woman returned voluntarily to live with her husband the order of 1881 became ineffectual as to the future. The woman should have instituted formal proceedings again under Chapter XXXVI of the Code. *PHUL KALI v. HARNAM.*

[VIII-217]

(12). s. 488 (5)—*Adultery—Evidence of—* (Act X of 1882).] In an application for cancellation of an order under s. 488 of the Code of Criminal Procedure on the ground of adultery, the evidence placed before the Court on behalf of the applicant was as follows:—Out of nine witnesses three disowned all or any knowledge of the misconduct imputed to the applicant's wife. Of the remaining six one said that he considered applicant's wife an adulteress, because she went continually to the bazaar. The other witnesses considered her adulteress because men went to the house where she lived. It was, however, in evidence that other people, including applicant's wife's mother, lived in the same house. *Held* that this evidence was absolutely insufficient to afford any reason for cancelling the order for maintenance on the ground alleged. *SHYAMA v. MADHO.*

[XIII-56]

(13). s. 488 (7)—*Accused a competent witness—* (Act X of 1882).] A person against whom an order for maintenance under s. 488 of the Code of Criminal Procedure is sought, is a competent witness on his own behalf in such proceedings. *HIRA LAL v. SAHEB JAN.*

[XV-242]

(14). s. 488 (9)—*Venue—* (Act X of 1882).] Where a wife after a temporary absence from her husband on a visit found on her return that he was living with another woman and thereupon left him and went to live in a different district and in that district applied for an order for maintenance against her husband. *Held* that the wife being justified in refusing to live with her husband and in choosing her own place of residence the neglect of her husband to maintain her was an offence within the jurisdiction of the appropriate Court at the place where the wife resided. *In re the petition of Shaik Fakrudin* (I. L. R., 9 Bom., 40) distinguished. *In the matter of the petition of W. B. Todd* (5 N. W. P., H. C. Rep., p. 237) followed. *IN THE MATTER OF THE PETITION OF MARY DECASTRO.*

[XI-115]

(15). ————— (Act X of 1882).] An application by a wife against her husband for maintenance under s. 488 of the Code of Crimi-

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s. 488—(continued.)

nal Procedure must be made in the district in which the husband is at the time residing. *In re the petition of Shaik Fakrudin* (I. L. R., 9 Bom., 40) followed. *DULARIA v. RAM CHARAN*.

[XIV-153]

(16).—*Decree of Civil Court superseding order—(Act X of 1882).* An order for the maintenance of a wife duly made under s. 488 of the Code of Criminal Procedure cannot be superseded by a declaratory decree of a Civil Court to the effect that the wife in whose favor such order has been made has no right to maintenance. *Subad Domni v. Katiraur Dome* (20 W. R. Cr. 58) referred to. *SUBHUDRA AND ANOTHER v. BASDEO DUBE*.

[XV-147]

s. 489.—“*Change in the circumstances—Temporary change—(Act X of 1882).*” The power given by s. 489 of the Code of Criminal Procedure to alter the amount payable by a person against whom an order under s. 488 has been passed on proof of “a change in the circumstances,” of such person is not intended to be exercised on account of a merely temporary and accidental change in one of such circumstances but is exercisable only on proof of a change in all. *RUKMINI v. PIARI LAL*.

[XI-32]

(1). s. 490—*Enforcement of order—Plea of divorce—(Act X of 1882).* Where a person in whose favor an order under s. 488 of the Code of Criminal Procedure has been made takes that order before a Magistrate, and the Magistrate finds that he has jurisdiction owing to the residence of the person affected by the order, and is satisfied as to the identity of the parties and the non-payment of the allowance due, it is his duty to enforce the order for maintenance. It is no part of the duty of a Magistrate on such an application as abovementioned, viz., an application under s. 490 of the Code of Criminal Procedure, to entertain a plea by the party against whom the order is sought to be enforced to the effect that he has divorced the applicant and is therefore no longer liable to pay maintenance. *Zeb-un-nissa v. Mendu Khan* (W. N. 1885, p. 25) dissented from. *MAHBUBAN v. FAKIR BAKHS*.

[XIII-63]

(2).—*Iddat—(Act X of 1882).* Where in answer to an application for enforcement of an order under s. 488 of the Code of Criminal Procedure for the maintenance of a wife the party against whom such order is subsisting pleads that he has lawfully divorced his wife and therefore the order can no longer be enforced, it is the duty of the Court hearing the application to entertain and consider such plea, and if it find the plea established, to decline to enforce the order for any period subse-

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s. 490—(continued.)

quent to the date when the marriage ceased to subsist between the parties. In such case where the parties are Muhammadans the marriage will be deemed to subsist until the expiration of the *iddat*. In s. 499 of the Code the “change in circumstances” referred to is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail a stoppage of the allowance. So held by Aikman and Blennerhassett, JJ., dissentiente Knox J. *In the matter of the petition of Din Muhammad* (I. L. R., 5 All., 226); *Abdul Rohoman v. Sakhina* (I. L. R., 5 Calc., 558); *Zeb-un-nissa v. Mendu Khan* (Weekly Notes, 1885, p. 29). *In re Kasam Pirbhai* (8 Bom., H. C. Rep., 95) referred to. *In re Abdul Ali Ismailji* (I. L. R., 7 Bom., 180); *Mahomed Abid Ali Kumar Kadar v. Ludden Sakiba* (I. L. R., 14 Calc., 276), and *Musammal Baji v. Nawab Khan* (29 Panj. Rec., 69) referred to. *Nepoor Aurul v. Furai* (10 B. L. R., App., 33) dissented from. *Mahbubun v. Fakir Bakhs* (I. L. R., 15 All., 143) overruled. *SHAH ABUL-LAIS v. ULFAT BIBI*.

[XVI-173]

PETITION OF DIN MUHAMMAD.

[II-237]

(3).—*Act X of 1882.* Held that a Muhammadan wife was entitled to maintenance up to the date of divorce, but noafter such date, not even for the terms of *iddat*. *ZEBUNNISSA v. MENDUKHAN*.

[V-29]

(4).—*Plea of adultery—Res-judicata—(Act X of 1872).*—A husband upon whom an order to make an allowance for the maintenance of his wife had been made under s. 536 of Act X of 1872, objected to the payment of the allowance on the ground that his wife was living in adultery. The Magistrate entertaining the objection disallowed it, on the ground that the charge of adultery against the wife was not established. The husband subsequently again objected to the payment of the allowance on the same ground. The Magistrate entertaining the second objection allowed it and directed the husband to discontinue paying the allowance. His order was based on proof of adultery by the wife before the date of the order of the former Magistrate. Held on the general principles of the rule of *res-judicata* that the second Magistrate was wrong in law in re-opening matter already adjudicated upon, and his order directing the discontinuance of the allowance on the ground of facts antecedent to the former Magistrate's order must be held to be illegal. *LARAITI v. RAMDIAL*.

[II-240]

CRIMINAL PROCEDURE CODE.**s. 490—(continued.)**

(5).—(Act X of 1872.) *A* obtained under s. 536 of Act X of 1872 an order directing her husband, *M*, to make her a certain monthly allowance. She subsequently applied for an order awarding her certain arrears of such allowance. By way of answer *B* preferred a petition in which he stated that he has stopped the allowance because his wife refused to live with him and was living in adultery. *Held* that the allegations of the husband must be entertained and adjudicated upon. **SOHNI v. MANOHAR.**

[II-168]

s. 494—Public prosecutor appointed under s. 492 (2)—Power to withdraw—(Act X of 1882.) *Held* by the Full Bench that a person appointed by the Magistrate of the district, under s. 492 of the Criminal Procedure Code, to be public prosecutor for the purpose of a particular case tried in the Court of Session has not the power of a public prosecutor with regard to withdrawal from prosecution under s. 494. **EMPRESS v. MADHO.**

[VI-94]**s. 496—Bail.]***See* s. 55, No. (2).

s. 498—Non-bailable offence—Power of Session Court to admit to bail—(Act X of 1872.) *Held* that a Court of Session has power under s. 390 (Act X of 1872) to admit a person committed for trial for a non-bailable offence to bail. **EMPRESS v. GHULAM MOHI-UDDIN.**

[II-234]

s. 503—"Inconvenience"—Parda ladies—(Act X of 1872.) *Seemle* that in criminal cases "*pardah nashin*" women are not of right exempted from personal attendance at Court. Also that the word "*inconvenience*" in s. 330 of the Criminal Procedure Code (Act X of 1872) empowers the Courts to allow examination by commission in criminal cases where a witness, according to the manners and customs of the country ought not to appear in public. The complainant in a case of defamation, alleging that she was a "*pardahnashin*" applied to be examined by commission. *Held* that the fact that she was a complainant and not merely a witness materially altered her position as regards the question whether she ought not to be exempted from personal appearance in Court, and that, under the circumstances, she ought not to be examined by commission, but ought to attend personally to be examined in Court. Direction to the Magistrate to make such arrangements for the examination of the complainant in Court as should secure her privacy, consistent with the recording of her evidence, according to law, in the presence of the accused. Witnesses in criminal cases should not be examined by commission except in extreme cases of delay,

CRIMINAL PROCEDURE CODE.**s. 503—(continued.)**

expense, or inconvenience. *In re* PETITION OF FARIDUNNISSA.

[II-184]

(2).—"*Officer representing B. I. Government—Resident of Gwalior—Delegation of authority—(Act X of 1882.)* *Held* that the resident of Gwalior was a person to whom the provisions of s. 503 of the Code of Criminal Procedure applied and that if a commission was issued to him in accordance with law he was bound to execute such commission and could not delegate his functions as Commissioner. **QUEEN EMPRESS v. MAHPAL SINGH.**

[XVI-106]

(1). **s. 509—"A Magistrate"—Magistrate inquiring into the case—(Act X of 1882.)** It is not necessary that the evidence of a medical witness in a criminal case should be taken before the Magistrate who is inquiring into the case. **QUEEN EMPRESS v. DURGA.**

[XIII-180]

(2).—"*In the presence of the accused—Presumption—(Act X of 1882.)* In the course of a Sessions trial before the High Court it appeared that the Assistant Surgeon was not summoned and was therefore not present for the purpose of giving evidence. The public prosecutor therefore tendered in evidence under s. 509 of the Criminal Procedure Code the deposition of the Assistant Surgeon which had been taken by the Magistrate which was signed by the Assistant Surgeon and the Committing Magistrate. The record contained no statement to the effect that it had been taken and signed in the presence of the prisoners, nor was any evidence forthcoming to prove this. *Held* that it was inadmissible notwithstanding s. 114, illustration (e), of the Evidence Act. **EMPRESS v. RIDING AND OTHERS.**

[VII-228]

(3).—(Act X of 1882.) Although all depositions of witnesses in criminal cases should be taken and attested in the presence of the accused, and a few apt words should be used on the face of the deposition to make it apparent that this has been done, there is no provision of the law which makes the attestation of the deposition by the Court in the presence of the accused obligatory. Section 80 of the Evidence Act therefore does not warrant the presumption that the deposition of a medical witness taken by a Committing Magistrate has been taken and attested in the accused's presence, so as to make such deposition admissible in the evidence at the trial before the Court of Session under s. 509 of the Criminal Procedure Code. *Queen Empress v. Riding (I. L. R., 9 All., 720)* referred to. **EMPRESS v. POHP SINGH AND ANOTHER.**

[VIII-11]

CRIMINAL PROCEDURE CODE, s. 509—(continued.)

(4).—*Private communication with medical witness—Legality—(Act X of 1882).*] In a trial for murder, in which the soundness of he accused's mind was a matter in issue, the Sessions Judge, after closing the case in open Court and taking the opinions of the assessors, reserved judgment, and, being of opinion that no sufficient motive for the murder had been shown, held interviews with and received a letter from the Civil Surgeon as to the mental condition of the accused. Subsequently he wrote a judgment convicting and sentencing the accused, but, having left the place where the trial had been, sent his judgment to be delivered and sentence passed by the Magistrate of the district. *Held* that the action of the Judge in discussing the condition of the accused's mind with the Civil Surgeon out of Court and after taking the opinions of the assessors, was illegal; and that if he desired further information from the Civil Surgeon, he should have adjourned the case for that gentleman's attendance and examination on oath like any other witness before the assessors and had his evidence duly recorded; and that such illegality had prejudiced the accused, who had no opportunity of putting questions to the Civil Surgeon. *QUEEN EMPRESS v. JIA LAL.*

[IX-181]

s. 511—*Previous conviction—How proved—(Act X of 1872).*] *Held* that where an accused person denies the fact of previous conviction the certificate extract from the records of the Court in which he was convicted should be put in evidence; proof should be given that he and the person named therein are one and the same and the Court should record a separate finding on the point. *EMPRESS v. MUNDAR.*

[I-144]

(1). s. 512—*Record of evidence in absence of accused—Admissibility—(Act X of 1882).*] S. 512 of the Criminal Procedure must be construed strictly, and must be interpreted as giving a Court jurisdiction to take depositions in the absence of the accused only in cases where it has been proved to its satisfaction (i) that the accused has absconded, and (ii) that there is no immediate prospect of arresting him. These facts must be proved by evidence, and not merely by the report of the police, unless that report is given in the shape of evidence before the Court. Where a Magistrate, professing to act under s. 512, recorded a deposition without proof that the accused had absconded, and that there was no immediate prospect of arresting him, *held* that the proceeding was not a "judicial proceeding" as defined by s. 4 of the Criminal Procedure Code, and that the witness could not be convicted under s. 193 of the Penal Code for giving false evidence in such proceeding. *QUEEN EMPRESS v. MAKHNI.*

[X-100]

CRIMINAL PROCEDURE CODE, s. 512—(continued.)

(2).—*(Act X of 1882).*] In 1874, five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner. *Held*, however, that, under the circumstances, the depositions given in 1874 before the Committing Magistrate, though not those given in the Court of Session, were admissible in evidence under s. 512 of the Criminal Procedure Code. *Per* Straight, J., that, under the special circumstances, the deposition taken in 1874 of the surviving witness was admissible under s. 157 of the Evidence Act as corroboration of her evidence given at the trial of the prisoner. In cross-examination before the Court of Session, a witness stated that, when she was before the Committing Magistrate, that officer, addressing her, said:—"Recollect, or I will send you into custody." *Held* that if the Magistrate did so address the witness, he exceeded his duty. *EMPRESS v. ISHRI SINGH.*

[VI-257]

s. 514—*Forfeiture of bond—(Act X of 1882).*] *Held* that where a bail bond executed by a surety and a bond executed by the prisoner himself under s. 426, Criminal Procedure Code, were not in the form prescribed by the High Court, but on the other hand were defective in some very material points, a forfeiture ordered by the Magistrate on the non-appearance of the prisoner was illegal and must be set aside. *IN THE MATTER OF THE PETITION OF CHATTAR SINGH.*

[V-44]

(1). s. 517—*Disposal of property—Restoration of stolen property—(Act X of 1882).*] One KR was convicted by a Magistrate of the dishonest receipt of certain stolen bangles, and the bangles were on the same day ordered

CRIMINAL PROCEDURE CODE.

s. 517—(continued.)

to be restored to the owner. On appeal *KR* was acquitted, the Court finding that, although the appellant "had clearly displayed the most gross want of common caution in buying such articles of a comparative stranger," it was not proved that he knew or had reason to believe, that the bangles were stolen. The appellant then applied for a restoration of the property to him. *Held* that under the circumstances above stated the Court was right in refusing the application and leaving the applicant to his remedy in a Civil Court. *KHAIRATI RAM v. BUDHU.*

[XIII-61]

(2).—*Destruction of obscene books—(Act X of 1872).* At the conclusion of the trial of a person for the sale and distribution of obscene books the Court trying him ordered the destruction of certain copies of such books, voluntarily surrendered by him, under s. 418, Criminal Procedure Code. *Held* that such Court was not empowered by that section to make such an order. *EMPRESS v. INDARMAN.*

[I-94]

(3).—*Restoration of stolen property—Appeal—Revision—(Act X of 1882).* Certain persons were convicted by a Magistrate of the offence punishable under s. 411, Penal Code, and some property found in their possession was ordered to be delivered to the complainant. Before that order was carried out the convicts appealed to the Sessions Judge, who acquitted them and ordered the property in question to be restored to them. *Held* that the order of the Sessions Judge as to the restoration of the property was not an order under s. 517 of the Code of Criminal Procedure, but was an order under s. 520 of that Code, and was a correct and legal order. *Held* also that the remedy against such an order made by an appellate Court was by a petition for revision and not by way of appeal. *In re Annapurna Bai (J. L. R., 1 Bom., 630).* *In the matter of Basudeb Surma Gossain (J. L. R., 14 Cal., 834); Queen Empress v. Bachhi Lal (W. N., 1896, p. 56); and Abadi Begam v. Ali Husen (W. N., 1897, p. 26)* referred to. *DEBI PRASAD v. PURAN AND OTHERS.*

[XVIII-40]

(4).—*Power of High Court—(Act X of 1882).* *Held* that where a Magistrate had, after the acquittal of certain persons on a charge of theft, made an illegal order for the restoration of the property alleged to have been the subject of the theft to the complainant, the High Court had no power to interfere with the possession of such property, further than by quashing the Magistrate's order, leaving the parties concerned to their remedy, if any, by a civil suit. *In re Annapurnabai (J. L. R., 1*

CRIMINAL PROCEDURE CODE.

s. 517—(continued.)

Bom., 630) followed. *QUEEN EMPRESS v. BACHHI LAL.*

[XVI-56]

s. 518.—*Return of stolen property to Magistrate—Directions—(Act X of 1882).* *A B* charged *A H* with the theft from her of certain notes. *A H* was convicted and the Court ordered the notes to be made over to *A B*. The notes were made over, but before the time limited for appeal had expired. *A H* appealed, and was acquitted. In the course of the appeal the appellate Court sent for the notes and obtained possession of some of them through the Magistrate, to whom they were voluntarily handed over by *A B*. Subsequently the appellate Court returned the notes to the Magistrate with instructions that they were to be disposed of as unclaimed property. *Held* that this latter order was wrong. The Judge should have simply returned the notes to the Magistrate by whom they might have been handed over to the person from whom he obtained them. *ABADI BEGAM v. ALI HUSEN.*

[XVII-26]

s. 519.—*Restoration of stolen property to innocent purchasers—(Act X of 1882).* A Deputy Magistrate convicted two persons of dishonestly receiving two bullocks and ordered the bullocks to be made over to one *C*, to whom the convicted persons had sold them, and in whose possession they had been found. *Held* that the Magistrate's order was wrong and the bullocks should have been given to the original owner. That s. 519 of the Criminal Procedure Code was not applicable to the case. *PETITION OF KARIM BAKHSI.*

[VI-291]

s. 520.—*Order for disposal of property—Appeal—Revision.*

See s. 517, No. (3).

s. 524 (2).—*Appeal—Procedure—(Act X of 1872).* An appeal to the Court of Session from an order passed under s. 417 of Act X of 1872 by the Magistrate of the District was treated as a sort of miscellaneous application and was summarily disposed of in favour of the appellant, the claimant to the property concerned, in an ex parte manner by the Sessions Judge. Notice of the appeal was not served on the Government, nor was the procedure of Chapter XX of Act X of 1872 followed in any respect. *Held* that the appeal allowed by s. 417 is an appeal in the full sense of Chapter XX and must be governed by its provisions. *Empress v. Joggesur Mochi (J. L. R., 3 Cal., 379)* and that the order of the Sessions Judge must be set aside, as vitiated materially by irregularities which could not but have affected the merits of the case, and the appeal must be re-tried according to law. *EMPRESS v. DINDAYAL.*

[I-150]

CRIMINAL PROCEDURE CODE, —(continued.)

(1). s. 526—*Transfer—Proceedings under s. 110, Criminal Procedure Code*.]

See s. 110, No. (5).

See s. 117, No. (7).

(2). ————.]

See s. 192, No. (3).

(3). ————*Ground for transfer—Local inspection and enquiry—(Act X of 1882).*] It is not only not objectionable, but in many cases highly advisable, that a Magistrate trying a Criminal case should himself inspect the scene of the occurrence in order to understand fully the bearing of the evidence given in Court. But if he does so he should be careful not to allow any one on either side to say any thing to him which might prejudice his mind one way or the other. IN THE MATTER OF THE PETITION OF LALJI AND OTHERS.

[XVII-52

(4). ————*Bias—Apprehension of unfair trial—(Act X of 1882).*] What the Court has to consider in the case of an application under s. 526 of the Code of Criminal Procedure is not merely the question whether there has been any real bias in the mind of the presiding Magistrate against the accused, but also the further question whether accident may not have happened which, though they may be susceptible of explanation and may have happened without their being any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and the impartial trial. *Dupreyrao v. Driver (I. L. R., 23 Cal., p. 495)* followed. FARZAND ALI v. HANUMAN PRASAD.

[XVI-177

(5). ————*Summoning Magistrate as witness—(Act X of 1882).*] The mere fact that a Magistrate in whose Court a criminal case is pending is or may be summoned as a witness for the defence is not of itself a reason for the transfer of the case from the Court of such Magistrate; but it may be a reason for such Magistrate committing the case to the Court of Session instead of, in the event of a conviction, passing sentence in it himself. IN THE MATTER OF THE PETITION OF MIRZA ABDULLAH.

[XVII-17

(6). ————*(Act X of 1882).*] When a transfer is asked for on the ground that the applicant wants to call the Magistrate as a witness the application must be supported by an affidavit showing that the evidence required of the Magistrate is relevant and material. IN THE MATTER OF THE APPLICATION OF NIZAM AHMAD AND OTHERS.

[VI-257

CRIMINAL PROCEDURE CODE, s. 526—(continued.)

(7). ————*Sanction—(Act X of 1882).*] A district judge directed a prosecution to be instituted against the prisoners under s. 195, P. C. The Magistrate who investigated the matter committed them for trial to the same Sessions Judge. The prisoners applied to the High Court for an order of transfer to another Sessions Judge. *Held* that from the mere fact that the Sessions Judge had ordered the prosecution it can not be inferred that a fair and impartial trial can not be had at his Court within the meaning of s. 526. (*Obiter dictum* Edge)—Having said this I must also say that if I, as a Sessions Judge, had directed the prosecution, I would have much preferred not to be the judge to try the offence. *EMPRESS v. GANGA DIN AND OTHERS.*

[VII-189

(8). ————*Affidavit—(Act X of 1882).*] Every application to the High Court for the transfer of criminal proceedings pending in a Court subordinate to it must be supported by affidavit: the mere written statement of the counsel who appeared in the lower Court is not sufficient for the Court to act upon. *AMRITA LAL v. LACHMAN DAS.*

[XI-37

(9). ————*Application by Sessions Judge—Affidavit—(Act X of 1882).*] Where a Sessions Judge wishes the High Court to transfer a case pending before him to some other Court, his proper course is to move the Court by application supported by affidavit in the usual form. *Queen Empress v. Zahir-ud-din (I. L. R., 1 Cal., 219)* followed. *In re THE QUEEN EMPRESS v. AHMAD BAKSH.*

[XIV-154

(1). s. 528—*Applicability of s. 350 to transfer under section—(Act X of 1882).*] *Held* that section 350 did not apply to cases transferred under s. 528, Criminal Procedure Code, and that the Court to which the case is transferred should commence the whole proceedings *de novo*. *EMPRESS v. ANGNU AND OTHERS.*

[IX-130

(2). ————*Notice—Reasons—(Act X of 1872).*] In this case after the evidence of the complainant and his witnesses had been taken down by the Subordinate Magistrate, the District Magistrate, on the application of the accused without giving the complainant an opportunity of showing cause and without stating any reasons for his decision, summarily transferred the case to the Joint Magistrate. The Joint Magistrate dismissed the complaint. *Held* on an application to the High Court for the revision of the two orders that the District Magistrate unwisely and improperly exercised the discretion given to him by s. 47, Criminal Procedure Code. That order and the subsequent order of the Joint Magistrate dismissing the complaint are set aside and the

CRIMINAL PROCEDURE CODE,

s. 528—(continued.)

case restored to the file of the Subordinate Magistrate. *QUEEN EMPRESS v. FAKIR CHAND.*

[I-53]

s. 529—*Tender of pardon—Magistrate competent to tender.*

See s. 337, (No. 2).

s. 531.—*Proceeding in wrong place.*—(Act X of 1882.) A criminal appeal was presented to the Session Judge of the Bijnor-Budaon Division at Bijnor within the said Sessions Division, but was heard by the said Judge at Moradabad, at which place he was empowered to exercise civil but not criminal jurisdiction. *Held* that the trial of such appeal at Moradabad was an irregularity, but no failure of justice being shown to have been occasioned thereby, was covered by s. 531 of the Code of Criminal Procedure, and did not render the trial of the appeal a nullity. *QUEEN EMPRESS v. FAZAL AZIM.*

[XIV-195]

s. 537.—*Irregularity.*—(Act X of 1882.) At the trial of a party of Hindus for rioting, the Magistrate, instead of examining the witnesses for the prosecution, caused to be produced copies of the examination-in-chief of the same witnesses which had been recorded at a previous trial of a party of Muhammadans who were opposed to the Hindus in the same riot. These copies were read out to the witnesses, who were then cross-examined by the prisoners, and no objection to this procedure was taken on the prisoners' behalf. The accused were convicted. *Held* that although the procedure adopted by the Magistrate was irregular, the irregularity was cured by the provisions of s. 537 of the Criminal Procedure Code and of s. 167 of the Evidence Act (1 of 1872) as it was not shown that there had been any failure of justice or that the accused had been substantially prejudiced, and as the matters elicited in cross-examination were sufficient to sustain the conviction. *EMPRESS v. NAND RAM AND OTHERS.*

[VII-143]

s. 540—"At any stage"—Act X of 1882.] It is not intended by s. 540 of the Code of Criminal Procedure, 1882, that a Judge shall reverse the order of a Sessions trial and call the witnesses summoned for the defence before the case for the prosecution is closed. It is illegal on the part of a Court to threaten witnesses with the penalties of the law unless they are evidently giving wilfully false evidence or persistently refusing to give evidence of facts which must be within their knowledge. A sentence which has been passed or a direction that an accused be set at liberty which has been given at a Sessions trial before the judgment required by s. 367 of the Code of Criminal

CRIMINAL PROCEDURE CODE,

s. 540—(continued.)

Procedure, 1882, has been written, is illegal. *QUEEN EMPRESS v. HARGOBIND SINGH AND OTHERS.*

[XII-83]

ss. 545 & 547—*Fine paid to complainant—Refund.*—(Act X of 1882.) On a sentence of fine being passed it was ordered, under s. 545 of the Code of Criminal Procedure, that a portion of the fine should be paid as the compensation to the complainant, and it was so paid. Subsequently the sentence was set aside in revision by an order of the High Court which directed that the fines should be refunded. *Held* that the sum which had been paid to the complainant was recoverable under this order as part of the original fine, and that it was recoverable by process under s. 547 of the Code and not by suit in a Civil Court. *MUTSADDI AND OTHERS v. MANI RAM.*

[XVI-182]

s. 548—*Charge—Copy.*—(Act X of 1882.) A charge is not an order of a Criminal Court, within the meaning of s. 548 of the Code of Criminal Procedure, 1882. A Magistrate therefore is not bound by the provisions of the above-mentioned section to grant to an accused person under trial before him copies of the depositions of the witnesses for the Crown where the trial has not reached a more advanced stage than the recording of the evidence for the prosecution. *QUEEN EMPRESS v. PRAG SAHU AND OTHERS.*

[XII-140]

s. 556.—

See cases under s. 487.

(1). s. 556—*Interest—Appeal.*—(Act X of 1882.) The interest which might disqualify a Court from trying or committing for trial a case, having regard to s. 555 of the Code of Criminal Procedure would not prevent an appellate Court from giving the permission contemplated by that section. *QUEEN EMPRESS v. FATEH BAHADUR.*

[XVIII-11]

(2).—*Excise officer—Offence under Excise Act.*—(Act X of 1882.) *Held* that an Excise officer who had himself taken proceedings against a person accused of an offence under the Excise Act was not competent to try such person in respect of the same matter. *QUEEN EMPRESS v. RAM CHARAN AND OTHERS.*

[XVI-105]

(3).—*Joint Magistrate—Municipality.*—(Act X of 1882.) A Joint Magistrate who had been verbally authorized by a Municipal Committee to institute prosecutions under its Bye-Laws directed the prosecution of a person in respect of an infringement of one of the rules of the said Bye-Laws and himself tried the case and convicted

CRIMINAL PROCEDURE CODE, s. 556—(continued.)

the accused. *Held* that the conviction was illegal, the Magistrate being debarred by the provisions of s. 555 of the Code of Criminal Procedure from trying the case. **MUNICIPALITY OF CAWNPORE v. NANHE MAL.**

[XI-81]

(4).—*District Magistrate—Offence under Municipality Act—(Act X of 1882).*] The prisoner and his coachman were convicted by the District Magistrate of Benares of cruelly ill-treating two horses, under Ch. III, s. 10 of the Bye-Laws of the Municipality. *Held* that under s. 555, Criminal Procedure Code, the Magistrate was not competent to try the case. **MUNICIPALITY OF BENARES v. BISHEN CHAND AND ANOTHER.**

[VI-291]

(5).—*Magistrate in charge of Treasury—Offence under Stamp Act—(Act X of 1882).*] A was convicted by the Magistrate (who was also the treasury officer) under s. 69 of Act I of 1879 (Stamp Act) and fined Rs. 28. *Held* on reference by the Sessions Judge that as the sanction of the Collector was not obtained and as the Deputy Collector was disqualified from hearing the case under s. 555 of the Code of Criminal Procedure, the conviction must be quashed and fine refunded. **EMPRESS v. BEHARI LAL.**

[IV-37]

(6).—*Magistrate in charge of opium administration—Offence under Stamp Act—(Act X of 1882).*] A Magistrate in charge of the excise and opium administration of a district is not "personally interested" in the observance of the provisions of Act No. 1 of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the above mentioned Act. **IN THE MATTER OF THE PETITION OF GANESHI.**

[XIII-79]

s. 561 (2).—*Investigation by officer below Police Inspector—Irregularity—(Act X of 1882).*] *Held* that where an offence to which the provisions of s. 561 (1) (a) of the Code of Criminal Procedure applied had been taken cognizance of by a District Magistrate, the fact that the investigation into the offence had been conducted by an officer below the rank of the Police Inspector was not a material irregularity which would vitiate the subsequent proceedings. **QUEEN EMPRESS v. MEHRI.**

[XV-9]

Sch. II.—*Adultery—Sessions case—(Act X of 1882).*] This case was referred to the High Court in order that a commitment made by the Cantonment Magistrate of Cawnpore to the Sessions Judge of two persons, one under s. 497, Penal Code, for adultery and the other under ss. 488 may be set aside on the ground that those offences are not triable by a Court of Session. *Held* that though in Sch. II of Act X of

CRIMINAL PROCEDURE CODE, Sch. II—(continued.)

1882, adultery, s. 497, Penal Code, is not shown as triable by a Court of Session, this was an obvious omission and the offence is triable by a Court of Session, and the commitment was not illegal. **EMPRESS v. MANSUK AND ANOTHER.**

[VIII-235]

HINDU LAW.

- (1). Adoption.
- (2) Guardian
- (3) Joint family.
 - (i) Sale in execution of family property and rights of purchase.
 - (ii) Power to sell family property in execution.
 - (iii) Alienation.
 - (a) By Father.
 - (b) By other members.
 - (iv) Miscellaneous cases.
- (4) Maintenance.
- (5) Reversioner.
- (6) Succession.
- (7) Stridhan.
- (8) Widow.
- (9) Miscellaneous cases

(1) Adoption.

(1).—*Only son—Factum valet.*] According to the Benares School of Hindu Law, the giving in adoption of an only son is sinful, and to that extent contrary to the Hindu Law; but the adoption of such a son, having taken place in fact, is not null and void; and the *maxim quod fieri non debet factum valet* is applicable and should be applied to such an adoption. So *held* by the Full Bench. **Hanuman Tiwari v. Chirai (I. L. R., 2 All., 164)** approved and followed. **BENI PRASAD v. HARDAI BIBI AND ANOTHER.**

[XII-161]

(2).—*Sister's son.*] According to the Hindu Law, a Brahman cannot validly adopt his sister's son. *B*, a childless Hindu and a Brahman adopted *X*, his sister's son, and, subsequently apprehending that the adoption was invalid, executed a will by which he left his estate to *X*. After *B*'s death, *X* obtained possession and remained in possession of the estate till his death, which occurred before he had attained majority. After *X*'s death *P* and *S*, two widows of *B*, obtained joint possession of the estate setting up a right of inheritance from *X* as being in

HINDU LAW—Adoption.—(continued.)

the position of mothers to him in consequence of his adoption by their deceased husband. They (*S* and *P*) brought a suit for partition of the estate. *Held* that the adoption of *X* by *B*, a Brahman, was invalid, and that *P* and *S* were not entitled to succeed him as his heirs. *PARBATI v. SUNDAR.*

[V-315]

(3). ————— *Factum valet.* *Held* that the adoption of a Hindu by his maternal grand-uncle, if it took full effect and had not been questioned or impeached for a period of 20 years, must be held valid on the principle of *factum valet* so as to disentitle the person adopted from inheriting from his natural ancestors. *MATADIN AND OTHERS v. GHANSHAM SINGH AND OTHERS.*

[I-125]

(4). ————— *Sister's daughter or mother's sister's son—Factum valet.* *Held* by the Full Bench (Banerji and Aikman, J. J., dissenting) that the Hindu Law of the School of Benares does not prohibit an adoption amongst the three regenerate classes, of a sister's son, of a daughter's son, or of a son of the sister of the mother of the adopter, and consequently the *onus* of proving that such an adoption is prohibited by usage is upon him who alleges that it is illegal. The authority in the School of Benares, of the Dattaka Mimansa of Nanda Pandita considered. That Mimansa is not on questions of adoption an "infallible guide" in the School of Benares, and is not followed when it imposes on the right of adoption restrictions not to be found in the recognized authorities of the School of Benares.

Per BANERJI, J., (Aikman, J., concurring).—The adoption by a Hindu belonging to one of the three regenerate classes of his mother's sister's son is prohibited according to the Hindu Law of the Benares School. Such prohibition is not merely directory, but the adoption is absolutely interdicted and void, and can not be validated by the rule of *factum valet*. *Held*, also by Banerji, J., that the Dattaka Chandrika and the Dattaka Mimansa are works of paramount authority on questions relating to adoption as well in those parts of India which are governed by the law of the Benares School as elsewhere. *BHAGWAN SINGH v. BHAGWAN SINGH.*

[XV-167]

(5). ————— *Sister's son—Bohra Brahman.* Amongst the *Bohra Brahmans* of the northern districts of the North-Western Provinces there exists a valid and a legal custom in virtue of which a person of that caste can adopt his sister's son. *MANSA RAM AND ANOTHER v. SUNDAR AND OTHERS.*

[XI-222]

HINDU LAW—Adoption.—(continued.)

(6). ————— *Daughter's son—Kirar Thakurs.* The plaintiff brought a suit on mortgage bonds executed by one *G*, the alleged adopted son of one *KS*, in which *J*, the daughter of *KS*, and *HR*, a person claiming through her, were also impleaded as defendants. *J* contended that *G* being the daughter's son of *KS*, his adoption among the *Kirar Thakurs* was invalid and consequently the property was not liable. The first court held the adoption invalid and gave a decree personally only against *G*. The lower appellate Court decreed the claim. *Held* that an entry in the *wajib-ul-arz*, though evidence, was not conclusive, and such a custom overriding the law, as that alleged by the plaintiff-respondent must be established by strong evidence, such for instance, as instances of such adoptions, and it might be ascertained under what circumstances the entry in the *wajib-ul-arz* came to be made, and an enquiry should be made as to the antiquity of the alleged customs and the class to which the parties belong, and whether the appellant *J* is estopped from disputing the adoption by her conduct at the time mutation of names in *G's* favor took place and whether she was a party to those proceedings. The case must go back for determination of the following issues:—(i) Is there any such custom established? (ii) Is *G* estopped from disputing the adoption by her conduct at the time mutation of names in *G's* favor took place? *JAMNA AND ANOTHER v. KARAM CHAND.*

[VII-29]

(7). ————— *Power of widow to adopt.* The widow of a separated Hindu made an adoption to her deceased husband under a power to adopt conferred upon her by her husband's will. The deed by which the adoption, the validity of which was not disputed was evidenced, contained, amongst others, the following conditions:—"That during my (*i. e.*, the adoptive mother's) life-time I shall be the owner and manager of the estate and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukerjee born of me." *Held* that these words conferred upon the widow an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made, so far as her position as manager was concerned. *KALI DAS v. JANI BIJAI SHANKAR AND ANOTHER.*

[XI-144]

(8). ————— *Jains—Right of adopted son.* In a suit to which the parties were Jains, and in which the plaintiff claimed a declaration that he was adopted by the defendant to her deceased husband, and that as such adopted son he was entitled to all the property left by her deceased husband, it was found that subsequent

HINDU LAW—Adoption.—(continued.)

(12). —————.] *Held*
that the mother and guardian of a Hindu minor,
although she is not a guardian appointed under

HINDU LAW—Guardian—(continued.)

Act XL of 1858, may when acting *bona-fide* and under the pressure of necessity, sell the minor's real estate to pay ancestral debts or to provide for his maintenance. S. 2 of Act XL of 1858 does not preclude the natural and legal guardian of a Hindu minor from dealing with the minor's property within the limits allowed by the Hindu Law, unless he has obtained a certificate of administration from the Civil Court. *Heit Singh v. Thakoor Singh* (All. H. C. Rep., 1872 p. 57) followed. **NANDAN SINGH AND OTHERS v. HARKISHEN SINGH.**

[I-21]

BHIM SINGH v. LUCHHO AND OTHERS.

[II-70]

(13). —————.] A Hindu mother, in order to raise her son's *quota* of certain mortgage-debt, acting as his guardian under Hindu Law, but without obtaining a certificate under Act XL of 1858, sold a portion of his share. The son, on attaining his age of majority, sued to set aside the sale. *Held* that the sale made by her was not invalid inasmuch as it was made for the son's benefit. **BHIM SINGH v. LUCHHO AND OTHERS.**

[II-70]

NANDAN SINGH AND OTHERS v. HARKISHEN SINGH.

[I-21]

(14). —————.] *Power to represent.* *Held* that a *bona-fide* auction sale held in execution of a decree (not open to any objections on the face of it) passed against a Hindu daughter, at that time in possession by inheritance, and against her minor sons, who were represented by her and which decree charged the property, cannot be assailed at the instance of the sons when they came of age, whether or not it be that their mother exceeded her power when she hypothecated the property. **LAKHMI CHAND AND OTHERS v. BHOPAL AND ANOTHER.**

[III-78]

(3) Joint family.

- (i) Sale in execution of family property and rights of purchaser.
- (ii) Power to sell family property in execution.
- (iii) Alienation.
 - (a) By father.
 - (b) By other members.
- (iv) Miscellaneous case.
 - (i) Sale in execution of family property and rights of purchaser.
- (15).—*Decree against father—Son's interest.*]

HINDU LAW—Joint family.—(continued.)

A certain house was put up for sale in the execution of a decree for money against one *KL* and was purchased by the appellant. The respondent, the son of *KL*, sued the appellant for a moiety of the house, alleging that it was ancestral property, that according to the *Mitakshara* law he was entitled to a moiety of it, and that the appellant had purchased only the rights and interests of his father, and not the rights and interests of the respondent. The appellant set up as a defence to the suit that the house had been put up for sale in satisfaction of a debt which the respondent's father had contracted on behalf of his family for necessary purposes, with his son's knowledge and the respondent was himself liable for the debt, and consequently his rights and interests had passed under the sale to the appellants. The lower Courts, having regard to *Deendyal Lal v. Jugdeop Narain Singh* (I. L. R., 1 Cal., 198) decided the case in favor of the respondent, on the ground that the respondent's father was not a party to the suit, in which the decree against his father had been made, and the appellant, as an auction purchaser, at the sale in the execution of that decree, could not acquire more than the respondent's father's right, title, and interest, whatever might have been the nature of the debt for which the decree was made. The appellant appealed to the High Court. The High Court remanded the case for the trial of the issue,—“whether *KL* was acting on behalf of the family when he contracted the debt?” **GANESHI LAL v. GOKUL CHAND.**

[I-8]

(16). —————.] When a member of a joint Hindu family is sued for a family debt it may be assumed that he is sued for the same as the representative of the family; and when the decree in such a suit is substantially one in respect of the family debt and against the representatives of the family, such decree may properly be executed against the family property. *Held* therefore (Straight, J., dissenting) where the father of a joint Hindu family, as the representative of the family, borrowed money for family purposes, hypothecating family property for the repayment of such money, and in a suit to recover such money by the sale of such property and other family property, a decree was made against him directing the sale of the hypothecated property and such other property, and such properties were sold in execution of such decree, that, having regard to these facts, it was reasonable to hold that the father was sued as the representative of the family, and such decree was made against him in that capacity and was so executed against him, and consequently his sons were not entitled to recover their legal shares of such properties from the auction-purchaser. **Bissessur Lal Sahoo v. Luchmessur Singh**

HINDU LAW—Joint family.—(continued.)

(5 *Calc.*, *L. R.*, 477; *L. R.* 6 *Ind. App.* 233) followed. *Deendyal Lal v. Jugdeep Narain Singh* (1 *L. R.*, 3 *Calc.*, 198) distinguished.

Per STRAIGHT, J.—That, the father alone having been a party to such suit and the sons not having been parties thereto either personally or by a formally constituted representative and such decree being against the father alone, the rights and interest of the sons in the family properties were not affected by the sale of such properties in execution of such decree, and the sons were entitled to recover their legal shares of such properties from the auction purchaser. *Deendyal Lal v. Jugdeep Narain Singh* (1 *L. R.*, 3 *Calc.*, 198) followed. *RAM NARAIN LAL AND OTHERS v. BHAWANI PRASAD.*

[I-11]

(17). —————.] Certain ancestral property was sold in execution of a decree for arrears of rent, passed against the father of the plaintiff, a Hindu. This suit was brought by the plaintiff against the auction purchaser to recover his share in the property sold. It appeared that what had been sold was the rights and interests of the father and that the son had not been a partner with the father or interested in the lease the arrears of rent were due under. *Held* that under the circumstances there were no grounds for concluding that the son's rights and interests were sold. *SHADI LAL v. GOPI NATH.*

[I-39]

(18). —————.] *N*, a member of a joint Hindu family, consisting of himself, his wife and his minor son, *L*, managed the joint family business, which was carried on under the style of "Atma Ram Anokhe Lal." As manager of such business he contracted certain debts for which he was sued as the "proprietor" and of the firm of "Atma Ram Anokhe Lal" and for which decrees were passed against him, in execution of which ancestral property of the family was sold. *L*, his minor son, sued to have such sale set aside, and to recover his share of such property, on the ground that such decrees had been passed against his father personally, and only his interest in such property passed by such sale. *Held* that, looking at the capacity in which *N* was sued, and the nature of the debts for which such decrees were given such decrees must be taken to have been passed against *N*, as the managing head of the family, and *L* was therefore not entitled to recover his share of such property. *PHULCHAND v. LACHMIN CHAND.*

[II-123]

(19). —————.] One *K*, the father of a joint undivided Hindu family, purchased on behalf of the family, out of family funds, the equity of redemption of certain proper-

HINDU LAW—Joint family.—(continued.)

ty. The mortgagee thereof brought a suit against *K*, for the sale of the property. *K* defended the suit, and a decree was given against him with costs. On *A*'s failure to pay these costs certain ancestral property belonging to the family was attached and sold. The sons of *K* then brought this suit against *K* and the purchaser of the property, alleging that they were not bound by their father's act. *Held* that as the costs were incurred for family purposes they were bound and the suit must be dismissed. *LALA RAM v. NARAIN SINGH AND ANOTHER.*

[III-201]

(20). —————.] The plaintiff purchased certain house at an auction-sale held in execution of a decree against the father of a joint Hindu family, and has brought the suit against the sons for the establishment of his right to and possession of the whole house purchased by him. The sons were not parties to the former suit and it appeared from the proceeding in execution of the decree that the rights and interests of the father alone were put up for sale. *Held* that it lay on the plaintiff to show that the interests of the family passed under the sale, and that in this case the execution proceedings appeared to be distinct on the point and the Court was not called upon to go behind them. *NILAMBAR SAHAI AND OTHERS v. JUGAL KISHORE.*

[I-170]

(21). —————.] The question in this suit was as to the extent of the property purchased by the plaintiff. The plaintiff had purchased at auction the rights and interests of *B* and *C* in execution of a decree to which the sons of *B* and *C* were not parties; they were not made defendants even in the present suit. The plaintiff did not contend in his plaint that the debt was a joint family debt. *Held* that under the circumstances the Court could not in second appeal interfere in the matters on the ground that the debt was a joint family debt for which the family property was liable. *MIR KHAN v. GULAB AND OTHERS.*

[I-30]

(22). —————.] This was a suit by a Hindu son to set aside the sale of certain ancestral immoveable property, sold in execution of a personal simple money decree, against the father, on the allegation that the property was his half share of the ancestral property. The father had stood security for the payment of certain money borrowed by one *P K* from *CR*. *CR* sued the father for the money and obtained the decree in execution of which the property in dispute was sold. *Held* that what was sold was the rights and interests of the father. The plaintiff's rights and interests were not and could not be sold. The suit must

HINDU LAW-Joint family.—(continued.)

therefore be decreed. *Bissessur Lall Sahoo v. Maharaja Luchmessur Singh* (L. R., 6 I. A., 233) followed. *CHAIT RAM AND ANOTHER v. DURJAN SINGH*.

[IV-14]

(23). —————] The defendant in this suit furnished security (to keep the peace) for the plaintiff's father. The security was forfeited and the defendant had to pay it. The defendant then brought a suit against the plaintiff's father and obtained a decree in execution of which the ancestral property of both the father and son was sold and purchased by the defendant. This is a suit by the son to recover the property thus sold. *Held* that the case was governed by the ruling of their Lordships of the Privy Council in *Sunaj Bansi Koer v. Sheo Persad Singh* (I L. R., 5 Cal., 148) and that the debt was contracted for immoral purposes. *Duleep Singh v. Sree Kishoon Panday* (N.-W. P. H. C. Rep., 1872, p. 83); *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187; L. R., 1 Ind. App., 321), *Bissessur Lall Sahoo v. Luchmessur Singh* (5 Cal. L. R. 477; L. R., 6 Ind. App., 233) and *Ram Narain Lal v. Bhawani Prasad* (I. L. R., 3 All., 443), referred to.

(24). —————] One *H P.*, deceased, was indebted to the appellants in a certain sum of money, secured by the hypothecation of his interests in a certain ancestral immovable property. The appellants sued his (*HP's*) sons (the respondent and *JP*), as his legal representatives and being in possession of his assets, to recover such debt, and obtained a decree. In execution of this decree they brought to sale and purchased the interest of *HP* in the property. The respondent subsequently brought the present suit against the appellants to establish his right to one-third of the property, on the ground of its being ancestral. *Held* that he was not estopped by the previous litigation from instituting the suit. *MAKUND RAM AND OTHERS v. AJUDHIA PRASAD*.

[II-51]

(25). —————] Where the sons of a joint Hindu family are suing to set aside an auction-sale held in execution of a decree against the father so far as it might affect their interests in the family property sold, the sale certificate is good evidence of what actually passed by the sale. *Pem Singh v. Partab Singh* (*Supra* p. 49) referred to. *RAGHUBAR SINGH AND ANOTHER v. LACHMI NARAIN*.

[XII-67]

(26). —————] The plaintiff was the purchaser at an auction-sale, held in execution of a decree against the father of a joint Hindu family. The sale certificate conveyed the rights and interests of the father. The plaintiff (auction-purchaser) sought to bind the rights and interests of the son also. *Held*

HINDU LAW-Joint family.—(continued.)

that the title deed of the plaintiff, *viz.* the sale certificate conveyed to him nothing more than the rights and interests of the father. *RAGHUBAR SINGH AND ANOTHER v. LACHMI NARAIN*.

[VII-291]

(27). —————] On 1 *AS*, the ancestor of the plaintiff, borrowed a sum of Rs. 99 from the defendants and as a security for that loan hypothecated a four anna share in Bhojapore which did not really belong to him; consequently the defendants brought a suit against *AS* for the money, obtained a simple money decree, put the right, title and interests of *AS* in certain *mauzas* to sale and bought it themselves. This suit has been brought by the sons and grandsons of *AS* to have it declared that the property sold was the joint property of the plaintiffs and *AS*, and the auction-sale passed only the right, title and interest of *AS* and that their own interest was safe. The defendants contended that as *AS* was the father of the plaintiffs it must be assumed that the decree was made against him in his capacity of *karla* and therefore the plaintiffs are also bound by that decree. *Held* that as the decree was a personal one against the father alone, for a liability which must be regarded under the Hindu Law as immoral and as the sale certificate professed to convey nothing beyond the right and interest of the father, the decree does not touch the rights and interests of the sons and grandsons and they are entitled to get their claim decreed. *RAM SAHAI AND ANOTHER v. KEWAL SINGH AND OTHERS*.

[VII-221]

(28). —————] *J* purchased a 10 *biswas* share in a village and *Y* purchased a village, both of which properties were, at the time they were respectively purchased, mortgaged to secure one debt. *J* died, leaving four sons. After *J's* death *Y*, whose village had been sold in execution of a decree for the sale of the mortgaged property, sued *R*, eldest son of *J*, for rateable contribution, in respect of the debt secured by the mortgage, and he obtained a decree for Rs. 210 and costs and directing the 10 *biswas* share to be sold in satisfaction of the decretal amount. Upon attachment of the share in execution of the decree, the three younger sons of *J*, claimed $7\frac{1}{2}$ *biswas* as belonging to them, and prayed that the same might be released from attachment. This objection was disallowed as made too late, and the sale in execution of the decree took place. The sale certificate showed that the property sold was 'the rights and interests of *R* in the 10 *biswas*.' The three younger sons of *J* subsequently brought a suit to establish their right to $7\frac{1}{2}$ *biswas* out of the 10, and to set aside the sale to that extent. *Held* that the shares of the plaintiffs were unaffected by the sale and all that passed thereunder to the purchaser was the $2\frac{1}{2}$ *biswas* share

HINDU LAW—Joint Family.—(continued.)

of the judgment-debtor. The plaintiffs were not bound by the decree in a suit to which they were not parties and by a sale to which they objected and in the teeth of the terms of the sale certificate put forward to defeat them. **SUNDAR LAL AND ANOTHER v. YAKUB ALI AND OTHERS.**

[IV-117]

(29). —————.] With reference to the question whether the whole joint family property or only a share or shares thereof is liable under a decree obtained against the father of a joint Hindu family, there is no distinction between a decree on a mortgage and a simple money decree. Where there is nothing to show any limitation of liability the whole joint family property will be liable. Where in execution of a simple money decree against the head (grand-father) of a joint Hindu family it appeared that the debt in respect of which the decree was passed was a debt incurred by the grand-father in connection with certain strangers and not for family purposes, and it was not shown whether in the application for attachment and sale any specification of the exact interests which it was sought to attach was or was not given in accordance with the provisions of s. 213 of Act VIII of 1859:—*held* that there was evidence to support the finding of the lower Court that the sale did not embrace the whole of the joint family property, and that therefore the sale held under that decree did not operate to pass a title to the share of an undivided grand-son born prior to the passing of the decree in question, and that, this being so, such finding could not be disturbed in second appeal. *Pem Singh v. Pariab Singh* (*Supra* p. 49) referred to. **MUHAMMAD HUSAIN v. DIP CHAND AND OTHERS.**

[XII-53]

(30). —————.] When a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property without any limitation as to the rights and interests sold, the rights and interests of all the co-parceners are to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt incurred for immoral purposes of the kind mentioned by *Yajnavalkya*, Chapter II, s. 48, and *Manu*, Chapter VIII, *Sloka* 159, and one which it would not be their pious duty as sons to discharge. If, however, the decree, from the form of the suit, the character of the debt recovered, by it, and its terms, is to be interpreted as a decree against the father alone and personal to himself, and all that is put up and sold there-

HINDU LAW—Joint Family.—(continued.)

under in execution is his right and interest in the joint ancestral estate, then the auction purchaser acquires no more than that right and interest, *i. e.*, the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder. *Girdharee Lall v. Kantoo Lall* (14 B.L.R., 187); *Deendyal Lall v. Jugdeep Narain Singh* (I. L.R., 3 Calc., 198); *Suraj Bansi Koer v. Sheo Prasad Singh* (I. L.R., 5 Calc., 148); *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh* (5 Calc., L. R., 477); *Muttayan Chetti v. Sangili vira Pandia Chinnattambiar*, (I. L.R., 6 Mad., 1); *Hurdey Narain Sahu v. Rooder Perakash Misser* (I.L.R., 10 Calc., 626); *Nanomi Babuasin v. Modun Mohun*, decided by the Privy Council on the 18th December, 1885; *Ram Narain Lal v. Bhawani Prasad* (I. L.R., 3 All., 443); *Gaura v. Nanak Chand* (W. N., 1883, p. 194 and W. N., 1884, p. 23); *Appovir v. Rama Subba Aiyar* (11 Mad., I. A., 75); *Phul Chand v. Man Singh* (I. L.R., 4 All., 309); *Chamaili Kuar v. Ram Prasad* (I. L.R., 2 All., 267) and *Rama Nand Singh v. Gobind Singh* (I. L.R., 5 All., 348) referred to. **BASA MUL AND ANOTHER v. KOER MAHARAJ SINGH.**

[VI-58]

(31). —————*Decree against one member—Interest of others—Sale certificate.*] *NK* and *K L* in execution of a money decree which they held against *G L* and *M D*, members of a joint Hindu family, caused a house, belonging to the family, to be sold in execution of that decree and purchased it themselves. *K L* subsequently assigned his interests to *K R*. The present suit was brought by *N K* and *K R* against all the members of the joint family for possession of the house on the ground that the defendants had dispossessed them. It was contended on behalf of the members of the joint family other than *G L* and *M D* that their rights and interests were not sold to the plaintiffs. *Held* that as the decree which was obtained was one which affected the rights and interests of *G L* and *M D* only, and as the sale-certificate, (plaintiffs' title-deed) showed that what was sold were those interests and nothing else, the plaintiffs could not obtain a decree for more than the rights and interests of *G L* and *M D* in the house, no matter whether the debt was a family debt or not. *Pettachi Chettiar v. Sangili Veera Pandia Chinnattambiar* (L. R., 14. Ind., App. 88) followed. **GIRDHARI AND ANOTHER v. NAND KISHORE AND ANOTHER.**

[VIII-191]

HINDU LAW—Joint Family,—(continued.)

(ii).—Power to sell family property in execution.

(32).—*Death of Judgment-debtor—Survivorship-Attachment.* In execution of a money decree, an order was issued under s. 274 of the Civil Procedure Code, for the attachment of property which was the joint ancestral estate of the judgment-debtor and his father. A copy of this order was not fixed up in the office of the Collector of the district in which the land was situate, as required by s. 274. The sale was ordered and a day fixed for sale, but in consequence of postponements made at the judgment-debtor's request, no sale took place. In the meantime the judgment-debtor died and the decree-holder applied for execution against the father as representative of the judgment-debtor whose interest had survived to him. *Held* that the decree-holder had, by the proceedings taken in execution during the son's life-time, obtained rights over his interest which could not be defeated by his death before sale. *Suraj Bansi Koer v. Sheo Persad Singh* (L. R., 6 Ind. App. 108) followed. *Held* also that, though the defect in the manner in which the attachment was made might render the attachment ineffectual for the purpose of avoiding alienations made, the attachment was effectual against the judgment-debtor and the defect did not afford a ground for declaring the execution proceedings ineffectual. *Rai Balkishen v. Rai Sita Ram and Another.*

[V-210]

(33).—[A creditor of a father in a joint Hindu family governed by the law of the *Mitakshara*, who has obtained a simple decree for money in a suit against the father alone cannot obtain execution of that decree against the joint family property or any part of it in the hands of the son in a proceeding against the son in execution of that decree instituted after the death of the father, and not being a proceeding in continuation of an attachment of the property effected during the lifetime of the father; the proceeding in execution not being barred by the law of limitation and the son not being precluded by any estoppel from proving that the property was joint family property at the time of his father's death and is in his hands ancestral property and not assets representing what was at the time of his father's death separate property of his father. But in such a case, if the creditor desires to obtain a remedy against the ancestral property, or any part of it, in the hands of the son, he must seek that remedy in a suit against the son, in answer to which suit, when brought, the son will be entitled to prove that the suit is barred by limitation, that the debt was tainted by immorality, or any other matter that would be a defence against the son. *Suraj Bansi Koer v. Sheo Proshad Singh* (L. R., 6 I. A., 88; S.C. I. L. R.,

HINDU LAW—Joint Family,—(continued.)

5 Calc., 148); *Mussumat Nanomi Bobuasini v. Modun Mohun* (L. R. 13 I. A. 1; S. C. I. L. R., 13 Calc., 21); *Badri Prasad v. Madan Lal* (I. L. R., 15 All., 75); *Seth Chand Mal v. Durga Dei* (I. L. R., 12 All., 313); *Clegg v. Rowlands* (L. R. 3 Eq., 373); *Payne v. Parker* (L. R., 1 Ch. App. 327); *Chowdhry Wahid Ali v. Musammal Fumae* (11 B. L. R., P. C. 149; S. C. 18 W. R., 185); *Raghubar Dyal v. Hamid Jan* (I. L. R., 12 All., 73); *Sangili Virapandia Chinnahambiar v. Alwar Ayyangar* (I. L. R., 3 Mad., 42); *Karnataka Hanumantha v. Andukuri Hanumayya* (I. L. R., 5 Mad., 232); *Muthia v. Virammal* (I. L. R., 10 Mad., 283); *Ariabudra v. Dorasami* (I. L. R., 11 Mad., 413); *Venkatarama v. Senthivelu* (I. L. R., 13 Mad., 265); *Balbir Singh v. Ajudhia Prasad* (I. L. R., 9 All., 142); *Jagannath Prasad v. Sitaram* (I. L. R., 11 All., 302) and *Beni Pershad v. Parbati Koer* (I. L. R., 20 Calc., 895). *LACHHMI NARAIN AND ANOTHER v. KUNJI LAL; AND LACHHMI NARAIN AND ANOTHER v. CHOTE LAL AND OTHERS.*

[XIV-169]

SRI NEWAS SEWAK, SINGH AND OTHERS v. JAIKISHUN DAS AND OTHERS.

[XIV-203]

(34).—[A member of a joint Hindu family, left two sons, R and S. S borrowed money upon a simple bond, and, after his death, the obligee sued his widow and daughter-in-law upon the bond, obtained a decree against them, and, in execution thereof, brought to sale S's interest in the property. B, the grandson of R, thereupon sued the purchaser to recover the same, on the ground that it was the joint property of S and himself, and could not be attached and sold in satisfaction of S's debt. *Held* that on the death of S, his interest passed to the plaintiff by survivorship, and was not liable after his death to any personal debt he had incurred, inasmuch as no charge had been made on the property, and the creditor could not recover his money from the joint property after the death of S when he had not obtained judgment against S and taken out execution by attachment against him. *Suraj Bansi Koer v. Sheo Persad Singh* (I. L. R., 5 Calc., 148) and *Rai Bal Kishen v. Rai Sita Ram* (I. L. R., 7 All., 731) referred to. *BALBHADAR AND OTHERS v. BISHESHAR.*

[VI-154]

(35).—[The members of a joint Hindu family brought suits in which they respectively prayed for decrees that their respective proprietary rights in certain ancestral property might be declared, and that their interests in such property, which were about to be sold in execution of two decrees against their father, might be exempted from

HINDU LAW—Joint Family,—(continued),

such sale. One of these decrees was for enforcement of a hypothecation by the plaintiffs' father of the property in suit. It was admitted on behalf of the plaintiffs, in connection with this decree, that, although the judgment-debtor was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, *viz.*, for the purpose of an indigo factory in which the family had an interest. *Held* that the plaintiffs were not entitled to any declaration in respect of the execution proceedings under the decree for enforcement of hypothecation. The second of the decrees above referred to was a simple money decree for the principal and interest due upon a Hundi executed by the father in favor of the decree-holder. The suit terminating in that decree was brought against the father alone, and the debt was treated as his separate debt. *Held* that the creditor's remedy was to have brought his suit, if he desired to obtain a decree which he could execute against the family property and not against the father's interest only, and if he could maintain such suit, either against those members of the family against whom he desired to execute his decree, or against the father as head of the family, expressly or impliedly suing him in that capacity; but that, not having taken this course, his decree was not enforceable against the plaintiff's rights and interests in the attached property. *Muttayan Chettiar v. Sangili Virapandia Chinnatambiar* (L. R., 9 Ind. App. 128; I. L. R., 6 Mad., 1) distinguished. *Nanomi Babuasin v. Modun Mohun* (I. L. R., 13 Cal., 21) and *Basa Mal v. Maharaj Singh* (I. L. R., 8 All., 205) referred to. **BALBIR SINGH v. AJUDHIA PRASAD AND OTHERS. JOGRAJ SINGH v. AJUDHIA PRASAD AND OTHERS.**

[VI-323]

(36). ————.] Where in execution of a simple money decree obtained against the father only in a joint Hindu family in respect of a debt incurred by him personally, the decree-holders attached the whole of the joint family property, and before sale in execution took place the sons of the judgment-debtor objected to the attachment under s 278 of the Code of Civil Procedure, and, the objection having been disallowed, sued for a declaration that they were entitled to a share in the property and for its release from attachment; *held* that the plaintiffs were entitled to impeach the attachment upon the ground that it affected interests which the decree could not touch and which therefore could not be attached under it, and that they were in a position to ask to have those interests exempted from the threatened sale in execution. **KAM DAYAL AND OTHERS v. DURGA SINGH AND OTHERS.**

[X-38]

HINDU LAW—Joint Family,—(continued).

(37). ————.] The father in a joint undivided Hindu family governed by the law of the *Mitakshara* mortgaged the ancestral property of the family as security for a debt incurred by him. His son was of age at the time of the mortgage, but the mortgagee did not make the son join in the mortgage. When the mortgagee brought a suit to enforce the mortgage, he brought it against the father alone; and he obtained a decree against the father alone for the sale of the property. On the property being attached in execution of the decree, the son objected to the sale of the property, so far as his own share according to Hindu law was concerned. This objection having been disallowed, he sued the mortgagee for a declaration that such share was not liable to be sold in execution of the decree, claiming on the ground that he was not bound by the mortgage or the decree, not having joined in the mortgage, or been a party to the suit in which the decree was made and that the debt secured by the mortgage had been incurred by his father for immoral purposes. *Held* that the son was not entitled to succeed in such suit merely because, although he was of age, he was not required by the mortgagee to join in the mortgage, and was not made a party to the suit to enforce the mortgage; but that he was in the same position as he would have been had he been a minor at the time the mortgage was made and the decree was passed, and was therefore only entitled to succeed if he showed that the debt incurred by his father was incurred for immoral purposes of his own. *Held* further that inasmuch as the debt in question was incurred for necessary purposes, and as the son was aware of the mortgage and did not protest against it, but on contrary stood by and benefited thereby and as he was aware of the suit and did not apply to be made a party thereto, he was asking too late for the relief which he sought. **Ram Narain Lal v. Bhawani Prasad** (I. L. R., 3 All., 443) referred to. **PHUL CHAND AND OTHERS v. MAN SINGH.**

[II-49]

(38). ————.] The mere obtaining of a money decree against a member of a joint Hindu family without any steps being taken during his life-time to obtain attachment order or execution of the decree, does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment debtor had in the joint family property. **JAGARNATH PRASAD v. SITA RAM.**

[IX-81]

(iii) Alienation.

(a) By father.

(39). ————. *Legal necessity—Onus.*] Where a

HINDU LAW—Joint Family,—(continued.)

Hindu son is coming into Court to assail either a mortgage made by his father, or a decree passed against his father, or a sale held or threatened in execution of such decree—whether it be upon a mortgage security or in respect of a simple money debt—where there is nothing to show any limitation of the extent of interest sold or threatened with sale or charged in a security or dealt with by a decree, it rests upon him, if he seeks to escape from having his interest affected by the sale, to establish that the debt he desires to be exempted from paying was of such a character that he, as the son of a Hindu, would not be under a pious obligation to discharge it, or that his interests in the property were not covered by the mortgage or touched by the decree, or affected by the sale certificate. **BENI MADHO v. BASDEO PATAK AND OTHERS.**

[X-17]

PEM SINGH AND OTHERS v. PARTAB SINGH.

[XII-49]

(40). —————.] Held following *Suraj Bansi Koer's case* (I. L. R., 5 Calc. 148) and *Muddun Thakoor v. Kantoo Lall* (14 B. L. R., 187) that, where joint ancestral property has passed out of a joint family, either under a conveyance, executed by a father, in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of decree for the father's debt, his sons, by reason of their duty to pay their father's debt, can not recover that property unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted. But it is to be observed that this rule is limited to antecedent debts, that is to say, debts contracted before the sale or mortgage sought to be impeached by the sons, and it does not cover cases in which a sum in ready money has been paid over to the father by the vendee or mortgagee. This distinction is founded on the view that while in the one instance the vendee or a mortgagee "is not expected to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate" on the other hand, he may reasonably be expected to prove the circumstances of his own particular loan. *Hunooman Parshad Pandya's case* (6 Moo. I. A., 419) referred to. **MOHAN SINGH AND ANOTHER v. DEO NARAIN SINGH AND OTHERS.**

[VI-96]

(41). —————.] One K S, a minor, sued his father and his mortgagees for a declaration, that the mortgages executed by the father did not affect his share in the ancestral property mortgaged, on the ground that the money raised by the above mortgage

HINDU LAW—Joint Family,—(continued.)

was paid to liquidate debts which were contracted for immoral purposes. The suit was instituted by the minor through G P (maternal uncle of K S) as his guardian *ad litem*. It is shown that G P, had taken an active part in the transaction of the mortgages. Held that there was reason to believe that the plaintiff was in collusion with the father and therefore it lay on him to prove that the debts were contracted for immoral purposes, and that the mortgagees had notice that they were so contracted. *Suraj Bansi Koer v. Sheo Prasad Singh* (I. L. R., 5 Calc., 148) and *Hunooman Prasad Panday v. Manraj Koonwaree* (16 Moo. I. A. 397) followed. Held further that it was not sufficient to show that the father was very extravagant and immoral but the particular debt must be shown to have been devoted to immoral purposes. **KISHEN SAHAI v. AJUDHIA PRASAD AND OTHERS.**

[VI-73]

(42). —————.] The grandsons of one R S, members of a joint undivided Hindu family, having borrowed certain money from the plaintiffs, gave them a bond in which they hypothecated certain ancestral property. In the present suit the plaintiffs claimed the money not only from the obligors, but from their sons, alleging that the money had been borrowed for the common benefit of the family. It was not proved that the loan was raised for a legal necessity nor was it shown by the other side that the debt had been incurred for unlawful or immoral purposes. It was shown that it had been the custom of all the members of the family for the last ten years at least to manage their affairs on joint principles and more particularly to raise loans mutually pledging each other's estate and credit. Held that under the circumstances it would be unreasonable to put the creditors to strict proof that the loan was taken for legal necessity only or to scrutinize too strictly the nature of the inquiry that satisfied him as to the purposes for which the money was needed. It was sufficient that these purposes were on the surface and presumably not unnecessary or immoral. **DILA RAM AND OTHERS v. RANJIT SINGH AND OTHERS**

[I-135]

(43). —————.] Where the father of a joint Hindu family had executed a mortgage over the whole of the immoveable property of the joint family, and where, the mortgagees having obtained a decree and put an attachment on the joint family property, the minor sons sued for a declaration that the property in question could not be sold in execution of such decree, inasmuch as the debts in respect of which the mortgage was executed had been contracted for immoral purposes and were not such as they were by the Hindu Law under a pious obligation to discharge:—held that the burden of proving that the debts had been contracted for the purposes alleged lay

HINDU LAW—Joint Family,—(continued.)

on the plaintiffs. *Beni Madho v. Basdeo Patak* (I. L. R., 12 All., 99) followed. *Lal Singh v. Deo Narain Singh* (I. L. R., 8 All., 279); *Basu Mal v. Maharaj Singh* (I. L. R., 8 All., 205); *Subramanya v. Sadasiva*, (I. L. R., 8 Mad. 75); *Hanooman Persaud Panday v. Munraj Koonwaree* (6 Moo. I. A., 393) and *Bhagbat Pershad Singh v. Girja koer* (I. L. R., 15 Calc. 717) referred to. BHAWANI BAKHSH AND ANOTHER v. RAM DAT AND OTHERS.

[XI-57]

(44). —————.] *Held* that where a Hindu son comes in Court to impeach a usufructuary mortgage of his share of the ancestral estate made by his father, he must not only show that the debt, to secure which the property was mortgaged, was contracted by the father for immoral purposes, but also that the mortgagee, at the time he made the loan, knew that the debts had been so contracted. *BISHEN DAT v. TIKAM SINGH AND OTHERS.*

[II-103]

(45). —————.] Where a Hindu, a minor, governed by the law of the *Mitakshara*, sued to set aside an alienation of ancestral property by his father, on the ground that such alienation was made to satisfy a debt contracted for immoral purposes:—*held*, by Straight, J., that the burden of proving that the debt was contracted for such purposes, and that the defendant had notice that it was contracted for such purposes, lay on the plaintiff, and that the plaintiff was not discharged from such burden because he had proved generally that his father had been guilty of extravagant waste of the ancestral property. *Hanuman Persaud Panday v. Babooee Munraj Koonmeree* (6 Moo., I. A., 392) and *Suraj Bansi Koer v. Sheo Persad Singh* (I. L. R., 5 Calc., 148). *Held* also, by Straight, J., that it could not be presumed from such conduct of the father that the debt in question had been contracted for immoral purposes.

Per STUART, C. J., that the plaintiff's father having been guilty of extravagant waste of the ancestral property, the burden of proof in this case lay on the defendant. As, however, there was reason to suspect that the suit was a collusive one, brought at the instance of the plaintiff's father, if not really by him, and it was very doubtful whether the alienation was objectionable on the ground taken in the name of the plaintiff, it would not be safe to give the plaintiff a decree. *GAURA, GAURDIAN OF HANUMANT SINGH v. MANAK CHAND.*

[IV-23]

(46). —————.] *Held* that a Hindu son can not succeed in setting aside a mortgage made by his father of the ancestral property unless he can show that the transaction was for immoral or illegal purposes

HINDU LAW—Joint Family,—(continued.)

though the father be alive. *HAR SHANKAR NARAIN SINGH v. TABA TURHA.*

[IV-45]

(47). —————.] The plaintiffs sued *KR* and *DD* and their sons upon a bond executed by *KR* and *DD* alone claiming the sale of certain joint ancestral property hypothecated in the bond. The sons denied their liability, but the Court of first instance decreed the claim as against them as well. The lower appellate Court, on an appeal by the sons, dismissed the suit so far as their interest was concerned, on the ground that there being no proof of any debts for the payment of which the money borrowed under the bond in suit might be said to have been borrowed, the money must have been borrowed for personal and vicious use. *Held* that the grounds on which the Judge's decision proceeds were unsatisfactory. The sons can only relieve themselves from liability to discharge their father's debts if they show that they were contracted for immoral purposes. The case was therefore remanded for a finding on the following issues:—
(i) Was the debt for which the bond in suit was given contracted for immoral purposes?
(ii) Was the plaintiff aware of the immoral purposes or did he lend without sufficient inquiry? *Girdharee Lall v. Kantoo Lall* (14 B. L. R., 187); *Muddan Thakoor v. Kantoo Lall* (14 B. L. R., 187); *Suraj Bansi Kuar v. Sheo Persad Singh* (I. L. R. 5 Calc., 148) followed. *RAM PARDIP RAI v. SALIG RAI AND OTHERS.*

[III-107]

(48). —————.] The appellants sued their father and the respondent for possession of certain joint ancestral property by setting aside a sale thereof made by their father to the respondent on the 29th November, 1875. The lower appellate Court found that the appellant's father, as manager of the family, had contracted a certain debt; that the appellants had not shown that this debt had been contracted for an immoral purpose; that a decree had been obtained against the appellant's father; that the property in suit had been advertised for sale in execution of that decree; that in order to save it the appellant's father had made the sale in question to the respondent; and that the respondent had purchased in good faith for valuable consideration, having regard to that decree. *Held* that on these findings the respondent is entitled to be protected in his purchase. *SALIG RAI AND ANOTHER v. RAMPARDIP RAI.*

[III-108]

(49). —————.] A suit was brought against *G*, the head of a joint Hindu family, by *S*, to whom he had mortgaged ten *biswas* of ancestral estate as security for a loan, to recover the amount of the loan by

HINDU LAW—Joint Family,

(continued.)

enforcement of the mortgage against the entire ten *biswas*. During the pendency of the suit *G* died, and his son *Z* and his widow *B* were brought on the record as his legal representatives. In support of his claim to enforce the mortgage against the entire ten *biswas*, and not merely against the share therein which *G* during his lifetime might have got separated, the plaintiff pleaded that the debt incurred by *G* was of such a character that, according to the Hindu law, his son *Z* was under a pious duty to discharge it out of his own estate. It was found that although the father was grossly extravagant and selfish in his expenditure, there was no evidence that the proceeds of the particular loan in question were applied to any special licentious purposes, but that the money was not borrowed to meet any family necessity or laid out in necessary expenses, but used in *G*'s personal expenses. *Held* that this evidence did not justify the lower Court in decreeing that the debt should be charged on the share of the father alone in the ten *biswas* mortgaged, as it did not establish that he had wasted the money on immoral purposes, or that the debt was such that a pious son would be free to repudiate it. *Nanomai Babuasin v. Modun Mohun*, decided by the Privy Council on the 18th December, 1885, followed. **SAHU SITA RAM v. ZALIM SINGH AND ANOTHER.**

[VI-62]

(50). —————.] *Held* by the Full Bench that the sons in a joint Hindu family are liable to be sued along with their father upon a mortgage bond given by the father alone after the sons were born which purported to mortgage the joint family property, the consideration having been, with a trifling exception, money advances antecedently made by the mortgagee to him not as a manager of the family or with the authority of the sons or for family purposes, but not for purposes of immorality or for purposes which if the father was dead would exonerate the sons from the pious obligation of paying such debts of the father. *Held* also that the decree in such a suit should be a decree for sale of the mortgaged property under s. 66 of Act No. IV of 1882. **BADRI PRASAD AND ANOTHER v. MADAN LAL AND OTHERS.**

[XIII-52]

(51). —————.] Although an admission contained in a deed of sale or made before the registrar, that the consideration has been received by the vendor is *prima facie* evidence against the person making it, it raises only a rebuttable presumption, the weight of which varies with the special circumstance of each case. Where such an admission contained in a deed of sale of immoveable property executed by a member of a joint Hindu family, and which was repeated by the vendor before the registrar, was used after his death in a suit

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(continued.)

for possession brought by the vendees against his son, who claimed not under him but by a title which, under the Hindu law, came from the grand father in ancestral property, and who, at the date of the sale, was only seven years of age; and where the plaintiff never attempted to obtain possession during the vendor's life-time, nor sued for possession until one day before the expiration of the period of limitation, — *held* that, under the circumstances, it rested upon the plaintiffs to prove payment of the consideration of the sale. *Rajah Kishen Datt Ram Panday v. Narender Bahadoor Singh* (L. R., 3, I. A., 85) referred to. *Held* also that, there being no allegation that the deed of sale was executed in satisfaction of any ancestral debt or for legal necessity, it was for the plaintiffs to prove that they had made proper inquiries to ascertain whether the alienation of ancestral property was justified by the Hindu Law. *Lal Singh v. Deo Narain Singh* (I. L. R., 8, All., 279) and *Jamna v. Nainsukh* (I. L. R., 9 All., 493) followed. *Bhagbut Pershad Singh v. Girja Koer* (I. L. R., 15 Calc., 717) distinguished. **SHEO RATAN v. ABDUL KARIM AND ANOTHER.**

[IX-142]

(52). —————.] The plaintiffs sued the sons upon an hypothecation bond which was given by their father. The family was a joint Hindu family. Neither party gave evidence as to the circumstances under which the bond was given or to show that any inquiry as to the legal necessity of the debt was made. The single question in appeal is as to upon whom the *onus* of proof lies. *Held* that it lay upon the plaintiffs. *Narayana Charaya v. Nurso Krishna* (I. L. R. 1 Bom. 262); *Luchmun Dass v. Giridhar Choudhry* (I. L. R., 5 Calc., 855); *Ganga Prasad v. Ajudhia Pershad Singh* (I. L. R., 8 Calc., 131); *Girdharee Lal v. Kuntloo Lal* (L. R., 1 I. A. 321); *Sita Ram, v. Zahuri* (I. L. R., 8 All., 231); *Nanomi Babuasin v. Modun Mohun* (I. L. R., 13 Calc., 21); *Rampardip Rai v. Salig Rai* (W. N., 1883, p. 107); *Ponnoppa Pillai v. Pappun Ayyangar* (I. L. R., 2 Mad. 1); *Gangulu v. Ancha Bapulo* (I. L. R., 4 Mad. 73); *Hanuman Singh v. Nanak Chand* (I. L. R., 6 All., 193) referred to and distinguished and *Madhoo Dyal Singh v. Golbur Singh* (9 W. R. 512); *Bhek Narain Singh v. Januk Singh* (I. L. R. 2 Calc., 438); *Hanoman Persad v. Mussammat Baboo* (6 M. I. A., 393.) and *Lal Singh v. Deo Narain Singh* (I. L. R., 8 All., 279) followed. **JAMNA AND OTHERS v. NAIN SUKH AND ANOTHER.**

[VII-116]

By other members.

(53). ———— *Consent.*] One member of a joint and undivided Hindu family governed by the law of the *Mitakshra*, can not mortgage or sell his share of the family property without the

HINDU LAW—Joint Family,
(continued.)

consent, express or implied, of the other members. *Chumaili Kuar v. Ram Prasad* (I. L. R. 2 All., 267) followed. *Deen Dyal Lal v. Jug-deep Narain Singh*, (I. L. R., 3 Calc., 198) and *Suraj Bansi Koer v. Sheo Prasad Singh* (I. L. R., 5 Cal., 148) referred to. *RAMANAND SINGH AND ANOTHER v. GOBIND SINGH*.

[III-61]

(54). ————. [One member of a joint Hindu family can not transfer his undivided share in the joint family property to another member of the family without the consent of the rest of the co-sharers. *CHANDAR KISHORE v. DAMPAT KISHORE AND OTHERS*.

[XIV-117]

(55). ————. [A member of a joint Hindu family has no power in his father's life-time to make a mortgage of any part of the ancestral family property. *Balgobind Das v. Narain Lal* (I. L. R., 15 All., 339) and *Madho Parshad v. Mehran Singh* (I. L. R., 18 Calc., 157) referred to. *BHAGIRATHI MISR v. SHEOBHAI AND OTHERS*.

[XVIII-59]

(IV) Miscellaneous cases.

(56). ————. [*Legal necessity—Discharge of another's liability.*] In this suit *A* sold his share of the ancestral property to the defendants in order to satisfy debts due by *B*. At the time of the alienation *A* and his two brothers *B* and *C* governed by the law of *Mitakshara* had separated from each other. This was a suit by *O*, *A*'s son, to set aside the sale, on the ground that it was made without legal necessity. Held that as *A* and his son *O* (who by birth acquired an interest in his father's estate) were joint owners in unascertained and undivided shares, neither of them was competent to make an alienation of the whole or any part of it without the consent of the other, except as a manager for family purposes. That the liquidation of the liabilities of his brother was not a legal necessity and the sale was therefore unjustifiable. *SHEONARAIN SINGH AND ANOTHER v. BECHU SINGH*.

[IV-85]

(57). ————. [*Endowment on idol.*] According to the Hindu Law, the power of a father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pande v. Babu Kunwar Singh* (S. D. A., L. P., 1843, Vol. 5, P. 24) referred to. In a suit brought by a son to set aside an alienation of ancestral estate by the father for the purpose abovementioned, the son having contended that the real motive for the gift was not piety to the Gods, but malice against him, the Court remitted an issue to the lower

HINDU LAW—Joint Family,
(continued.)

appellate Court for the purpose of ascertaining whether the endowment had been made *bona fide* for the satisfaction of the idol and the benefit of the donor's soul, or from motives of spite against the plaintiff. *RAGHUNATH PRASAD v. GOBIND PRASAD*.

[VI-19]

(58). ————. [*Decree for money criminally misappropriated.*] Held also that as the decree was not one to satisfy which the family property could be sold, being a mere money decree against the father personally and for a debt which it was not the duty of the sons to pay, and as the purchaser was bound to have satisfied himself as to whether the family property was liable to be sold in satisfaction of the decree, the purchaser could not, on the principles laid down in *Girdharee Lal v. Kantoo Lal* (14 B. L. R., 187) and *Suraj Bansi Koer v. Sheo Persad Singh* (I. L. R., 5 Cal., 148) be protected as a *bona fide* purchaser for value without notice that the family property was not liable to be sold in satisfaction of the decree, but must be taken to have had constructive notice of that fact. *MAHABIR PRASAD AND ANOTHER v. BASDEO SINGH*.

[IV-47]

(59). ————. [

See Nos. (22), (23), and (27).

(60). ————. [*Separation—What amounts to.*] In order to show separation of a joint *Mitakshara* family it is not necessary to establish a partition of the joint estate into separate shares or holdings; it is enough that there has been an ascertainment and definition of the extent of right and interest of the several co-sharers in the whole, and of the proportion of participation each of them is to have in the income derived from the property, in other words, to effect a severance and distinction of the joint tenancy and to convert it into a tenancy in common. *Appavier v. Rama Subba Ayyar* (11 Moo. I. A. 75) and *Deo Narain Singh v. Dukhran Singh* (I. L. R., 5, All. 532) followed. *SULTAN SINGH AND OTHERS v. SHEO BAKHSH SINGH*.

[IV-172]

ADIDEO NARAIN SINGH AND ANOTHER v. DUKHRAN SINGH AND OTHERS.

[III-117]

(61). ————. [*Onus.*] Three brothers, *M S, P S* and *H S*, once constituted a joint Hindu family. After the death of all of them the descendants of *M S* sued the descendants of *H S* in effect to obtain their share of the property which had been of *P S* in his life time. In their plaint they alleged that the family was still joint. By their evidence, however, they set up a separation between themselves and *H S* shortly after

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the death of *P S*. The defendants, on the other hand, alleged that some twenty or twenty-five years before suit, after the death of *M S*, there had been a separation between the plaintiffs on the one side and *P S* and *H S*, on the other. *Held* that, the plaintiffs having set up a case which was inconsistent with the presumption of the family remaining joint, it was for them to prove that the separation took place as they alleged. *Obhoy Churn Ghose v. Gobind Chunder Dey*, (I. L. R. 9 Cal., 243) referred to. *RAM GHULAM SINGH AND OTHERS v. RAM BIHARI SINGH AND ANOTHER*.

[XV-234]

(62.) —————. [Certain persons who had at one time with the defendant formed a joint Hindu family, sued the defendant for possession of their shares in some property which they alleged to have been of the joint family. The family admittedly separated in 1894. Out of the property claimed part was some *zamindari* property which had come into the defendant's hands under a deed of conditional sale executed in 1877 and foreclosed in 1883, and part was a cultivatory holding acquired under a sale in favour of the defendant before partition. *Held* that under these circumstances it lay upon the defendant to prove that the property in suit was his separate acquisition and had not been the property of the joint family. *Ram Ghulam Singh v. Ram Behari Singh* (I. L. R. 18 All., 90) referred to. *TULSHI RAM v. BHIRG NATH AND OTHERS*.

[XVIII-60]

(63.) —————. [Evidence.] Where there has existed a joint Hindu family possessed as such of immoveable property the presumption is that until the contrary is shown such family will continue to be joint. The fact that in the revenue and village papers individual members of a Hindu family once admitted joint, are recorded as holding each a certain specified portion of property is not standing by itself sufficient evidence that a separation has taken place, nor is the fact that specific purchases of immoveable property have been made from time to time in the names of individual members of the family and that the property as purchased was recorded in each case in the name of the nominal assignee. *GAJENDAR SINGH v. SARDAR SINGH AND ANOTHER*.

[XVI-23]

(64.) —————. [Evidence of.] A four *anna* ancestral share in a *zamindari* village was owned by two brothers, in which the share of *H*, son of one of the brothers, was one half, the remaining half being the share of the plaintiffs, the descendants of the other brother. In the village records there has been a definition of shares followed by entries of separate interests in the revenue records and since 1264

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Fasli the two plaintiffs have each been recorded as the owner of a one *anna* share and *H* of a two *anna* share thereof. The entire four *anna* share has been in the possession of mortgagees from the year 1844, excepting the *sir* lands of which *H* held separately his own share, *viz.* 10 *bighas*. On the 7th July, 1883, *H* executed a deed of gift of his two *anna* share in favor of the defendants, and caused mutation of names to be made in their favour surrendering to them at the same time possession of the *sir* land. *H* died on 21st January, 1884, leaving neither son, widow nor daughter, and the plaintiffs were his heirs at law. They brought this suit to set aside the deed of gift and for possession of the *sir* land from the defendants. The suit was dismissed by the Court of first instance and in appeal the district Judge affirmed the decree, holding that the four *anna* share was not joint and undivided property between the co-sharers and that *H* was in separate possession of the two *anna* share of which the defendants were the donees. On second appeal it was contended that inasmuch as since 1844 there could have been no separate enjoyment of the four *annas* which was in the possession of the mortgagees, the evidence afforded by separate registration could not prove actual separation. *Ambika Dat v. Sukhmani Kuar* (I. L. R., 1 All. 437) was cited in support of the contention. *Held*, that from evidence of definition of shares followed by entries of separate interests in the revenue records, if there be nothing to explain it, separation as to estate may be inferred. Joint family property in the hands of mortgagees may be separated in estate, although there could be no separate enjoyment of the shares so separated. *RAM LAL AND ANOTHER v. DEBI DAT AND ANOTHER*.

[VIII-203]

(65.) —————. [Held] that the mere circumstance that various members of a Hindu family are living in separate houses all of which belong to the family does not constitute such a division as is contemplated by the Hindu Law. *SITAL PRASAD AND ANOTHER v. BANSIDIAR*.

[II-168]

(66.) —————. [Earnings of Hindu educated at family expense.] *Held*, that the mere fact that a member of a joint Hindu family had acquired a certain general education of a not very advanced character at the expense of the joint family funds would not have the result of making all the subsequent earnings of that member joint family property, but they would remain his self acquired property. *Rauliem Valoo Chetty v. Pauliem Soorya Chetty* (I. L. R., 1 Mad., 252) and *Krishnaji Alahadav v. Alora*

HINDU LAW—Joint Family, —

(continued.)

Mahadev (I. L. R. 15 Bom., 32) referred to and followed. *LACHMIN KUAR AND ANOTHER v. DEBI PARSAD*.

[XVIII-101]

(67).—*Property acquired from joint funds.*] Property acquired by one member of a joint Hindu family by means of a nucleus of property belonging to an ancestral firm will be an accretion to the joint family estate and liable to partition amongst the members of the family. In this respect there is no distinction between moveable and immoveable property. *Sheo Dyal Tewaree v. Jadoo Nath Tewaree* (9 W. R., 61) referred to. *GUR CHARAN LAL AND OTHERS v. BADRI NARAIN AND OTHERS*.

[XVII-187]

(68).—*Capability of a member to sue on behalf of family.*] In a suit for money lent, brought by the father of a joint Hindu family who carried on jointly an ancestral money-lending business, the plaintiff stated, in examination, that he had ceased to take an active part in the management of the affairs of the firm, and that the control of its business was in the hands of his sons, whom he described as 'Maliks.' *Held* that, under the circumstances, the plaintiff could not maintain the suit in his individual capacity and without joining his sons as plaintiffs with him, his sons being his partners in the ancestral business, and he not being the managing member or proprietor. *JUGAL KISHORE v. HULASI RAM AND ANOTHER*.

[VI-89]

(69).—*Suit by two only of the four sons of a Hindu to have it declared that the land in dispute belonged to their father and that the defendant's predecessor in title was only a benami-dar.* The Court below found that the property really belonged to the plaintiffs' father but in decreeing the suit it limited the rights possessed by the plaintiffs to their one-half share in the land. In appeal the plaintiffs-appellants contend that under the doctrine of the Hindu Law of joint ownership the decree should have been in respect of the entire property. *Held* that the contention was unsound and the judgment of the lower Court is correct. *BALDEO AND ANOTHER v. BHOJRAJ*.

[VIII-173]

(70).—*Grandson—Liability for interest.*] The mortgagee from a Hindu of the joint ancestral property of the latter can enforce his mortgage against the grandson of the mortgagor for the realization of the interest secured by the mortgage in addition to the principal amount of the mortgage. *Narasimharao Krishnarave v. Antaji Virupakshi* (2 Bom., H. C. Rep. 64); *Panomal Babuasin v. Modkan Mohun* (I. L. R., 13 Calc., 21); *Hanooman Persaud Pandey v. Mussumat Babooee Munraj Koonweree*

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(continued.)

(6 *Moo.*, I. A. 393) and *Girdharee Lall v. Kantoo Lall* (L. R., 1 I. A., 321) referred to. *LACHMAN DAS v. KHUNNU LAL AND ANOTHER*.

[XVI-183]

(71).—*Power of father to eject son from family house.*] The father of a joint Hindu family is not entitled to eject *sua motu* a son who chooses to reside in the joint family house. *Baldeo Ram v. Sham Lal* (I. L. R., 1 All., 77) distinguished. *BADRI DAS v. RATAN LAL*.

[XII-35]

(72).—*Presumption—Ancestral property.*] The bare fact that the father in a joint Hindu family consisting of himself and his son, makes in favor of the son a deed of gift of certain property, does not afford even *prima facie* evidence that the property was not ancestral property of the family. *GADADHAR PRASAD AND OTHERS v. AJUDHIA PRASAD*.

[XVII-74]

(4) Maintenance.

(73).—*Possession in lieu of.*

See Nos. (128), (130), (132), (144), and (151).

(74).—*Widow—Right of residence in family house—Personal right.*] The right of a Hindu widow to reside in a house which was once the property of her deceased husband and which has been alienated without her concurrence is a strictly personal interest and can not be transferred or extended to any one but herself, and her occupation should be limited so as to provide her with just sufficient shelter with the least possible encroachment on the transferee's otherwise unqualified right of possession. *NAGAR MAL v. KESAR*.

[XIII-199]

(75).—*Business house.*] The right of a Hindu widow to reside in a house which was once the property of her husband's family can not apply to a house which is principally a place of business and only incidentally and partially a place of residence. *CHAMPA KUAR v. RADHA KISHEN AND OTHERS*.

[XIII-198]

(76).—*Auction purchaser.*] In considering whether a widow in a joint Hindu family can enforce a right to reside in the family house which has been or is about to be sold in execution of a decree, what is to be looked to is whether the debt on account of which the decree was obtained was a debt incurred for the purposes of the joint family and if so, it is immaterial whether it was secured by a mortgage or was an unsecured debt. *Ramandan v. Rangammal* (I. L. R., 12 Mad.

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tinued.)**

260) referred to. *CHUNNI v. BEHARI LAL AND OTHERS.*

[XIV-160

(77). —————] This was an action for ejectment of a widow from the house of her deceased husband by one A, who had purchased the house in an auction-sale held in execution of a decree against the husband and other members of the family. The widow contended that she had a right to reside in the house. *Held* that the plaintiff was entitled to possession of the house by ejectment of the widow. *Talchand Singh v. Rukhmina* (I. L. R., 3 All., 353); *Mangala Debi v. Dina Nath Bose* (4 B. L. R., 72); *Gauri v. Chandramani* (I. L. R., 1 All., 262); *Bhikham Das v. Pura* (I. L. R., 2 All., 141) and *Sitanath Das v. Roy Luchmiput Singh* (11 Calc., L. R., 268) referred to and distinguished. *AJUDHIA PRASAD AND ANOTHER v. JASODA.*

[VII-279

(78). ————— *Amount.*] In estimating the amount of maintenance which should be allowed to a Hindu widow out of her husband's estate, regard should be had to the value of the estate as gauged by the annual income derivable therefrom, to the position and status of the deceased, and to the position and status of the widow, and the expenses involved by the religious and other duties which she has to discharge. *Sreemulky Nitto Kissors Dossee v. Jogendro Nath Mulick* (L. R., 5 I. A., 55) and *Narhar Singh v. Dirgnath Kuar* (I. L. R., 12 All., 407) referred to.

Per MAHMOOD, J.—The amount of maintenance should not be determined with reference to the principle that the life of a Hindu widow should be of a peculiarly ascetic character, and that she should have only a "starving allowance." The austerities enjoined upon Hindu widows are matters not of legal obligation, but only of moral injunction and cannot be enforced by Court of justice. The Courts should bear in mind that Hindu widows are by ancient custom debarred from remarriage, and should fix the maintenance at a sum sufficient to obviate the danger of the widow being driven to immorality. *BAISNI v. RUP SINGH.*

[X-112

(79). ————— *Suit for reduction of.*] In this suit to have the amount of maintenance, payable to the widow of a deceased brother, reduced, on the ground that the income of the properties left by the deceased had diminished since the date the amount was fixed by the Court. The Court below found "that the reduction of income was entirely due owing to the laches of the plaintiffs themselves, having been brought about by acts of fraud undertaken with a view to defeat the defendant's lawful claim." *Held*

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tinued.)**

that on these findings of fact the suit must be dismissed. *MUNNA AND ANOTHER v. KABUTRA.*

[I-12

(20). ————— *Unchastity.*] *Held* that a Hindu widow who becomes unchaste is not entitled to maintenance. *HARKHU SINGH AND ANOTHER v. NANDA KUAR.*

[V-164

(81). —————] A decree obtained by a Hindu widow declaring her right to maintenance is liable to be set aside or suspended in its operation on proof of subsequent unchastity given by the husband's relatives either in a suit brought by them expressly for the purpose of setting aside the decree or in answer to the widow's suit to enforce her right upon proof of such subsequent unchastity the widow is entitled to no maintenance whatever. *Vishnu Shambhog v. Manjamma* (I. L. R., 9 Bom., 108) and *Roma Nath v. Rajonmonu Dasi* (I. L. R., 17 Calc., 674) approved. *DAULTA KUARI v. MEGHU TEWARI AND ANOTHER.*

[XIII-149

(82). ————— *Maintenance when a charge on the estate—Auction-purchaser.*] The maintenance of a Hindu widow is not, until it is fixed and charged on her deceased husband's estate by a decree or by agreement, a charge on such estate, which can be enforced against a *bona fide* purchaser of such estate for value without notice. When the maintenance of a Hindu widow has been expressly charged on her husband's estate a portion of such estate will be liable to such charge in the hands of a purchaser even if it be shown that the heirs to such estate have retained enough of it to meet such charges, but such estate will not be liable if its transfer has taken place to satisfy a claim for which it is liable under Hindu Law and which under that law takes precedence of a claim of maintenance. *SHAM LAL v. BANNA.*

[II-42

(83). —————] The *bona fide* purchaser for value of the estate of a Hindu husband, sold in order to satisfy the husband's debts, does not take such estate subject to the wife's maintenance even if such maintenance is fixed and charged on the estate. *Jamna v. Machul Sahu* (I. L. R., 2 All., 315) and *Sham Lal v. Banna* (I. L. R., 4 All., 296) referred to. *GURDIAL v. KAUNSILA.*

[III-65

(84). —————] The heirs of a certain deceased Hindu executed a bond in favor of A in 1876, in which they hypothecated a garden also. In 1877, a widow of a son of the deceased sued the heirs for arrears of her maintenance from 1871-1876, obtained a decree in execution of which the

HINDU LAW—Maintenance,—(continued.)

garden was sold and purchased by *B*. This suit was brought by *A* against the obligors of the bond and *B* the purchaser of the garden. *Held* that as maintenance created no charge, the decree in execution of which *B* had purchased the garden was a simple money decree and therefore the garden was sold subject to *A*'s prior lien. *GANGA SAHAI v. SHAM LAL*.

[I-4]

(85). ———— *Wife and daughter of a convert—Power of Court to charge maintenance upon estate.*] *J*, a Hindu, embraced the Mahomedan religion, and married a Mahomedan woman, whom he took to live with him. At the time of his conversion he had a Hindu wife who together with her minor daughter, now instituted a suit against him, praying (i) for an allowance by way of maintenance, (ii) that the allowance might be fixed as a charge on specific property belonging to the defendant, (iii) for an order compelling the defendant to provide the plaintiffs with a separate house for their residence, and (iv) that a sum of Rs. 4,000 might be awarded to them to defray the marriage expenses of the minor plaintiff. *Held* that the defendant ought not to be compelled to provide residence for the plaintiffs, inasmuch as the allowance awarded to them should cover all such expenses as maintenance and house-rent. *Held* that the claim of Rs. 4,000 for the minor plaintiff's marriage expenses should be rejected, since it was not shown that any marriage expenses had been incurred or were at present required for her and since, if she lived to reach a marriageable age, the matter would be then in the hands of her guardian. *Held* further, that the right of the wife and daughter to be maintained out of the husband's and father's property was undoubted and that when the Court has made an order directing a sum to be paid by way of maintenance, it has undoubtedly the power to ensure the enforcement of its order, and this could best be done by fixing the allowance to be a charge on specific property. *Jamna v. Machul Sahu* (I. L. R., 2 All., 315); *Ramabai v. Trimbak Ganesh Desai* (9 Bom., H. C. Rep., 283); *Sham Lal v. Banna* (I. L. R., 4 All., 296) and *S. M. Mahalakshamma Garu v. S. M. Venkataratnamma Garu* (I. L. R., 6 Mad., 83) referred to. *MANSHA DEVI AND ANOTHER v. JIWAN MAL alias ABDUL RAHMAN AND OTHERS*.

[IV-192]

(86). ———— *Widow and her daughters—Marriage expenses.*] A Hindu widow with her two daughters as co-plaintiffs sued the son of her deceased husband by another wife, alleging that he was in possession of his father's property for maintenance and for the marriage expenses of the daughters both of whom were of a marriageable age. The Court of first instance gave the plaintiffs a decree for a monthly allowance and Rs. 540 to the widow as arrears of

HINDU LAW—Maintenance,—(continued.)

maintenance, Rs. 1,000 for the marriage expenses of the daughters. *Held* that inasmuch as the mother was the natural guardian of the two other plaintiffs and it was proper for them to reside with and be provided for by her, and the common maintenance was, so to speak, a joint matter, the suit was not at any rate at the stage of appeal, open to objection on the ground of misjoinder of parties and causes of action, nor looking at the peculiar circumstances of the family, which made the mother the most natural and proper person to arrange the marriage of the two minor plaintiffs, was the prayer for marriage expenses improperly added. *Held* further that the Court of first instance should have separated the maintenance to which it considered the three plaintiffs respectively were entitled, and that, as to the two minor plaintiffs it should have declared that such maintenance should cease upon their marriage. *GOPAL v. TULSA AND OTHERS*.

[IV-208]

(87). ———— *Son's widow—Moral obligation—Legal duty.*] In a Hindu family governed by the Mitakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father, was, at the time of her husband's death a minor; she had never co-habited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by, her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his life-time and which was now in the hands of the defendants. *Held* (Mahmood, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendant's hands from which she would be entitled to maintenance; inasmuch as, during the father's life-time, it was not in any sense ancestral, and the sons had no co-parcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and in the case of the plaintiff's husband such interest by reason of his predeceasing his father, never became vested. *Adhibai v. Cursandas Nathu* (I. L. R., 11 Bom., 199) dissented from on this point. *Savitribai v. Luximibai* (I. L. R., 2 Bom., 573) referred to. *Held*, however, that the father was under a moral, though not legal, obligation not only to maintain his widowed daughter-in-law during his life-time, but also to make provision out of his self-acquired property for her maintenance after his death; and that

HINDU LAW—Maintenance,
- (continued.)

such moral obligation in the father became, by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son (who took the estate not for his own benefit but for the spiritual benefit of the last proprietor) and against the property in question. *Adhibai v. Cursandas Nathu; Ganga Bai v. Sita Ram* (I. L. R., 1 All., 170); *Kalu v. Kashibai* (I. L. R., 7 Bom., 127); *Khetramani Dasi v. Kashinath Das* (2 B. L. R., A. C., 15); *Rajjomonney Dossce v. Shubchunder Mullick* (2 Hyde, 103), and *Tulsha v. Gopal Rai* (I. L. R., 6 All., 632) referred to.

Per Mahmood, J.—There is no difference between the Mitakshara and the Bengal Schools of Hindu Law regarding the principle that the right of inheritance is based on the spiritual benefits which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs. *JANKI v. NAND RAM AND ANOTHER.*

[IX-30

(88).—*Decree against property—Personal liability.*] A suit by a Hindu widow for arrears of maintenance, based on a decree charging immoveable property with the payment of the maintenance allowance, is not a suit of the nature cognizable in a Court of Small Causes. *Pahlud Singh v. Ahlud Singh*, (N.-W. P., H. C. Rep., 1874, p. 91) followed. A decree obtained by a Hindu for maintenance, directed that certain ancestral property, which D and S had purchased, should be liable in their hands for the payment of the maintenance allowance. Held that the widow was not entitled, by virtue of such decree, to recover arrears of the allowance from D and S personally, after such property had left their hands. *DHARAM CHAND v. JANKI.*

[III-73

(89).—*Illegitimate son—How long right continues.*] According to Hindu Law and usage, illegitimate sons are entitled to maintenance from their father, and his estate is liable for its payment. *Raja Parichai v. Zalim Singh* (L. R., 4 I. A., p. 165); *Chhotuaya Ram Murdun Syn v. Sahub Purhalad Syn* (7 Moo. I. A., 18) followed. *Nurbibi v. Husen Lal* (I. L. R., 7 Bom., 538) referred to. It is immaterial whether the illegitimate sons have been begotten on a female slave or on a concubine. *Sarasuti v. Mannu* (I. L. R., 2 All., 134) followed. The test by which the continuance of the right to receive maintenance must be decided, is not the age of the illegitimate descendant, or his capacity to earn his own livelihood, but obedience to the head of the family. This test cannot be applied till he has reached full age. By docility or obedience, in

HINDU LAW—Maintenance,
(continued.)

the sense of texts is meant the rendering to the head of the family such reasonable service as is ordinarily rendered by cadets of a family in that station of life to which the parties belong. *HARGOBIND KUARI v. DHARAM SINGH AND OTHERS.*

[IV-100

(90).—*Mother—Auction purchaser.*] The plaintiff acquired by purchase at execution sales the rights and interests of two brothers in an ancestral 10 *biswas* share in a village. He first acquired one brother's share and then the other brother's. He brought this suit against their mother for the possession of the same. She resisted the suit on the ground that if the sons had partitioned she would have been entitled to one-third of the share under the Hindu law, and that the sale of the share of one brother had the effect of partition. Held that as enough property remained even after the sale for her maintenance and for her one-third share her contention must be disallowed. *HEM KUAR v. BIRJ LAL.*

[V-261

(5). Reversioner.

(9).—*Liability of estate in the hands of reversioner for the debts of widow.*]

See Nos. (152) and (153.)

(92).—*Alienation by widow in possession in lieu of maintenance—Right to set aside.*]

See No (133).

(93).—*Alienation by widow—Consent of near reversioner—Right of remoter reversioners to set aside.*]

See Nos. (138)—(142) and (144).

(94).—*Suit by reversioner for possession.*]

See Nos. (149) and (150).

(95).—*Suit for possession against alienee.*]—One K had two sons SK and NR. SK died leaving a daughter P. NR died leaving two sons B and M. P sold certain immoveable property to ZS, which she had inherited from her father and which was found to be the separate estate of her father SK. ZS sued her for possession of such property. B and M were made *pro forma* defendants in this suit. Held that P being alive there was nothing in the Hindu Law to prevent the transfer in dispute being good at the present time and for so long as P might live. *BALDEO AND ANOTHER v. ZALIM SINGH.*

[I-95

(96).—*Son of the son of daughter—Right to maintain suit.*] Held, in a suit to set aside an

HINDU LAW—Reversioner—(continued.)

alienation made by a Hindu widow of property which had been of her deceased husband in his life-time, that the sons of the son of a daughter of the alienor's late husband, were, their father and grandmother being dead, reversioners, and as such entitled to sue to set aside the alienation made by the widow. *Krishnayya v. Pichamma* (I. L. R., 11 Mad., 287) and *Babu Lal v. Nanku Ram* (I. L. R. 22 Cal., 339) referred to. *SHEOBARAT KUARI AND ANOTHER v. BHAGWATI PRASAD AND ANOTHER.*

[XV-117]

(97).—*Statement before Settlement Officer—Right of reversioner to maintain suit.*] A sonless Hindu widow, in possession of her deceased husband's estate, as such made a statement before a revenue official, which was recorded by him, to the effect that she wished the property to go after her death to her nephew, and that S, the person entitled to succeed her, had no right to the property. *Held* that such statement, as it was intended to operate, and would have operated, as a will in respect of the property, gave S a right to sue for a declaration that it should not have any effect as against him. *KALIAN SINGH AND ANOTHER v. SANWAL SINGH.*

[IV-337]

(98).—*Decree against widow representing estate—Bar against reversioner.*] Upon the death of R, a Hindu, who was separate from his brother S, his widow G became life-tenant of his estate, and his daughter B became entitled to succeed after G's death. In 1882, a suit was brought by S and G against V, to recover the value of a branch of a mango tree wrongfully taken by the defendant, and for maintenance of possession over the grove in which the tree was situate. The suit was dismissed, and it was decided that R was not the owner of the grove, nor was G the owner. In 1885 B brought a suit against G, S, V and A, to whom V had sold some of the trees, claiming a declaration of her right and possession of the grove, upon the allegation that the proceedings of 1882 were carried on in collusion between S and G on the one hand and V on the other, for the purpose of improperly preventing her from asserting her rights. *Held* that if the suit of 1882 was a genuine suit and was properly contested by the then plaintiffs, though S might have been improperly joined as plaintiff, any decision then passed against G would be binding upon the present plaintiff, and estop her again litigating questions which were then decided. *Held* also that if the plaintiff's specific allegation of fraud and collusion in the proceedings of 1882 were established, and even if the decree of 1882 did dispose of the question now sought to be re-opened, the decision in that suit would not be binding on the plaintiff under the circumstances. *Held* also that if it should

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turn out that there was fraud and collusion in the proceedings of 1882, and an attempt to interfere with the plaintiff's right as reversioner to the grove on the death of her mother, she would be entitled in the present suit to claim not only a declaration of her right, but also to have the grove reduced into the possession of the life-tenant, and that such relief could be given upon this form of plaint. *Katama Natchiar's Case* 9 Moo., I. A., 543; *Adi Deo Narain Singh v. Dukharan Singh* (I. L. R., 5 All., 532) and *Sant Kumar v. Deo Saran* (I. L. R., 8 All., p. 365) referred to. *SACHIT AND ANOTHER v. BUDHUA KUAR.*

[VI-153]

See also

SANT KUMAR v. DEOSARAN AND OTHERS.

[VI-129]

BACHCHA AND ANOTHER v. BHAWANI PRASAD AND ANOTHER.

[I-106]

(99).—*Near and remote reversioners—Suit by.*] Where a Hindu widow in possession as such of her deceased husband's property alienates it, only the person presumptively entitled to possess the property on her death may sue for a declaration of his right as against such alienation, unless such person has precluded himself from so suing by collusion and connivance, when the person entitled next to him may so sue. *RAGHUNATH AND OTHERS v. THAKURI AND OTHERS.*

[I-111]

MADARI AND ANOTHER v. MALIKI AND OTHERS

[IV-151]

JHULA AND ANOTHER v. KANTA PRASAD AND ANOTHER.

[VII-91]

SHEOMURAT SINGH AND ANOTHER v. RAM AUTAR AND ANOTHER.

[VIII-173]

ISHUAR NARAIN v. JANKI.

[XIII-49]

(100).—*Reversioner of the estate of a deceased Hindu sued for cancellation of a sale-deed executed by the widow, on the ground that it was executed without legal necessity, and for a declaration that the alienation was void and incapable of affecting his right of succession. A daughter of the deceased was still living, and had taken no steps to set aside the sale.*

Per MAHMOOD, J., that mere delay by a reversioner in instituting a suit to set aside an illegal sale made by a childless Hindu widow, can not

HINDU LAW—Reversioner,

(continued.)

be understood to amount to acquiescence in the sale. The acquiescence which would entitle a more remote reversioner to maintain the suit must be such as would amount to an equitable estoppel, precluding the first reversioner from contesting the validity of the sale made by the widow. *Duleep Singh v. Sreekishoon Panday*, (N. W. P. H. C. Rep., 1872, p. 83), followed.

Also *per* MAHMOOD, J., that the existence of female heirs, whose right of succession can not surpass a "widow's estate" does not affect the status of the nearest presumptive reversionary heirs to the full ownership of the estate, and that such presumptive heir can maintain a suit for declaratory relief, such as was prayed for in the present suit, irrespective of the question of collusion or concurrence by such female heirs in the alienation by a childless Hindu widow or other female heir holding a similar estate. *Chunder Koomar Hazaree v. Dwarka Nath Purdhan* (S. D. A., L. P., 1859, P. II, p. 1623) and *Balagobind Ram v. Hirusranee* (2 W. R., 255) followed. *Bhagwan Deen Doobey v. Mayna Bace* (11 Moo. I. A., 487); *Sri Gajapathi Nilamani Patta Mahadevi Garu v. Sri Gajapathi Radha Mani Patta Mahadevi Garu* (L. R., 4 I. A., 212) and *Ram Lal v. Bunsee Dhuur* (S. D. A., N.-W. P., 1866, p. 67) referred to; *Rani Anund Koer v. The Court of Wards* (L. R., 8 I. A., 14) distinguished.

Per OLDFIELD, J., that the nearest reversioner being the widow's daughter, who herself could only take a limited interest in the property, and who had herself taken no steps to set aside the sale, the Court would be exercising a proper discretion in permitting the plaintiff, as the next reversioner after the daughter, to bring the suit. *BALGOBIND v. RAM KUAR AND OTHERS*.

[IV-155]

(6). Succession.

(101).—*Sapinda*.] Held that a Hindu in the 6th line of descent from the deceased was well within the "Sapinda" limit and had all the rights of a "Sapinda." *Kalian Singh v. Pan Kuar* (All. H. C. Rep., 1875, p. 338) and *Umaid Bahadur v. Udoi Chand* (I. L. R., 6 Calc., 119) followed. *AGDI AND OTHERS v. LALJI AND OTHERS*.

[I-142]

(102).—*Brother's son*.] Held that, in default of brothers, brother's sons inherit the property *per capita* and not *per stirpes*. *AJUDHIA PRASAD v. SHEO NARAIN AND OTHERS*. *AJUDHIA PRASAD v. SHEO NARAIN AND OTHERS*.

[III-140]

BALDEO PRASAD AND ANOTHER v. KANHIA LAL.

[V-301]

(103).—*Mother—Step mother*.] There is no distinction in the Hindu Law between a

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(continued.)

mother and a step mother in regard to the share to which they are entitled on partition. Both mother and step-mother are entitled to a share equal to the share of a son. *Damoodur Misser v. Senabutty Misrain* (I. L. R., 8 Calc., 537) referred to. *MATHURA PRASAD v. DEOKA AND ANOTHER*.

[X-124]

(104).—*Step-mother—Custom*.] According to the *Mitakshara* School of Hindu Law a step-mother, not being one of the females expressly named in the *Mitakshara* and not being included under the term "Mother" in Chapter II, s. 3, cannot inherit from her deceased step-son. *Gauri Sahai v. Rukko* (I. L. R., 3 All., 45); *Jagat Narain v. Sheo Das* (I. L. R., 5 All., 311); *Lala Joti Lal v. Musammatt Durand Kower* (B. L. R., Supp. Vol., Pt. I, p. 67); *Kessarbai v. Valab Raoji* (I. L. R., 4 Bom., 188) and *Kumaravelu v. Virana Goundan* (I. L. R., 5 Mad., 29) referred to. To establish the existence of a custom, modifying or varying the general law it is necessary to prove not merely that instances have occurred apparently consistent with the alleged custom, but cases should be shown in which the right has been more or less contested and the contest subsequently abandoned by persons interested in denying the existence of the custom alleged. *RAMA NAND AND OTHERS v. SURGIANI*.

[XIV-47]

(105).—*Sister*.] According to the law of the *Mitakshara* none but females expressly named can inherit, and the sister of a deceased Hindu, not being so named, is therefore not entitled to succeed to his estate. *Gauri Sahai v. Rukko* (I. L. R., 3 All., 45) followed. *JAGESRA KUARI v. SHEODAS AND ANOTHER*.

[III-51]

(106).—*Sister's son*.] Held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the *Mitakshara* law of inheritance. *Thakoorain Sahiba v. Mohun Lal* (11 Moo. I. A., 386); *Rao Kurun Singh v. Nawab Mahomed Fyz Ali Khan* (14 Moo. I. A., 187); *Amrita Kumari Debi v. Lakee Narain Chakrabutty* (10 W. R., F. B., 76); *Gridhari Lal Roy v. The Bengal Government* (12 Moo. I. A., 448); *Naraini Kuari v. Chandi Din* (I. L. R., 9 All., 467); and *Umaid Bahadur v. Udoi Chand* (I. L. R., 6 Calc., 119) referred to. *RAGHUNATH KUARI AND ANOTHER v. MUNNAN MISR*.

[XVIII-18]

NARAINI KUAR v. CHANDI DIN AND ANOTHER.

[VII-118]

(107).—*Unprovided daughter*.] The estate of a deceased Hindu governed by the law of

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the *Mitakshara*, was in the possession of one of his daughters, who was in poor circumstances. His other daughter, who was well off and possessed of property, claimed to share in such estate, contending, with reference to the law of the *Mitakshara*, that, as no provision had been made for her by her father, she was "unprovided" for, within the meaning of that law, and therefore entitled to share in such estate. *Held* that such expression must be construed irrespective of the sources of provision or nonprovision. *DANNO v. DARBO AND ANOTHER.*

[II-30]

(108).—Daughter's son's son.]

In the case of a sonless Hindu, his separate estate devolves in the first instance, upon his widow or widows, and thereafter upon the daughter or daughters and it is not till the death of the daughter or daughters that the daughter's son's right of inheritance initiates, and the death of a daughter's son antecedent to the death of a daughter would prevent the estate from devolving upon the son of such daughter's son. Upon the death of a sonless Hindu, his separate estate devolved upon his two widows, the first of whom had a daughter, who had two sons *G* and *S*, *G* having a son *D*. After the death of the first widow, the second came into sole possession of the property, and so continued till her death in 1882. At that time *S* was still living, but *G* had not been heard of by any of his relatives or friends since 1869 or 1870. In 1884, a purchaser from *S* claimed possession of the whole estate, and was resisted by *D*, on the ground that the estate had, on the death of the second widow, devolved on his father and *S* jointly, and *S* was not competent to alienate it. *Held* that under the circumstances the defendant's father must be held to have died prior to the time referred to; that consequently, according to the Hindu Law, the right of succession to his grandfather's estate did not vest in him jointly with the plaintiff's vendor, so as to enable the defendant to claim through him; that the plaintiff's vendor was therefore competent to alienate the entire estate, and the claim must be allowed. *Mazhar Ali v. Budh Singh* (I. L. R., 7 All., 297); *Janmajay Mozumdar v. Keshab Lal Ghose* (2 B. L. R., A. C., 134); *Guru Das Nag v. Mali Lal Nag* (6 B. L. R. Ap., 16) and *Parmeshar Rai v. Bisheshar Singh*, (I. L. R., 1 All., 53) referred to. *DHARUP NATH v. GOBIND SARAN.*

[VI-239]

(109).—Son born after partition—Property acquired after partition.]

The property acquired by a Hindu governed by the law of the *Mitakshara* after a partition has taken place between him and his sons devolves on his death, when he leaves a son born after partition on such son, to the exclusion of the

HINDU LAW—Succession.—(continued.)

other sons. *NAWAL SINGH v. BHAGWAN SINGH AND ANOTHER.*

[II-98]

(110).—Grandson—Vested interest—Power to enforce partition.] In a joint Hindu family governed by the *Mitakshara* law a grandson has by birth a vested interest in ancestral property, which entitles him to enforce partition in the life-time of his father and grandfather, and such interest is saleable in execution of decree. *Deen Dayal Lal v. Jugdeep Narain Singh* (I. L. R., 3 Calc., 198); *Laljeet Singh v. Rajcoomar Singh* (12 B. L. R., 373) and *Nagalinga Mudali v. Subbaramaniya Mudali* (1 Mad. H. C. Rep., p. 77), referred to. *JUGAL KISHORE v. SHIB SAHAI AND ANOTHER.*

[III-102]

(111).—Outcaste—Brother in caste—Son.] Khuman, a Brahmin, lived with a Bania widow, for which offence he was outcasted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons in possession of the property which he had acquired. This being so the brothers of the deceased Khuman sold the property which had been thus acquired by him to one *R K*. *R K* thereupon sued his vendor and the surviving sons of Khuman by the widow, together with their mother and the widow of a deceased son for recovery of the property. *Held* that the sons of Khuman by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by Khuman as against the brothers of the deceased who had remained in caste. *RADHA KISHEN AND OTHERS v. RAJ KUAR.*

[XI-157]

(112).—Illegitimate son—Sudra.] *Held* that an Ahir who was the offspring of an adulterous intercourse, was incapable of inheriting his father's property, even as a Sudra. *Vencetachella Chetty v. Parvathammal* (8 Mad. H. C. Rep., 134); *Parisi Nayudu v. Bangaru Nyadu* (4 Mad. H. C. Rep., 204); *Viramuthu Udayan v. Singaravelu* (I. L. R., 1 Mad., 306); *Rahz v. Govinda* (I. L. R., 1 Bom. 97) and *Narain Bharthi v. Laving Bharthi* (I. L. R., 2 Bom., 140) referred to. *DALIP AND OTHERS v. GANPAT*

[VI-136]

(113).—Brother's widow.] In this case the district Court, relying on the ruling of the Privy Council in *Lulloobhoy Bappooobhoy v. Cosibai* (L. R., 7 Ind. App., 239) granted a certificate under Act XXVII of 1860 to the brother's widow of the deceased in preference to his

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second male cousin. *Held* that the view expressed in that case by their Lordships of the Privy Council had reference to the law of inheritance recognised in the presidency of Bombay, and not to that followed on this side of India. The law as recognised in these provinces was to be found in the ruling of this Court in *Gauri Sahai v. Rukko* (1. L. R., 3 All., 45). *KALKA PRASAD AND OTHERS v. GAURA AND ANOTHER.*

[II-79]

(114)——*Full and half blood.*] The distinction of whole blood and half blood applies, according to the rule of succession of the *Mitakshara* founded on propinquity of blood, to *sapinda* relations other than the brother and his sons. *Samat v. Amra* (1. L. R., 6 Bom., 394) not followed. *SUBA SINGH AND OTHERS v. SARAFRAZ KUAR AND OTHERS.*

[XVII-53]

(115)——*Priests—Custom.*] The appellants, the sons of one *G C*, deceased, after their father's death, by an instrument, dated the 26th January, 1871, confirmed an endowment of certain property which their deceased father had made in favour of a certain temple. That instrument provided that one *C L* should be the resident priest of the temple, and should be entrusted with its repairs and expenses, which were to be defrayed from the profits of the property, the subject of the endowment, and that his heirs and successors were to act in accordance with the terms of the instrument, one of which required that yearly accounts should be submitted to the appellants. *C L* having died, the appellants brought the present suit to eject his widow *J*, a minor, and to obtain a declaration of their right to appoint his successor. The suit was defended on *J*'s behalf by her father, who disputed the claim of the appellants on the ground that *J* was the legal successor to her deceased husband. *Held* that the appellants had a right to see that the funds were administered, according to the intention of the endowment; that they could interfere if the manager neglected his duties and betrayed his trust. The question whether *J* could succeed to *C L* depended upon the rules and customs by which priests were appointed, which must be ascertained. *NARSINGH SAHAI AND OTHERS v. DARJAN.*

[I-52]

(116)——*Mahant—Custom—Nihang.*] The question who is entitled to succeed to the office of a deceased *Mahant* must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased *Mahant* belonged. It is necessary for the person claiming a right to succeed as *Mahant* to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponent's

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title. It was necessary for the plaintiff in this case to prove that he was "*Nihang*", as distinguished from "*Grihast*", which he failed to do. *Genda Puri v. Chhatar Puri* (L. R., 13 J. A., 100) referred to. For explanations of the terms "*Nihang*" and "*Grihast*" see the judgment of Mahmood, J. *passim*. *BASDEO v. GHARIB DAS.*

[XI-59]

(117)——*Exclusion from inheritance—Leprosy.*] This was a suit by one *RS* to set aside a deed of *Sankalap* executed by his brother *RG* in favor of *X*, on the ground that *RG* had been a leper from his birth, and that he had never taken a share in the family ancestral property. The defence was that the leprosy was not congenital but of recent date, and that *RG* had for many years before its commencement been in separate possession of his share in the ancestral estate and was therefore competent to transfer his share. Both the lower Courts found that *RG*'s leprosy was not congenital and that up to the date of the *Sankalap* he had shared in the profits of the ancestral estate, but the lower appellate Court finding that the ancestral estate was joint undivided family property gave the plaintiff a decree on the ground that an alienation by co-sharer in a joint undivided family property of his share without the consent of the other co-sharers was invalid. *Held* that the finding of the lower Courts on the question whether *RG* held his share of the ancestral estate separately were not satisfactory. *Held* further that it is incurable leprosy only of the *sanious or ulcerous* type, which, if contracted before partition excludes the person afflicted with it from a share in the ancestral estate and there was no distinct finding by either of the lower Courts as to the character of the leprosy. *Ananta v. Rama Bai* (1. L. R., 1 Bom., 554). Both those issues were consequently sent down to the Court below for a distinct and definite finding. *RAM GHOLAM AND ANOTHER v. RAM SAHAI.*

[I-121]

(118)——*Insanity.*] A person is disqualified under Hindu law from succeeding to property, if he is insane when the succession opens, whether his insanity is curable or incurable. Under the same law, when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption. Under the same law although a person becomes qualified to succeed to property after the disqualification of insanity ceases, he cannot resume properly from an heir who has succeeded to it in consequence of his disqualifications when the succession opened. *Dwarka Nath Bysak v. Mahendro Nath Bysak*, (9 B. L. R., 198); *Braja Bhukan Lal Akusti v. Bichan Dobi* (9 B. L. R., 204, Note); *Kalidas Das v. Krishan Chandra*

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(continued.)

Das, (2, B. L. R., F, B., 103) referred to. *DEO KISHAN v. BUDH PRAKASH*.

[III-105]

(119). —————.] The rule of Hindu Law which disqualifies "idiots" and "madmen" from inheritance should be enforced only upon the most clear and satisfactory proof that its requirements are satisfied. The rule does not contemplate the disqualification of persons who are merely of weak intellect in the sense that they are not up to the average standard of human intelligence, or endowed with the business capacity to manage their affairs properly. *Tirumamagal Ammal v. Ramaswami Ayyangar* (1 Mad. H. C. Rep., 214) distinguished. *SURTI v. NARAIN DAI*.

[X-110]

(7) *Stridhan*.

(120). ————— *Moveable property*.] *Held* that under the Benares school moveable property, to which a Hindu woman succeeds by inheritance does not form part of her *stridhan*. *CHANDAN KUAR v. ISHRI SINGH AND ANOTHER*.

[IV-67]

(121). ————— *Property inherited from father Alienation*.] Ordinarily it is the duty of the father in a Hindu family to provide for his daughter's marriage, but where the father was not possessed of sufficient means to do so, and the mother, to raise money to meet the expenses of the daughter's marriage, mortgaged property of her own which had come to her from her father. It was *held* that the mortgage was made for legal necessity and was a valid mortgage. *RUSTAM SINGH v. MOTI SINGH*.

[XVI-155]

(122). ————— *Property received from uterine brother—Succession alienation*.] Immoveable property acquired by a childless Hindu widow from her deceased uterine brother is her *stridhan* and *stridhan* with which the heirs to her husband have nothing to do. Over such property her control is absolute and unimpeachable, and the relations of her husband have no such reversionary status in respect of it as will entitle them to sue to set aside an alienation of it by her. *MUNIA AND ANOTHER v. PURAN*.

[III-47]

(123). ————— *Succession—Form of marriage*.] Upon the death of a childless Hindu widow who had been married in one of the four approved forms of marriage, *S*, one of the collateral relatives of her husband, stating that his minor son had been adopted by her, obtained possession of certain property which had formed her *stridhan*, and mutation of names was effected in the minor's favor in the revenue records. A suit

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(continued.)

was instituted against *S* and his son by *C*, on the allegation that he and *S*, who were collateral relatives of the widow's husband, were entitled, under the Hindu Law, to succeed in moieties to the properties left by her as her *stridhan* and claiming recovery of possession of half her property. In defence, the adoption was pleaded, and another plea was that the widow had left a brother, who in the absence of the adoption, would succeed to the property to the exclusion of the plaintiff. The Court of first instance held that the alleged adoption had not been proved. In the lower appellate Court the plea as to adoption was given up. *Held* that, upon the facts found, the plaintiff was the heir of the deceased widow, and as such entitled to succeed to her *stridhan* under the Hindu Law. *Thakoor Deybee v. Baluk Ram* (11 Moo. I. A., 135) followed. *Munia v. Puran* (I. L. R., 5 All., 310) distinguished. *CHAMPAT v. SHIBA AND ANOTHER*.

[VI-142]

(124). —————.] Where there was no reliable evidence as to the particular form in which the marriage of a deceased Hindu widow was celebrated:—*held* by the Full Bench that the marriage must be presumed to have been in one of the approved forms, and that the deceased's *stridhan* would therefore descend to her husband's and not to her father's heirs. *Musammatt Thakoor Deybee v. Rai Balak Ram* (11 Moo. I. A., 175) followed. *CHATAR SINGH v. ANAND RAM*.

[X-96]

(125). ————— *Widow's possession—Presumption as to nature of*.] The very slightest evidence would be sufficient to raise a presumption that a childless Hindu widow in a joint Hindu family was in possession of the estate with the consent of the heirs or owners as a licensee only. But where such a widow has been in continued and unobstructed possession of profits for many years and more particularly where she has dealt with the property by sale as her own, and such acts have not been challenged by those interested in the property, and there is no evidence that she was in possession with the consent of the heirs or owners for maintenance, no presumption of law arises except the ordinary presumption that a person in enjoyment of property under such conditions is in possession adversely to the owners. *SEWA RAM AND OTHERS v. LACHMAN PRASAD AND OTHERS*.

[VIII-133]

(126). —————.] One *TR* predeceased his father *SR* who died in 1858. From 1858 to 1881 *S*, widow of *TR*, was in possession of the property left by *SR*. The plaintiff, representative of *C*, brother of *SR*, claims the property on the allegation that the family was joint and that on the death of *SR*

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the plaintiff's father became entitled to the property. No evidence was given by the plaintiff to show that *S* was in possession of the property by the consent of the family, or for maintenance or for any other reason which might induce a Hindu family to allow a widow to be in possession. *Held* that the Court was not, in the absence of such evidence, bound to conclude that the widow was in possession with the consent of the family. That under the circumstances the possession of *S* must be presumed to be adverse. *NARAIN DAS v. BANSHIDHAR.*

[VII-43]

(127). —————. In this suit plaintiff-respondent came into Court in the character of a reversioner, seeking to invalidate two alienations made by a Hindu widow, on the ground that she had only a life interest in the property and therefore could not alienate the property for purposes not necessary beyond her life-time. The defence of the widow *S* was that she had got the property from her husband by a deed of gift; that ever since she had been in possession as absolute proprietor. That she was recorded as proprietress in possession in the life-time of her deceased husband and has so continued ever since (a period of 20 years) is not denied by the plaintiff. *Held* that the burden of proving that she was not the absolute proprietress of the estate was upon the plaintiff and he having given no evidence must fail. *Held* further that the plaintiff cannot now take the ground that a Hindu widow who has taken property by gift from her husband is also restricted from making such alienation, as it would be taking a ground altogether different and inconsistent with that upon which he came into Court. *SHYAM KUAR AND ANOTHER v. SUMER SINGH.*

[V-282]

(128). —————. *Compromise.* Disputes having arisen between the sole surviving member of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possession of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house, that she had been put in possession of the house and was in sole proprietary possession thereof, and that he had no connection whatever with it. Subsequently, the widow executed a deed of gift purporting to convey to the donee an absolute proprietary title to the house. After her death, the brother-in-law brought a suit against the donee to recover possession of the house, on the ground that the deed of gift could not convey to him more than the life-interest of the widow donor. *Held* that the deed of

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gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family, entitled only to maintenance. *Sreemutty Babutty Dossee v. Sibchunder Mullick* (6 Moo. I. A., 1) and *Denonath Mukerji v. Gopal Churn Mukerji* (8 Calc. L. R., 57) referred to. *Held* also, having regard to the rules of the Hindu Law regarding the possession by widows of joint family property in lieu of maintenance, and to the experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed of gift, had any such absolute right of ownership as would entitle her to alienate the property for any interest beyond a life-estate. *Held* further, that there was nothing in the deeds under which the donor obtained possession of the property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property; and that her estate therefore could at best be regarded as a life-estate, and the deed of gift as binding upon the plaintiff during her life-time, but not further. *GANPAT RAO v. RAM CHANDER.*

[IX-111]

(129). —————. *Partition.* Upon the death of one *B S*, his heirs agreed to refer the question of the distribution of his estate to a *panchayat*, which, in 1868, gave its award, under the terms whereof the entire estate of the deceased was partitioned. In this partition an entire village *G* was allotted to *B K*, the widow of the deceased. *B K* died in 1882 and her son's widow *G K* laid claim to half the village *G*. It is admitted that *G K*'s husband had predeceased his mother *B K* and there is no question that if *B K*'s estate in the village were in the nature of an ordinary Hindu widow's estate, *G K* would have no right of inheritance under the Hindu Law. But it is contended that the award of 1868 was in fact a mere family arrangement and not a regular partition. That the village was given to *B K* in lieu of maintenance and that the real intent of the award was to divide the village between the two sons of *B S*, the plaintiff's husband and his brother. *Held* that a careful perusal of the *panchayat* award showed that its intent and effect was to make a partition in which *B K* was allowed a share as the widow of *B S*. *G K* had therefore no right in the property. *BIHARI SINGH AND OTHERS v. GANESH KUAR.*

[IV-217]

(130). —————. *Entry in wajib-ul-arz.* One *M R*, a separated Hindu, died in 1862, leaving him surviving two daughters and a daughter-in-law, Musammat Sohni, the widow of a predeceased son. During his life-time *M R* had caused to be recorded in the *wajib-ul-arzes* of two villages *D* and *A*, owned by him—“Musammat Sohni, wife of my son Salig Ram,

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shall be regarded as owner after my death." In the *wajib-ul-arz* of a third village the following entry was recorded. "After my death Ganga Sahai, the adopted son, and Musammatt Sohni, the wife of Salig Ram, shall have a right to the property. Subsequently to the death of *M R*, the nature of the estate taken by Musammatt Sohni in the villages *D* and *A*, came before a Court of law and Musammatt Sohni did not challenge the decree which was then passed declaring her interest to be only a life estate. Held that under the above circumstances and having regard to the sentiments prevalent amongst Hindus on the subject of the devolution of immovable property upon females, the devise of the villages *D* and *A* must be taken to convey an estate for life only and not the absolute ownership in the villages. *Sreemutty Soorjeemoney Dassee v. Denobundoo Mullick* (6 Moo. I. A., 526) and *Moulvie Mahomed Shumsool Hooda v. Shewukram* (L. R., 2 I. A., 7) referred to. *Hira Bai v. Lakshmi Bai* (I. L. R., 11 Bom., 573) and *Koonj Behari Dhur v. Prem Chund Dutt* (I. L. R., 5 Calc., 684) considered. *MATHURA DAS AND OTHERS v. BHUKHAN MAL AND OTHERS*.

[XVI-171]

(131).—Presumption as to property being separate.] Held that the fact of a Hindu widow's name being recorded in the revenue papers is not even *prima facie* evidence that she inherited her husband's share (in a joint Hindu family). It might have been recorded by way of consolation which is often the practice. *GANESH SINGH AND ANOTHER v. JAMNA KUAR*.

[VII-215]

(132).—Alienation—Right of purchaser to recover purchase money.] Held that a Hindu widow could not alienate joint ancestral property and the purchaser of such property could not claim the purchase money on the sale being set aside. *BALDEO DAS AND ANOTHER v. TOTA RAM*.

[VI-70]

(133).—Possession in lieu of maintenance.] Held that a Hindu widow who is in possession of her husband's estate in lieu of maintenance and not in succession to him, has not a right to sell or alienate such estate; and the reversioner to such estate is entitled to have any such sale (or alienation by her) set aside. *JAGAT RAM AND OTHERS v. MAHESH CHAUBEY AND OTHERS*.

[II-57]

(134).—Legal necessity—Pious purposes.] An alienation by a Hindu widow of her deceased husband's estate for pious and religious purposes, made for her own spiritual welfare, and not for that of her deceased husband, is not valid. The power of a Hindu widow to alienate her deceased husband's estate for pious and religious purposes defined. *The*

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Collector of Masulipatam v. C.V. Narrainapah (8 Moo. I. A., 500) referred to. *PURAN DAI v. JAINARAIN AND ANOTHER*.

[II-115]

(135).—Expenses of litigation.] *R*, a Hindu widow, who had succeeded to the estate of her deceased husband, mortgaged a portion of it to *L*, as security for the repayment of money which she borrowed from him for the purpose of suing for an estate to which her deceased husband had an alleged right of succession, which he had not however himself sought to enforce. This suit was dismissed. *R*, subsequently transferred her deceased husband's estate to her daughter *I*. *L* sued *R* and *I* to enforce the mortgage made to him by *R*, by cancellation of such transfer. Held that the mere fact that the mortgaged property had been transferred to *I* did not preclude her from contending, as next reversioner, that the mortgage of such property by *R* was void for want of legal necessity. That under the circumstances stated above, there was not any "legal necessity" within the meaning of the Hindu Law, for such mortgage, and such suit not having been for the benefit of the estate of *R*'s deceased husband, that consequently such mortgage was not valid so far as the reversionary right of *I* was concerned. That, however, *I*'s right to the mortgaged property as transferee from *R*, was subject to such mortgage. The nature of a Hindu widow's estate in her deceased husband's immovable property, her power of alienation generally, and her power of alienation in particular for the purposes of litigation, discussed. *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (6 Moo. I. A., 393); *The Collector of Masulipatam v. C.V. Narrainapah* (8 Moo. I. A., 529); *Grose v. Amritamayi Dasi* (4 B. L. R. O. C., 1, 12 W. R. O. C., 13); *Phool Koer v. Dabee Pershad* (12 W. R., 187); *Roy Mukhun Lal v. Stewart* (18 W. R., 121); *Nugenderchunder Ghose v. Sreemutty Kaminee Dossee* (11 Moo. I. A., 241) and *Baijun Doobey v. Birj Bhookhun Lal Awusti* (L. R. 2 Ind. App., 275) referred to. *INDAR KUAR v. LALTA PRASAD*.

[II-133]

(136).—Government revenue.] A mortgagee from a Hindu widow wishing to show as, against the widow's reversioners, that legal necessity, in the shape of payment of Government revenue, existed for making the mortgage, must show in such a case that a sale on behalf of Government was contemplated imminent. *Maia Parshad v. Bhageeruthee* (N. W. P. H. C. Rep., Vol. 2 p. 78) distinguished and in part dissented from. *MAHIPAT SINGH v. AJUDHIA*.

[XIII-163]

(137).—Application of the money.] A Hindu widow in possession of her

HINDU LAW—Stridhan, (continued.)

husband's estate as such borrowed money from the appellants on a mortgage of such estate for the purpose of discharging a just debt due from such estate, and the appellants lent her such money for such purpose. She did not use such money for the purpose for which it was borrowed and lent, but for some other purpose of her own. *Held* that the mortgage was not invalid because the mortgage-money had not been applied for the purpose for which it had been borrowed. **GANGA DIN AND OTHERS v. MAHARAJI.**

[I-14]

(138). ———— *Consent of next reversioner.* *A*, a Hindu widow, transferred the property left to her by her husband to *B* by a deed of gift. *C*, a divided next reversioner, consented to such transfer by attesting the deed of gift. *Held* that *C*'s son could not sue to set aside the alienations. **GANESH DAI v. BABBU MISR AND OTHERS.**

[III-176]

(139). ———— *A* Hindu widow in possession can, with the consent of a reversioner, make a valid gift which will operate so far as the interests of the widow and that of the consenting reversioner are concerned. **RAMADHIN AND ANOTHER v. MATHURA SINGH AND OTHERS.**

[VIII-79]

(140). ———— *A* gift by a Hindu widow, who has succeeded to the separate estate of her deceased husband, of such estate, is not valid and does not create a title which cannot be impeached by the remoter reversioner, because it has been made with the consent of the next reversioner. *Raj Bullubh Sen v. Oomesh Chunder Roos* (1. L. R., 5 Calc., 44) and *Nofer Doss Roy v. Modhu Soondari Burmonia* (1. L. R., 5 Calc., 732) dissented from. *Raj Lukhee Dabea v. Gookool Chunder Chowdhry* (13 Moo. I. A., 209) and *The Collector of Masulipatam v. Cavalry Vencata Narrainapak* (8 Moo. I. A., 529) referred to. *Sia Dasi v. Gur Sahai* (1. L. R., 3 All., 362, F. A. No. 116 of 1882) not reported distinguished. **RAMPHAL RAI AND ANOTHER v. TULA KUARI AND OTHERS.**

[III-243]

(141). ———— *A* alienation by a Hindu widow of her husband's estate does not, because it is made with the consent of her daughter, the next reversioner, and in favor of the daughter's sons, the heirs presumptive, so far as remoter reversioners are concerned, pass any thing more than the widow's interest in such estate. *Rampthal Rai v. Tula Kuari* (1. L. R., 6 All., 116) followed. **MADAN MOHAN AND ANOTHER v. PURAN MAL AND OTHERS.**

[IV-81]

HINDU LAW—Stridhan, (continued.)

(142). ———— *The* widow of a separated Hindu being in possession as such widow of property left by her husband executed a deed of gift of such property in favor of her daughter's son, her daughter being also a party to the deed. Subsequently to the execution of this deed of gift the executant's daughter gave birth to another son. *Held* that the deed in question could not affect more than the life-interests of the executant and her daughter and could not operate to prevent the succession (as to a moiety of the property) opening up in favor of the subsequent born son on the death of the survivor of the two ladies. *Rampthal Rai v. Tula Kuari* (1. L. R., 6 All., 116) referred to. **DULI SINGH v. SUNDAR SINGH.**

[XII-33]

(143). ———— *Saraogi Banyas—Jains.* *Held* that amongst Agarwalla Banias of the Saraogi sect of the Jain religion a widow has full power of alienation in respect of the non-ancestral property of her deceased husband; but that she has no such power in respect of the property which is ancestral. *Held* also that where a custom alleged to be followed by any particular class of people is in dispute, judicial decisions in which such custom has been recognized as the custom of the class in question are good evidence of the existence of such custom. *Sheo Singh Rai v. Dakko* (6 N.-W. P. H. C. Rep., 382) and (1. L. R., 1 All., 688) referred to. *Chotay Lall v. Chunno Lall* (1. L. R., 4 Calc. 744) explained. *Hoolas Rae v. Bhowani* (6 N.-W. P. H. C. Rep., 396, 397) and *Behari Lal v. Sookbasi Lal* (loc cit, p. 398) commented upon. **SHIMBHU NATH AND ANOTHER v. GAYAN CHAND.**

[XIV-123]

(144). ———— *Sadhs.* Upon the death of a Hindu, a dispute as to his separate estate took place between his mother and his widow, which was referred to arbitration, and an award was made dividing the property between the disputants. It did not appear that either of them claimed the property absolutely, but they disputed as to who should have a life-interest in it, and this was the subject of the arbitration and of the award. Subsequently the mother executed a deed of gift of part of the property which came to her in favour of her nephews. The daughter and the daughter's sons of the deceased, as reversioners, sued the donees to set aside the gift, asserting that the donor had no power to make it having under the Hindu Law a life-interest only in the property. The parties were *Sadhs.* *Held* that the Hindu Law of inheritance was presumably applicable to the parties, and the defendants had not shown that any custom among the *Sadhs.* having the force of law, prevailed opposed to the Hindu Law. *Held* that inasmuch as the donor was in any circumstances

HINDU LAW—Stridhan, (continued.)

entitled to maintenance, and the decision came to upon the arbitration was to put her in possession of half the property, but only on the footing of a woman's interest for life, the defendants could not set up any title by adverse possession on her part to defeat the claim of the reversioners. *Held* also that the plaintiffs were competent to maintain the suit as reversioners to the widow, and were entitled to a decree for a declaration that the gift should not affect any of their rights as reversioners after the widow's death. **GOPI CHAND AND ANOTHER v. SUJAN KUAR AND OTHERS.**

[VI-243]

(145).—*Two widows—Nature of their estate.* When their Lordships of the Privy Council have seen fit to place a definite construction upon any point of Hindu Law, the High Court is bound by such construction until such time as their Lordships may think fit to vary the same. According to the *Mitakshara* law, the estate which two Hindu widows take by inheritance from their deceased husband is not several, but joint. The senior of two such Hindu widows is not a manager of such estate, and competent for purposes of legal necessity to alienate it without the consent of the other. *Bhugwandeem Doobey v. Myna Bae* (11 *Moo. I. A.*, 487) and *Gajpathi Nilamani v. Gajapathi Radhamani* (*I. L. R.*, 1 *Mad.*, 290) referred to. **RAM PIYARI v. MUL CHAND.**

[IV-282]

(146).—*Decree against widow as representing the estate—Res-judicata.* The reversioners to the estate of a deceased Hindu brought a suit against his widow for possession of certain shares in certain villages alleging that such shares were joint ancestral property and the widow was only entitled to maintenance. The widow set up a defence that such shares were the separate property of her husband. The Court finding that the shares were joint ancestral property decreed the plaintiff's claim in the following terms:—"The claim of the plaintiffs to establish their right of inheritance to the shares claimed is decreed, but their claim for possession of such shares is dismissed, and the defendant shall remain in possession thereof for life; after her death the plaintiffs are entitled to take possession of such shares. The defendant shall not be competent to transfer the same and any act of waste on her part shall be held invalid and void." Some ten or twelve years after the daughters of the deceased sued their mother for possession of such shares, claiming by right of inheritance from their father alleging that their cause of action arose in 1879 when their mother attempted to commit waste. The widow confessed judgment and the Court made a decree in accordance with this confession of judgment. Thereupon the reversioners brought the present suit against the daughters and the widow for

HINDU LAW—Stridhan, (continued.)

cancelment of that decree as collusively obtained and for possession of such shares. The daughters set up as a defence that such shares were not joint ancestral property but the separate property of their father. *Held* that the former decree having been fairly and openly obtained against the widow, the daughters were bound by it. *Nand Kumar v. Radha Kuari* (*I. L. R.*, 1 *All.*, 282). The respondents were not however entitled to possession as that decree declared future acts of waste by the widow to be "*ipsis factis*" null and void. It did not declare the reversioners entitled to possession on their occurrence. **BACHCHA AND ANOTHER v. BHAWANI PRASAD AND ANOTHER.**

[I-106]

(147).—*Suit brought against K, the widow of R, a Hindu, by the representatives of R's brothers H and P, for possession of his estate, ended in a compromise by which the defendant recognized the plaintiff's rights, and conceded that the family was joint. After K's death, M, a daughter of R, brought a suit on her own behalf against the abovementioned plaintiffs for possession of her father's estate, but afterwards withdrew her claim. Subsequently, S, M's son, who had been born after K's compromise, brought a suit against M and the representatives of H and P to recover possession of the estate on the allegation that the family being a divided one, he was entitled under the Hindu law, to succeed to such estate, and that both the compromise entered into by K and the withdrawal of the former suit by M were in fraud of his succession, and did not affect his rights. The Court of first instance found that plaintiff was entitled to succeed to the estate, but that his mother being still alive, he was entitled to possession after her death only, and upon these findings, gave him a decree declaring his right to possession on M's death. The lower appellate Court reversed the decree holding that the compromise entered into by K was conclusive against the plaintiff's claim, and also that, during his mother's life-time, he had no *locus standi* to maintain the suit.*

Per MAHMOOD, J., that the plaintiff's right as a daughter's son (which were not affected by his birth having taken place after his maternal grandfather's death) did not entitle him, under ordinary circumstances to succeed to his maternal grandfather's estate in a divided Hindu family, during the existence of a daughter, whether she were his own mother or his maternal aunt; and that the claim for possession was therefore rightly dismissed. *Aumirtolal Bose v. Rajoneekant Mitter* (15 *B. L. R.*, 10); *Sibta v. Badri Prasad* (*I. L. R.*, 3 *All.*, 134) and *Bajinath v. Mahibir* (*I. L. R.*, 1 *All.*, 608) referred to. Also that the prayer in the plaint was wide enough to include prayer for declaratory relief such as

HINDU LAW—Stridhan,—(continued.)

the first Court had given. Also that the rule whereby decrees obtained against a Hindu widow succeeding to her husband's estate as heir are binding by way of *res-judicata* against all who in the order of succession come after her, and in that sense may be dealt with as her representative was limited to decrees fairly obtained against the widow in a contested and *bonâ fide* litigation, and would not apply to the compromise effected by *K*, which could scarcely be regarded as on a higher footing than an alienation which the widow in possession of her husband's divided estate might have made and which the plaintiff distinctly alleged had not been fairly obtained. *Ram Anund Koer v. The Court of the Wards* (1. L. R., 6 Calc., 764); *Nand Kumar v. Radha Kuari* (1. L. R., 1 All., 282) and *Katama Natchiar's case* (9 Moo. I. A., 543) referred to. Also that *M*'s withdrawal of her suit was not a bar to the suit of the plaintiff. Also that it could not be said that daughter's son was not under any condition, competent to maintain a declaratory suit. *SANT KUMAR v. DEO SARAN AND OTHERS*.

[VI-129]

See also

SACHIT AND ANOTHER v. BUHNA KUAR.

[VI-153]

(118).—*Adverse possession against widow—Reversioners.*] Where property which by law should be in the possession of a female heir is held adversely to such heir by a trespasser, the possession of trespasser is adverse also as against the reversioner of such female heir as well as against the female heir, and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. *Hanuman Prasad v. Bhagauti Prasad* (W.N. 1897, p. 80) approved. The Full Bench decision in *Ram Kali v. Kedarnath* (1. L. R., 14 All., 156) has been implicitly overruled by the judgment of the Privy Council in *Mussammat Lachhan Kunwar v. Anant Singh* (L. R., 22 I. A., 25). In an appeal from an order of an appellate Court the High Court is bound to accept, as in a second appeal from a decree, the findings of fact arrived at by the lower appellate Court. *Gouri Shankar v. Karima Bibi* (1. L. R., 15 All., 413) approved. *Tika Ram AND ANOTHER v. SHAMA CHARAN.*

[XVII-195]

(149).—*Alienation—Forfeiture.*] Held that the mere fact that a Hindu daughter had consented to allow the names of her uncle's sons to be recorded in respect of her father's separate estate did not cause her to forfeit her rights in the estate so as to entitle the next reversioners (her sons) to maintain an action for possession of the estate. *Prag Das v.*

HINDU LAW—Stridhan,—(continued.)

Hari Kishan (1. L. R., 1 All., 503) followed. *MOHAN LAL AND ANOTHER v. PAL RAM AND OTHERS.*

[II-11]

(150).—[A Hindu widow *S* alienated a portion of the property she had inherited from her husband to her husband's brother's widow *R*. The plaintiffs, the next reversioners to the estate of the husband, sued to establish their reversionary right to such estate and for the cancellation of the alienation. Held that the plaintiffs were entitled to a decree as claimed, but at the same time defendant *R* should hold and enjoy possession of the property transferred to her during the life time of *S*, and that the decree would not prejudice any rights of maintenance that *R* might hereafter be able to assert against the holders of the estate when the succession to it opened out on the death of *S*, as it was found that both the widows were entitled to be maintained out of the profits of the land. *SUKH DAS AND ANOTHER v. RAMMO.*

[I-104]

(151).—*Widow in possession in lieu of maintenance—Right to maintain suit as co-sharer.*] This was a suit by the plaintiff for a declaration of her proprietary right to certain land held in common by the co-sharers of the village and to have certain buildings erected thereon without her consent, by the defendants, also a co-sharer demolished. Held that as she was the widow of a Hindu who had pre-deceased his father and as her name was entered in the *khevat* for the purpose of her maintenance, she had no proprietary right in the village and the suit was not maintainable. *MENDU v. NATHAN AND OTHERS.*

[IV-102]

(152).—*Suit to set aside alienation.*] Held that a childless Hindu widow had no *locus standi* to sue to set aside a mortgage made by the members of the joint family. *MATADIN AND OTHERS v. GHANSHAM SINGH AND OTHERS.*

[I-125]

(153).—*Widow's debts—Liability of estate.*] *G D*, a separated sonless Hindu, died possessed of certain *zemdari* property, which passed to his widow *J*. During *J*'s possession the *lambardar* of the village paid certain Government revenue due by *J* in respect of the property left by *G D*. *J* died and the property in question passed to *S N* as heir to *G D*. On suit by the *lambardar* to recover from *S N* the money paid on behalf of *J*, it was held that the only decree to which the *lambardar* was entitled was a decree against *S N* as *J*'s representative payable out of the assets, if any, which had come to *S N* from *J*. *Seeth Chitor Mal v. Shib Lal* (1. L. R., 14 All., 273) referred to. *SIMANAND v. HAR LAL.*

[XVI-154]

HINDU LAW—Stridhan,—(continued.)

(154).—[The creditors of a Hindu widow cannot after her death have recourse to ancestral property in the hands of the reversioners in respect of which the widow had had only a widow's life-estate even though the debt sued upon was incurred for legal necessity and was one in respect of which such property might have been made liable beyond the widow's life-time, if in fact there is no instrument charging the property beyond the widow's life-time. *Shiamanand v. Har Lal* (W. N. 96, p. 154); *Ramasami Mudaliar v. Sellattammal* (I. L. R., 4 Mad., 375) referred to. *Ram Coomarr Mitter v. Ichamoyi Dasi* (I. L. R., 6 Cal., 36), dissented from. **DEHRAJ SINGH v. MANGA RAM AND ANOTHER.**

[XVII-69]

(9). Miscellaneous.

(155).—[*Raj—Impartibility—Primogeniture—Custom—Alienation.*] Where there is no local or family custom overriding the general law, the successions to a *Raj* or impartible *zaminadari*, according to Hindu Law, goes by primogeniture. In the absence of any custom to the contrary, a *Raj* or impartible *zaminadari* is according to Hindu Law, not separate property but joint family property. *The Shivagunga Case* (9 Moo. I., p. 543); *Rama Lakshmi Ammal v. Sivanautha Perumal Sethurayar* (14 Moo. I. A. 570); *Doorga Prasad Singh v. Doorga Konwari* (I. L. R., 4 Cal., 190); *Stree Rajah Yammula Venkayamah v. Stree Rajah Yammula Boochia Vankondora* (13 Moo. I. A. 333) and *Periasami v. Periasami* (L. R., 5 I. A., 61) followed. *The Tipperah Case* (12 Moo. I. A., 523) observed on. According to the law of the *Mitakshara*, joint family property cannot be alienated by any member of the family save for urgent and necessary expenses of the family, without the consent of all the members. *Held*, therefore, where the holder of an impartible *Raj* made an absolute gift of a portion of the estate appertaining to the *Raj* to one of his wives, "in token of his love for her," and his eldest son sued to set aside the alienation, that the parties being members of a joint Hindu family, and governed by the law of the *Mitakshara* the son was entitled to bring the suit, and that the alienation, not being made for necessary purposes, was void. *Held* also on the evidence in this case that a custom entitling the holder of the *Raj* to make such an alienation was not established. **BHAWANI GHULAM AND ANOTHER v. DEO RAJ KUAR, GUARDIAN OF LAL NARAINDAR BAHADUR PAL.**

[III-121]

(156).—[*Widow—Succession.*] Impartible ancestral estate is not merely by reason of its being impartible, the separate estate of the single member of the undivided family, upon whom it devolves so long as the family continues joint. *Chinta Man Singh v.*

HINDU LAW—Miscellaneous, (continued.)

Nowlukho Koeri (I. L. R., 1 Calc., 153); (L. R., 2 Ind., Ap., 263) referred to and followed. A female can not inherit impartible, ancestral estate, belonging to a joint family, under the *Mitakshara*, when there are any male members of the family who are qualified to succeed as heirs, a rule of law not dependant on custom, only a custom modifying the law in this respect must be accustomed to admit females, not accustomed to exclude them. *Maharani Hiranath Koer v. Ram Narain Singh* (9 B. L. R., 274) approved. Where *Raj* estate, ancestral and impartible, was not separated property and the family was undivided, and where no special custom existed, modifying the *Mitakshara* law of succession, *held* that the nearest male collateral relation of the last *Raja* who died without male issue, was entitled to succeed in preference to the *Raja's* widow. This relation, *viz.* a brother of the late *Raja's* deceased father, at one time received an allowance for maintenance out of the family estate. What amounted to an attachment of this, according to a subsequent judicial decision, occurred in 1857. *Held* that he had not thereby been deprived of his right of succeeding as a member of the joint family. The *Raj* estate in question originated in the partition of a more ancient one with others out of which minor estates were formed. If in the latter there had been descents to widows, no inference hence, to support the widow's claim to inherit in this family could be drawn. Such minor's estates might have been separate (which estates granted for maintenance probably would be) and in that case the widows of the last holders would have succeeded them in due course of law. Unless connection is shown between families, evidence of a special family custom in one is not evidence of a similar family custom in another. **RAJAH RUP SINGH v. RANI BAISNI AND THE COLLECTOR OF ETAWA.**

[IV-246]

(157).—[*Restitution of conjugal rights.*] This suit for restitution of conjugal rights by a *sunar* was resisted on two grounds:—(1) that under an agreement, the plaintiff had prior to his marriage to the defendant No. 1 undertaken to live in the house of his mother-in-law after marriage and that defendant No. 1 was married to him on that condition, that contrary to that agreement plaintiff has left the house and refuses to live in it. That the plaintiff having taken a Muhammadan woman as his mistress has been put out of caste. *Held* that the first defence was clearly absurd. As to the second defence it had force, but as the impropriety and breach of caste rules of which plaintiff was guilty was of such a character as did not render him liable to perpetual excommunication, the suit should be decreed with the condition that the plaintiff should first obtain his restoration to his caste. **SARASSUTI AND ANOTHER v. SHEO-NARAIN.**

[VI-5]

HINDU LAW—Miscellaneous,—(continued.)

(158). ————.] According to the Hindu Law the main rights and duties of husband and wife *inter se* were legal, as distinct from moral, rights and duties and their enforcement devolved upon the king. Moreover the Hindu Law contemplated the enforcement of such rights and duties by either party against the other and not exclusively by the husband against the wife. The Civil Courts of British India as occupying the position in respect of judicial functions formerly occupied in the system of Hindu Law by the king have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband. It is not necessary as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and a refusal by the defendant. The provisions of arts. 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits of the description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Muhammadans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with s. 23 of the Limitation Act. Desertion by a wife of her husband is permitted by the Hindu Law under certain circumstances, but the insanity of the husband will not justify his desertion by the wife. In any case desertion does not terminate the relation of husband and wife. A suit for restitution of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant. *BINDA v. KAUNSILIA AND ANOTHER.*

[XI-18

(159). ———— *Marriage—Karao—Fats.*] Held that a *Karao* marriage between *Fats* was a lawful union and the issue of such a marriage was entitled to inheritance. *NAURANG v. FAHIM AND OTHERS.*

[III-17

(160). ———— *Gandharva—Custom.*] Held that a marriage by the "*gandharv*" form is nothing more or less than concubinage, and has become obsolete as a form of marriage giving the *status* of wife and making the offspring legitimate. Also with reference to the entry in the *wajib-ul-urz*, that it did not necessarily place illegitimate children on an equality

HINDU LAW—Miscellaneous,—(continued.)

with legitimate as heirs; and if that was its intention it was ineffectual, as parties could not by agreement alter the law of succession; and if the entry was regarded as evidence of custom it was not conclusive. *BHAUNI v. MAHARAJ SINGH.*

[I-48

(161). ———— *Between illegitimate Hindus.*] There is nothing to prevent two illegitimate Hindus from contracting a valid marriage between themselves according to Hindu rites. *SUKKHO AND ANOTHER v. RAM CHARAN.*

[XII-27

(162). ———— *Father's consent.*] Under the Hindu Law if a girl is given in marriage by her mother and all the necessary rites are duly performed and there is no question of force or fraud and no other legal impediment to the marriage, the marriage will not be invalid merely because the consent of the girl's father has not been obtained. *Baee Rulyat v. Fey Chand Kewal* (1 *Morley's Digest*, 181) and *Venkatacharyulu v. Rangacharyulu* (1 *L. R.*, 14 *Mad.*, 316) referred to. *GHAZI v. SUKRU.*

[XVII-139

(163). ———— *Conflict of Hindu and Muhammadan laws.*] To entitle a person to have the Hindu or Muhammadan law applied to him under the first paragraph of s. 24 of Act VI of 1871, he must be an orthodox believer in the Hindu or Muhammadan religion. The mere circumstance that he calls himself, or is called by others, a Hindu or Muhammadan, as the case may be, is not enough. His only claim to have a special kind of law applied to him is that he follows and observes a particular religion that of itself creates his law for him. If he fails to establish his religion his privilege to the application of its law fails also and he must be relegated to that class of persons whose cases have to be dealt with under the latter paragraph of s. 24 of Act VI of 1871, according to justice, equity, and good conscience. *B* alleging that his family was a joint undivided Hindu family sued *R*, his father, for a declaration that certain property was joint ancestral property, and for partition of his share according to the Hindu Law of inheritance of such property, *viz.* one moiety. *R* set up as a defence to the suit that the members of the family were Muhammadans and were therefore not governed by the Hindu Law. The evidence in the suit established that the members of the family were neither orthodox Hindus nor Muhammadans. It also established that the Hindu Law of inheritance had always been followed in the family. Held, following the principle enunciated above, that the family not being Hindu or Muhammadans, the rule of decision applicable to the suit was neither Hindu nor Muhammadan law, but justice, equity, and good

HINDU LAW—Miscellaneous.—(continued.)

conscience, that, the Hindu Law of inheritance having always been followed in the family, it was justice, equity, and good conscience to apply that law to the suit; and that therefore *B* was entitled to demand a partition of half of the family estate. *RAJ BAHADUR AND OTHERS v. BISHEN DIAL.*

[II-74]

(164.) —————.] The plaintiff, a Muhammadan, claimed as heir to one Inder Kuar through her (Inder Kuar's) mother. It was found that Inder Kuar was the daughter of a Muhammadan prostitute by a Hindu father and had been brought up in her father's house as a Hindu. She had been married according to the Hindu ceremony to a person who was the son of a Muhammadan mother and a Hindu father and who lived as a Hindu. Held that, even if the plaintiff had established her relationship to the mother of Inder Kuar (which was not clear), there was no principle of law by which she could be regarded as the heir of Inder Kuar. The principle of law enunciated in *Raj Bahadur v. Bishen Dayal* (I. L. R., 4 All., 343) followed. *BUDDHI BIBI v. BABU RAM AND OTHERS.*

[XI-65]

(165.) ———— *Religious endowment—Right to manage—Alienation.*] The right of managing a temple, which is a religious endowment, of officiating at the worship conducted in it, and of receiving the offerings at the shrine, can not, in default of proof to the contrary, pass outside the family of the trustee, until absolute failure of succession in his family, and such rights are therefore not saleable in execution of decree. The principle laid down by the Privy Council in *Rajah Vurmah Valia v. Ravi Vurmah Mutha* (L. R., 4 Ind. App., 76) followed. *DURGA BIBI AND ANOTHER v. CHANCHAL RAM.*

[I-124]

(166.) ———— *Gift—Seesen.*] The delivery to the donee of immoveable property of the deed of gift is sufficient to pass the title to such property to the donee without actual physical possession of such property being taken by the donee. *Manbhari v. Naunidh* (I. L. R., 4 All., 40) followed. *BALMAKUND v. BHAGWAN DAS.*

[XIV-21]

(167.) ———— *Debts—Liability of person in possession of property.*] Held that the daughters-in-law of a Hindu who were in possession of the whole of the property left by him under a will though not legal heirs to the deceased, could be sued for the debts due by the deceased donor and were liable to the extent of the property devised, no matter whether the will was genuine or otherwise. *GULABI AND ANOTHER v. ASA RAM.*

[I-50]

HINDU LAW—Miscellaneous.—(continued.)

(168.) ———— *Partition—Person seeking must bring all property in hotchpot.*] Held that where a member of a joint Hindu family seeks for partition of property in the hands of the other members he is bound to bring into hotchpot any undivided property held by himself alone. *PIARI LAL v. UMRAO SINGH.*

[III-220]

INDIAN PENAL CODE.—(Act XLV of 1860.)

(1).—s. 21.—*Public servant—Conservancy moharrir.*] Held that a conservancy moharrir is not a public servant within the meaning of s. 21, Penal Code. *EMPRESS v. KHURSHED ALI.*

[V-175]

(2). ———— *Conservancy Inspector.*] Held that a Conservancy Inspector (attached to the Municipality) sent by the Municipal Board on the application of one *M* to the house of *M* to cause his foundation to be filled up and to report, if any body prevented it, was not a public servant within the meaning of s. 21, clause (6); consequently offering a bribe to him was not punishable. *EMPRESS v. DEBI DIN.*

[VI-295]

(3). ———— *Manager under Court of Wards.*] Held that the Manager of a village under the Court of Wards was a public servant within the meaning of s. 21, clause (9). *ISHARI v. SITAL PRASAD*

[V-297]

(4). ———— *Person discharging duties of.*] Any person, whether receiving pay or not, who chooses to take upon himself duties and responsibilities belonging to the position of a public servant, and performs those duties, and accepts those responsibilities, and is recognised as filling the position of a public servant, must be regarded as one, and it does not lie in his mouth to say subsequently that, notwithstanding his performance of public duties and the recognition by others of such performance, he is not a "public servant", within the definition contained in s. 21 of the Penal Code. *EMPRESS v. PARMESHWAR DAT.*

[VI-63]

See also

QUEEN EMPRESS v. KALIAN SINGH.

[XI-206]

(5). ———— *Mirdeh.*]

See s. 353, No. (2).

s. 23.—*Wrongful loss—Wrongful gain.*]

See s. 409, No. (1).

s. 24.—*Dishonestly.*]

See s. 378, No. (1).

INDIAN PENAL CODE—s. 24—(continued.)

See s. 391, No. (1).

s. 403, No. (2).

ss. 24 & 25—*Fraudulently and dishonestly.*]

See s. 463, Nos. (2) and (3).

s. 471, Nos. (1) and (2).

s. 30—*Valuable security.*]

See s. 467.

(1).—s. 34—*Act done in furtherance of common intent—Private defence.*]

See s. 99, No. (4).

(2).—[The prisoners, *A, B, C* and *D*, resisted the lawful arrest of *A* by a public servant in the lawful discharge of his duty and in doing so caused grievous hurt to him. The injuries to the public servant were inflicted by *A* and *B*. Upon these facts the Sessions Judge convicted *A* and *B* under s. 333, Penal Code, and *C* and *D* under s. 334, Penal Code. Held that the conviction of *A* and *B* was right, but that of *C* and *D* was not right under either of the two sections, for they had not caused the grievous hurt, nor was it caused "in furtherance of the common intention of all," their common intention being to rescue the prisoners and not to cause grievous hurt; so s. 34 was not applicable, nor was s. 109 applicable. These two should be convicted under s. 332, Penal Code. *EMPRESS v. DHARAM RAI AND OTHERS.*

[VII-236]

s. 38—*Different offences.*]. A quarrel arose between *C* on the one side and *I* and *B* on the other. *C* abused *I*, whereupon *I* struck him with a stick, and *B* struck him down with an axe on the head. He also received two other wounds with the axe on other parts of the body. Any one of the three axe wounds was sufficient to cause death, more specially that on the head. Held, that *B* was guilty of culpable homicide, while *I* was guilty of voluntarily causing hurt and that the case fell under s. 38, Penal Code. *EMPRESS v. INDAR AND OTHERS.*

[II-23]

(1). s. 40—*Offence—Order directing arrest under s. 55, Criminal Procedure Code.*]

See s. 224.

(2).—*Travelling without ticket.*]

See s. 64.

s. 59—*Transportation—Imprisonment in lieu of fine.*]. Held that the word "imprisonment" as used either in s. 59 or s. 75, Penal

INDIAN PENAL CODE—s. 59—(continued.)

Code, cannot be taken to include, not only the substantive imprisonment which can be awarded, but also such imprisonment as might have been awarded on account of default in payment of fine, in computing the terms of three years and seven years mentioned in those sections respectively. *EMPRESS v. YUSUF.*

[II-116]

s. 64—*Imprisonment in lieu of excess fare recoverable under Railway Act—Offence.*]. A passenger who travels in a train without having a proper pass or ticket with him has not committed an "offence." He cannot therefore be legally sentenced to imprisonment in default of payment of the excess charge and fare which may be recovered under the provisions of s. 113, cl. (4) of Act IX of 1890. *QUEEN EMPRESS v. RAM PAL.*

[XVII-196]

s. 70—*Imprisonment in lieu of fine—Discharge of fine.*]. The accused was convicted and sentenced to simple imprisonment for two months, and to pay a fine of Rs. 2,000, or, in default, to suffer a further term of imprisonment. He paid a part of the fine only and was therefore released after having suffered the proportionate imprisonment, provided for, in the case of default, under s. 69, Penal Code. Held that the fact that he had undergone the proportionate imprisonment did not discharge him of his liability to pay the fine. But that the Judge had a discretion in the matter and as in this case the failure to pay was due to the accused's want of means the fine is pardoned. *EMPRESS v. FANTHOM.*

[II-85]

(1). s. 71—*Double convictions—Under ss. 147 and 325.*]. In prosecution of the common object of an unlawful assembly, *M*, with his own hand, caused grievous hurt. *M* and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 147 and causing grievous hurt under s. 325, Penal Code, and were each sentenced to separate terms of imprisonment for each offence. Held that the riot could not, in any of the cases, be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal. *Queen Empress v. Ram Partab* (I. L. R., 6 All., 21) dissented from; *Queen Empress v. Dungan Singh* (I. L. R., 7 All., 29); *Queen Empress v. Ramsarup* (I. L. R., 7 All., 767); *Queen Empress v. Rubbe-oo-llah* (7 W. R. Cr. 13); *Lokenath Sirkar v. Queen Empress* (I. L. R., 11 Calc., 349); *Queen Empress v. Pershad* (I. L. R., 7 All., 414); *Chandra Kant Bhattacharjee v. Queen Empress* (I. L. R., 12 Calc., 498); *Reg. v. Tukayabin Tamana* (I. L. R., 1 Bom., 214) referred to. *EMPRESS v. BISHESHAH AND OTHERS.*

[VII-149]

INDIAN PENAL CODE, s. 71—(continued).

(2).—Under ss. 148 and 304.] *G* and certain other persons were committed for trial before the Court of Session, charged under ss. 148 and 304, Penal Code. The Sessions Judge found on the evidence that a fight took place between two parties; that the prisoners were the aggressors; that they used *lathis*; that the deceased received blows at the hands of one or more of the accused; that his spleen which was not diseased, was thus ruptured and his death was caused; and that each of the five prisoners having at the time been a member of an unlawful assembly was responsible for the death of the deceased. On these findings he convicted them under s. 304, Penal Code, and sentenced them to three months' rigorous imprisonment. *Held* that on these findings the prisoners should have been convicted both under ss. 148 and 304 Penal Code, and that the sentences passed were inadequate. Accordingly all the prisoners were convicted under s. 148 and 304, Penal Code, and sentenced each to six months' rigorous imprisonment under s. 148 and the sentence on *G* was enhanced to one year's rigorous imprisonment. *EMPRESS v. GATTU AND OTHERS.*

[III-32]

(3).—Under ss. 380 and 457—Sentence.] Under ss. 35 and 235, Criminal Procedure Code, a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under ss. 379 and 380 and 454, Penal Code, the two offences forming part of the same transaction and being tried together. But a Sessions Judge trying such a case under s. 379 or s. 380 and s. 454, would under no circumstances be justified in passing a sentence of 10 years' imprisonment under the latter part of s. 454 and of 4 years' imprisonment under s. 380. The latter portions of s. 454 and 457 were framed to include the case of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft. *Queen Empress v. Ajudhia* (I. L. R., 2 All., 644); and *Queen Empress v. Sakharan Bhan* (I. L. R., 10 Bom., 493) referred to, *EMPRESS v. ZOR SINGH.*

[VIII-5]

(4).—] *Held* that double convictions under ss. 380 and 457, both offences forming one connected act of theft or house-breaking, were improper. *EMPRESS v. BANDHU AND OTHERS.*

[III-223]

(5).—Under ss. 380 and 461.] Where an accused person was found to have caused an iron safe to be broken open and to have removed and appropriated the contents, it was *held* that he might be lawfully convicted of and sentenced for separate offences under ss. 380 and 461 of the Indian Penal Code. *Queen*

INDIAN PENAL CODE, s. 71—(continued.)

Empress v. Zor Singh (I. L. R., 10 All., 146) and *Queen Empress v. Sakharan Bhan* (I. L. R., 10 Bom., 493) referred to—*QUEEN EMPRESS v. RAM LAL.*

[XVI-184]

(6).—Under s. 161.] The accused, a head constable of police, was, on the facts mentioned below, charged and convicted of two offences under s. 161, of (i) accepting a bribe of Rs. 80, on or about the 17th May, 1887, and (ii) of accepting a bribe of Rs. 70 on or about the 15th August, 1887. On the 15th May, 1887, some *Telies* were arrested by order of the accused for being in possession of some oil suspected to be stolen. One of the *Telies* says that one *BN*, who was with the accused, said that for Rs. 150 he would release the oil and the men. Rs. 80 were raised and paid to the accused on the 17th May, 1887, and the *Telies* were thereupon released, the accused saying that he could not give up the oil at once. The remaining Rs. 70 were paid on the 15th August when the oil was also made over to the *Telies*. *Held* that this was but one transaction; one bribe of Rs. 150 was demanded by the accused and it does not make any difference whether the money was paid in one lump sum or in two sums. The accused should therefore have been convicted and punished of one offence under s. 161. *EMPRESS v. TUFAIL HUSAIN.*

[VIII-184]

(7).—Under s. 379.] *Held* that an accused who had at one and the same time stolen two bullocks from the custody of a herdsman, to whom they had been entrusted by their owners could not be separately tried and convicted of two offences under s. 379, Penal Code, on the ground that the bullocks belonged to different owners, where there was nothing to show that the accused knew any thing about their ownership. *EMPRESS v. RAGHU RAI.*

[I-154]

(8).—Under s. 411.] Where a person was found in possession of stolen property identified as belonging to different owners, but it did not appear that he had received such property at different times. *Held* that, he could not properly be tried and convicted under s. 411 of the Indian Penal Code, separately in respect of the property identified by each owner. *Ishan Muchi v. The Queen Empress* (I. L. R., 15 Cal., 511) approved. *QUEEN EMPRESS v. MAKHAN.*

[XIII-101]

(9).—Under s. 392 and s. 19 of Act XI of 1861.] *Held* that when a person committed robbery being armed with a sword, for the possession of which he had not got a license, he might properly be convicted of both offences, the robbery and the possession of unlicensed arms and punished for them separately. *QUEEN EMPRESS v. NAND LAL.*

[XVI-181]

INDIAN PENAL CODE.—(continued.)

(1). s. 73.—*Solitary confinement—Summary trial.* Held that it was legal for a Magistrate to award solitary confinement in a case which had been tried summarily. *EMPRESS v. UMAR KHAN.*

[III-224]

(2).———*Limit—Several offences.* A Magistrate found an accused person guilty at the same trial of three separate offences and sentenced him to three separate terms of imprisonment, the collective terms amounting to four years; to those sentences the Magistrate also annexed in each case a term of solitary confinement making altogether eight months solitary confinement. Held that the sentence of eight month's solitary confinement, if within the letter of the law, was contrary to the intention of the Legislature and it was reduced to three months. *QUEEN EMPRESS v. GAMU.*

[XVI-132]

(3).———*For the whole term of sentence.* It is illegal to order a convict to be kept in solitary confinement for the whole term of imprisonment to which he is sentenced even though such term does not exceed the maximum duration of a period of solitary confinement allowed by s. 74 of the Indian Penal Code. *QUEEN EMPRESS v. ACHRAJ AND ANOTHER.*

[XV-82]

(1). s. 75.—*"Imprisonment"—In lieu of fine.*

See s. 59.

(2).———*Applicability of section to offences under s. 511.* S. 75 of the Indian Penal Code does not apply to cases which are confined to s. 511 of that Code. The offences which come under s. 511 must be punished entirely irrespective of s. 75. *Queen Empress v. Ajudhia (W. N. 1895, p. 22)* approved. *QUEEN EMPRESS v. BHAROSA.*

[XV-23]

EMPRESS v. BEHARI.

[VI-255]

EMPRESS v. RUSTAM.

[II-178]

(3).———*Section 75 of Act No. XLV of 1860 does not apply to the case of an attempt to commit the offence punishable under s. 457 of the Code, after previous convictions of offences falling within Chap. XII or Chap. XVII, such offence being punishable under s. 511.* *Sheo Saran Taito v. The Empress (I. L. R., 9 Calc., 877); Empress of India v. Ram Dayal (I. L. R., 3 All., 773); Empress v. Nana Rahim (I. L. R., 5 Bom., 149) and Queen Empress v. Sricharan Bauri (I. L.*

INDIAN PENAL CODE, s. 75.—(continued.)

R., 14 Calc., 357) referred to. *QUEEN EMPRESS v. AJUDHIA.*

[XV-22]

(4).———*Previous conviction.—Security for good behaviour.* The fact of a convict having suffered a term of imprisonment in consequence of his default in giving security for good behaviour is not a matter which can be taken into consideration under s. 75, Penal Code. *QUEEN EMPRESS v. KHUDA BAKHS.*

[XIII-43]

(5).———*Term of sentence.* Held that a Sessions Judge, on convicting an accused person under s. 411, Penal Code, who had been previously convicted of a similar offence, is not bound to sentence the prisoner to double the amount of punishment to which he would otherwise be liable or to transportation for life under s. 75, Penal Code. He is competent to sentence the prisoner to less than double the amount of punishment. *EMPRESS v. KALLU.*

[III-98]

(6).———*Transportation for ten years was illegal.* The only alternative to the Sessions Judge was either transportation for life or double the amount of imprisonment provided by s. 379. *EMPRESS v. KHUNWA.*

[III-225]

s. 95.—*Act causing slight harm.*

See s. 352.

s. 425, No. (1).

s. 403, No. (1).

s. 499, Nos. (1) and (2).

(1). s. 97.—*Right of private defence—Riot.*

See s. 146, Nos. (1), (2), (3), and (4).

(2).———*One MK, a relative of R, had a quarrel with S and K, the relatives of the accused BR. R went to the spot armed with a lathi to protect MK from S and K; BR also went there armed with a lathi to protect S and K from R and others. R and BR exchanged abusive language. R then struck BR on the head with his lathi and BR then returned the blow; R fell on the ground and he was then struck another blow by another person. Held that on these facts BR could not be convicted of any offence as he was acting in self defence.* *EMPRESS v. BISAMBHAR RAI.*

•[VI-135]

INDIAN PENAL CODE, —(continued.)

(1). s. 99.—*Right of private defence—Public servant.*

See s. 332, Nos. (1), and (2).

s. 353, No. (1).

(2). ———— *Right of private defence—Public servant.* The right of private defence of property does not apply in the case of acts done by a public servant ostensibly in the execution of his duty as such, though such acts are clearly beyond the power and authority of such public servant. *QUEEN EMPRESS v. LEKHRAJ AND OTHERS.*

[XI-185]

(3). ———— *Time to have recourse to public authority.* Where certain persons found others taking away moveable property in which they were interested it was held that they were justified in at once reclaiming their property by force; the circumstances being such that had the owners applied for the assistance of the police the others would in all probability have successfully made off with the stolen property. *QUEEN EMPRESS v. SHAM-SHER KHAN.*

[XVI-170]

(4). ———— *Extent to which right may be exercised.* Several persons on their way to a police station to lodge a complaint were met by others who attempted by force to prevent them going to the police station. A fight ensued in which one of the opposing parties suffered grievous hurt. Held that under the circumstances the first party were justified in having recourse to the right of private defence and that though some of them had exceeded the limits of that right, only those who were proved to have exceeded those limits were liable, and s. 34 of the Indian Penal Code could not be applied so as to render liable to punishment those members of the party who were shown to have caused merely simple hurt to their assailants. *QUEEN EMPRESS v. FATEH SINGH AND OTHERS.*

[XVI-149]

s. 100.—*Right of private defence—Reasonable apprehension.* The law most undoubtedly authorizes a man who is under a reasonable apprehension that his life is in danger or his body in risk of grievous hurt to inflict death upon his assailant either when the assault is attempted or directly threatened, but the apprehension must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purposes of self-defence. It must be proportionate to and commensurate with the quality and character of the act it is intended to meet and what is done

INDIAN PENAL CODE, s. 100—(continued.)

in excess is not protected. *EMPRESS v. WHITTAKER.*

[II-172]

(1). s. 107.—*Abetment.*

See s. 34, No. (2).

(2). ———— *Forged document—Client—Pleader.* Held that, unless it is found as a fact that the document filed by a pleader was known by him to be forged he cannot be convicted under s. 471, Penal Code. That the client who gave the document to the pleader was liable not as an abettor but as a principal under s. 471, Penal Code. *EMPRESS v. JIWAN AND ANOTHER.*

[VII-195]

(3). s. 107—*Expl. (2)—“Facilitate”—Extorting confession.* A zamindar who had lodged a complaint of theft lent a house belonging to him to the Police officer who was conducting the investigation into the theft case for the purposes of such investigation. It was found that at the time of lending the house the zamindar knew that it was likely to be used for the purpose of putting illegal pressure upon persons suspected of complicity in or knowledge of the theft and also that the zamindar was at times present while the Police officer was engaged in that house in torturing certain persons summoned there by him, though he did not actually take part in the torturing. Held that under the above circumstances the zamindar was properly convicted under s. 107, Explanation ii, of the Indian Penal Code, of doing an act in order to facilitate the commission of an offence namely, the offence punishable under s. 330 of the Code. *QUEEN EMPRESS v. FAIZAZ HUSAIN AND ANOTHER.*

[XVI-194]

(1). s. 109.—*Abetment—Forgery.*

See s. 511, No. (1).

(2). ———— *Criminal breach of trust.*

See s. 409, No. (1).

s. 111.—*“Probable consequence of abetment.”—Knowledge.* M and C were proved to have connived at a robbery in which excessive violence was used, resulting in the death of the persons robbed. The Sessions Judge convicted M and C of abetment of murder, on the ground that the death was “a probable consequence of the intention known and abetted” by them. Held, that the test of guilt in charges of abetment must always be whether having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which according to ordinary experience and common sense, the abettor must

INDIAN PENAL CODE, s. 111—(continued.)

have foreseen as probable; and that having regard both to the strictness of the tests which should be applied to the interpretation of a penal statute, and specially of a section such as s. 111 of the Penal Code and also to the necessary difficulty of questions as to the state of a man's mind at a particular moment. It could not, in the present case, be said that, because the accused knew of and connived at the intended robbery, they must be presumed to have foreseen that such excessive violence as was used was probable. *EMPRESS v. MATHURA DAS AND OTHERS.*

[IV-251]

s. 114—Presence of abettor.] One *M L* accused *K S* with having assaulted him and knocked out his tooth. *K S*, on being acquitted charged *M L* under s. 211, Penal Code. *M L* was accordingly committed to the Court of Session and convicted. The finding of the Sessions Judge was that although *K S* did not himself assault the accused or knocked out his tooth, he instigated his servants to do so, which they did and probably knocked out his tooth. *Held* that on the facts found *K S* was guilty of abetment of the assault, but being present he must be presumed to have committed the offence. Therefore the charge of assaulting the accused in person, brought by *M L*, was not false and his conviction must be set aside. *EMPRESS v. MINDAI LAL.*

[III-39]

s. 124 A—"Disaffection."] Any one who, by any of the means referred to in s. 124 A of the Indian Penal Code excites, or attempts to excite, feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites, or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in s. 124 A. Such feelings are necessarily inconsistent with and incompatible with a disposition to render obedience to the lawful authority of Government and to support that Government against unlawful attempts to subvert or resist it. The term "disaffection" may be taken as synonymous with "disloyalty." The ordinary meaning of the term "disaffection" as used in s. 124 A is not varied by the explanation appended to that section. When a person is charged with having committed the offence punishable under s. 124 A of the Indian Penal Code, his intention may be inferred from one particular speech, article, or letter, or from that speech article or letter considered in conjunction with what such person has said written or published on another or other occasions. Where it is ascertained that the intention of such person was to excite feeling of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, or written or published could have the effect of exciting such feeling of disaffection, and it is immaterial

INDIAN PENAL CODE, s. 124A—(continued.)

whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection. *QUEEN EMPRESS v. AMBA PRASAD.*

[XVIII-1]

s. 141.—Unlawful assembly—Common object.] To constitute an unlawful assembly within the meaning of s. 141 of the Indian Penal Code, it is not necessary that the persons composing such assembly should meet together with a common object; it is sufficient if from their actions a common object may be inferred and such object falls within the purview of s. 141. *QUEEN EMPRESS v. SUMESHAH RAI AND OTHERS.*

[XIII-169]

(1). s. 146.—Rioting—Right of private defence.] The petitioners were convicted of rioting under s. 147, Penal Code. They were the lessees of certain land and had been in possession of it for many years. They went to plough the land and were interfered with by one *P* and his adherents; a riot occurred in which some of *P*'s partisans were hurt. *Held* that the conviction was bad as the petitioners had a right of private defence. *EMPRESS v. DHARAMRAJ AND OTHERS.*

[II-42]

(2). —————.] The appellants and one *R* were at feud, in regard to a field both claiming possession under a mortgage. A suit was instituted in the Civil Court, but they agreed to arbitrate the dispute between them. The arbitrators were assembling, on the day the offence was committed and the appellants had assembled armed with clubs, when *R*'s son passed by on the other side with some bullocks and a plough. The appellants believing that he was going to plough the field in dispute rushed upon him, assaulted him and caused the death of one of his party. *Held* that under the circumstances the appellants were properly convicted of rioting. There was no question in this case of the right of private defence. *Empress v. Gokul (W. N., 1885, p. 96), distinguished.* *EMPRESS v. RAM SARAN AND OTHERS.*

[VII-74]

(3). —————.] A body of *Kunjars*, numbering about 50 persons, encamped in a certain grove of trees in the district of Muzaffarnagar. The *zamindars* of the village in which the grove was situated, collected a number of cultivators and went to the grove and requested the *Kunjars* to quit the grove. The *Kunjars* declined to do this and a fight took place between them and the *zamindars*. It was doubtful which party first

INDIAN PENAL CODE, s. 148—(continued.)

resorted to violence. The Magistrate being of opinion that the *Kunjars* constituted an unlawful assembly as their common object was to commit criminal trespass and that they were guilty of rioting as violence was used by them in the prosecution of that common object, convicted and sentenced the *Kunjars* under s. 147, Penal Code. *Held* that as the accused appear to have been simply defending themselves against the attack made upon them by the *samindar* they were not guilty of an offence under s. 147, Penal Code. And as there was no evidence that any of the accused entered into or upon the property in question "with intent to commit an offence, or to intimidate, insult or annoy any person in possession of such property" they could not be convicted of an offence under s. 143, Penal Code. *EMPRESS v. BIDHI.*

[VI-254

(4.) —————.] An exclusive claim to some grass on a certain piece of land in a village was made by one *S B. H.*, another co-sharer in the village, and his party determined to take physical possession of this grass and to cut it. The grass belonged to the joint sharers. *H* and his party, consisting of 30 or 40 men went and cut the grass and took it away towards their own premises. On their way home they passed by the place where the other party in the village were sitting and discussing among themselves whether they should or should not take any physical steps to prevent *H* and his party from taking the grass. After some consideration they decided not to interfere, but when the opposite party was passing by they asserted their right, but were insulted and assaulted by bricks being thrown at them. They then jumped up and the fight began and in the result one man of the party who had the grass was killed and a man on the other side injured. There was no evidence who dealt the fatal blow. *Held* that the party of *S B* were guilty of no offence but that of *H* were guilty of rioting and voluntarily causing grievous hurt by dangerous weapons. *EMPRESS v. GOKUL AND OTHERS. EMPRESS v. SIGDAR AND OTHERS.*

[V-96

(5.) ————— *Deadly weapon—Lathi.*] The question whether or not a *lathi* is a "deadly weapon" within the meaning of s. 148 of the Indian Penal Code is a question of fact to be determined on the special circumstances of each case as it arises. *QUEEN EMPRESS v. NATHU AND OTHERS.*

[XII-158

s. 149—*Section creates no offence.*] S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not

INDIAN PENAL CODE, s. 149—(continued.)

with his own hand commit the offence, committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object. *EMPRESS v. BISHESHAR AND OTHERS.*

[VII-149

(2.) ————— *Offence committed in prosecution of common object.*] One *S P*, with the object of recovering certain property which was being carried away in a cart, collected eight or nine friends and servants, pursued the cart, and catching up the cart, he snatched the property off the cart and ran away. His men however, on his running away, assaulted and robbed the persons in the cart. *Held* that *S P* could be convicted of rioting only and not for causing grievous hurt and robbery committed by his friends and servants by calling in aid the provisions of s. 149, Penal Code. *EMPRESS v. SHEOPARSHAN.*

[II-179

s. 153—"Doing anything illegal".] *Held* that an offence under s. 153, Penal Code, requires that the offender should do something illegal by doing which he malignantly or wantonly gives provocation to any person intending or knowing it to be likely that a riot would be the result. Where the facts did not disclose these ingredients, a conviction cannot be sustained. *EMPRESS v. KHUSHAL SINGH.*

[VI-23

s. 154—"Owner of land"—*Karinda.*] It is not necessary, in order to render the owner of land on which a riot takes place criminally liable, that he should be aware of the likelihood of such an occurrence. That his *Karinda* should have taken an active part in the riot is sufficient to warrant the conviction of the owner, under s. 154 of the Indian Penal Code. *QUEEN EMPRESS v. PAYAG SINGH.*

[X-176

(1). s. 159—"Public place"—*Chabutra.*] *Held* that a *chabutra* which was neither a place to which the public had a right of access, nor a place to which the public were ever permitted to have access, was not, though it adjoined a public road—"a public place" within the meaning of s. 159 of the Indian Penal Code. *QUEEN EMPRESS v. SRI LAL AND OTHERS.*

[XV-42

(2.) ————— *Railway platform.*] The accused were convicted of committing an affray under s. 160, Penal Code. The scene of the affray was a railway station and platform, at a time when no train was due except a goods train. *Held* that as "public peace" had not been disturbed within the meaning of the

INDIAN PENAL CODE, s. 159—(continued.)

section the conviction could not be sustained. *EMPRESS v. MADAN MOHAN AND ANOTHER.*

[III-197]

s. 161.—*Illegal gratification.* The accused found a widow at the shop of a certain goldsmith at night. The goldsmith gave them a bribe to hold their "tongues" and to prevent him from being "disgraced." *Held* that on these facts the accused (*Chaukidars*) were not guilty of an offence under s. 161. *EMPRESS v. ABDUL AZIZ AND ANOTHER.*

[III-179]

s. 172.—*Avoiding service of summons.* On a police report that the branches of a tree said to belong to *H L* and certain other persons overhung a certain house, and were dangerous as a means of affording facility to thieves, the Deputy Magistrate issued a notice to *H L* and the other persons to cut down the branches of the tree, or to show cause why they should not do so. *H L* refused to sign a receipt for the notice and was convicted under s. 172. *Held* that the conviction and sentence are illegal for several reasons. There was no jurisdiction to make the order under s. 133, Criminal Procedure Code, nor was refusal to give a receipt an offence under s. 172, Penal Code, and the prosecution was further illegal with reference to the provisions of s. 487, Criminal Procedure Code. *EMPRESS v. HIRA LAL.*

[III-222]

(1). s. 174.—*Non-attendance in obedience to an order from a public servant—Summons not served personally.* The accused was convicted of an offence under s. 174, Penal Code, for non-attendance in obedience to a summons from a public servant. The summons was not served on him personally. It was taken to his brother, he being absent, who refused to receive it, and the person deputed to serve it carried it away with him without leaving a copy or obtaining a receipt. *Held* that the conviction could not be sustained. *EMPRESS v. F. TODD.*

[II-52]

(2). ————*Summons not specific and clear.* A summons should be clear and specific in its terms as to the title of the Court, the place at which, the day, and the time of the day when, the attendance of the person summoned is required, and it should go on to say that such person is not to leave the Court without leave, and, if the case in which he has been summoned is adjourned, without ascertaining the date to which it is adjourned. Where a summons did not mention the place at which, or the time of the day when, the attendance of the person summoned was required, *held*, that such person could not lawfully be

INDIAN PENAL CODE, s. 174—(continued.)

punished under s. 174 of the Penal Code for non-attendance in obedience to such summons. *EMPRESS v. RAMSARAN.*

[II-145]

EMPRESS v. BHOLA NATH AND OTHERS.

[III-109]

(3). ————*"Summons ... proclamation—Order issued to Sub-Inspector."* A notice was issued under s. 112 of the Criminal Procedure Code requiring certain persons to show cause on a certain date why they should not find security for keeping the peace. In consequence of the Magistrate who issued the notice being transferred to another district, it became necessary to alter the date fixed for showing cause; and accordingly an order was addressed to a Sub-Inspector of police stating that a fresh date had been fixed, and directing the police to inform the parties of such date, and to have their evidence ready on such date. The order did not specify any time or place at which the parties were to attend. They did not attend on the fresh date, and were convicted and sentenced for an offence under s. 174 of the Penal Code. *Held* that the order addressed to the Sub-Inspector was not a summons, notice, order or proclamation within the meaning of s. 174, of the Penal Code; and that the accused had committed no offence under that section. *QUEEN EMPRESS v. HIRA LAL.*

[X-1]

(1). ————*Summons not specific.* *Held* that a surety under s. 426, Criminal Procedure Code, against whom a subpoena is issued by a Police officer, summoning him to attend at the police station in order to admonish and urge him to produce the principal offender, is guilty of no offence if he does not attend or sign the summons, for the police have no authority to summon him for the purpose. *EMPRESS v. CHATTAR SINGH.*

[V-43]

s. 175.—*Summons unspecific.* Where a summons was issued to a junior member of a joint Hindu family carrying on business as a partnership, to attend in Court and bring his *bahikhata*, the summons not specifying what *bahikhata* was required, and the father being admittedly the *karta* of the family; *held* that the summons was of too general a nature to be complied with, and that the father was the proper person to whom a summons to produce any of the books of the family business should be directed. *QUEEN EMPRESS v. SALIG RAM.*

[X-171]

(1). s. 177.—*Furnishing false information—Parading borrowed stage-carriage.* The accused paraded a borrowed stage-carriage

INDIAN PENAL CODE s. 177.—

(continued.)

instead of his own cart before the local Superintendent of Police. His object was to induce that officer to report favourably on his application for a renewal of license under Act XI of 1861. *Held* that the misconduct did not constitute the offence punishable under ss. 177 or 182, Penal Code. *EMPRESS v. MUHAMMAD KHALIL.*

[VII-268]

(2).———*To obtain recruitment in Police.* A person attempted to obtain his recruitment in the police of a district by giving certain information which he knew to be false to the District Superintendent of Police. *Held* that such person had not thereby committed an offence punishable under s. 177 or s. 188 of the Indian Penal Code, or the offence of attempting to "cheat" within the meaning of s. 415 of that Code. *EMPRESS v. DWARKA PRASAD.*

[III-224]

(3).———*Police officer recording false report.* *Held* that a Police officer at a police station, who, being as such officer bound to enter all reports brought to him of cognizable or non-cognizable offences in the station diary, refused to enter a report made to him concerning the commission of an offence, and entered instead in the diary a totally different and false report as that which was made to him, had thereby committed the offence punishable under s. 177 of the Indian Penal Code. *QUEEN EMPRESS v. MUHAMMAD ISMAIL KHAN.*

[XVII-227]

s. 180—*Refusal of witness to sign statement.* *Held* that, assuming that, under the Code of Civil Procedure, a Judge is legally competent to require that a witness shall sign his evidence, it will only be when the evidence has been read over to the witness, and he has admitted it to be correct, and has refused to sign it, that he will be guilty of an offence under s. 180. *EMPRESS v. MABALI RAM.*

[I-43]

s. 181—*Public servant or person authorized to administer oath—Deputy Collector making enquiry under Simap Act.*

See s. 193, No. (4).

(1). s. 182—*Intention—Parading borrowed carriage.*

See s. 177 No. (1).

(2).———*Intention—Knowledge.* In order to constitute the offence defined in s. 182 of the Indian Penal Code it is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public

INDIAN PENAL CODE s. 182.—

(continued.)

servant to whom false information is given; but the intention, or knowledge, (to be inferred from his conduct) of the person supplying such information. *Golam Ahmed Kazi (I. L. R., 14 Cal., 314)* dissented from. *QUEEN EMPRESS v. BUDH SEN AND ANOTHER.*

[XI-109]

(3).———*Intention to injure.* *M*, falsely informed the Collector of a district that certain *Zamindars* had usurped possession of certain land belonging to Government with the intent "to give trouble to such *Zamindars* and waste the time of the public authorities." *Held* that, inasmuch as such information was no more than an expression of a private person's belief that the Collector might, if he chose, sustain a civil suit with success against such *zamindars*, and as, had the Collector agreed with the informant, the result would not have been that he would have used his lawful power as a Collector or as a Magistrate to the injury or annoyance of such *zamindars* or that he would have done anything he ought not have done, *M* had not committed an offence under s. 182 of the Indian Penal Code. *EMPRESS v. MADHO.*

[II-128]

(4).———*Offence falling under s. 182 and 211—Section under which proceeding should be taken.* *Held* that where a specific false charge is made, the proper section for proceedings to be taken under is s. 211 and not s. 182, Penal Code. *EMPRESS v. JUGAL KISHORE.*

[VI-133]

(5).———*Charge against one B of an unnatural offence, and subsequently preferred the same charge to a Magistrate.* This was followed by a Magisterial inquiry, which resulted in the discharge of *B*. The accused was then tried for an offence under s. 182 and convicted. *Held* that the accused should have been tried for an offence under s. 211 and not under s. 182. *EMPRESS v. BALDEO.*

[II-178]

(6).———*One R K lodged a petition in the police charging J N of theft. The police on inquiry reported the charge to be foundationless. Thereupon J N instituted proceedings under s. 182, Penal Code. The District Magistrate after recording evidence on both sides dismissed the complaint on the ground that the charge should have been under s. 211. Held that the Magistrate should have altered the charge into one under s. 211. That as the offence had not been committed in relation to any proceedings in Court, no sanction for the prosecution was necessary under s. 195 (Criminal Procedure Code).* *JAI NARAIN v. RAM KRISHNA.*

[V-95]

INDIAN PENAL CODE,—(continued.)

s. 184—"Obstruction."] *B S* and *I S* were convicted of an offence under s. 184, Penal Code, the former because he executed, and the latter because he accepted, a deed of sale of some property which was ordered to be sold in execution of a decree of a Revenue Court. *Held* that the Magistrate was wrong in considering that the execution of the deed was an "obstruction" to the sale within the meaning of s. 184. *EMPRESS v. BADAM SINGH AND ANOTHER.*

[III-197]

(1). 186—*Obstructing public servant.*] *C L*'s son strayed away from his home. He was found at a police out-post, some distance from a *thana* and was sent into the *thana* under the charge of a *Chaukidar*. Near the *thana* *C L* met the *Chaukidar* and claimed his son. The *Chaukidar* told him that he would get his son when the *thana* was reached. *C L* accompanied the *Chaukidar*, remonstrating and quarrelling with him for not giving up his son. On reaching the *thana* *C L* refused to allow his son to be taken inside. He took away his son from the *Chaukidar* and police *Moharir* and used bad language. The Sub-Inspector then came up and *C L* went away. On these facts accused was charged and convicted under s. 186, Penal Code. *Held* that the conviction was valid but a nominal fine would have been a sufficient punishment. *EMPRESS v. CHEDA LAL.*

[III-170]

(2). —————.] One *M*, the head constable in charge of a *havalat*, was making, in the discharge of his duty, inquiries with reference to the diet of the prisoners. He found that *P* who had deposited money for his own food, was feeding one *K* as well. On his remonstrating *P* and *K* and other prisoners gave him insubordinate answers, and surrounded him in threatening attitudes. *Held* that they were rightly convicted, on the facts proved, of an offence under s. 186, Penal Code. *EMPRESS v. PADARATH.*

[II-233]

(3). —————.] The accused was convicted of an offence under s. 186, Penal Code. It appeared that the Cantonment Magistrate had directed certain persons to perform certain work on certain land. The accused in the honest belief that by doing such work such persons were trespassing on the land of a friend of his ordered them to abstain. *Held* that the conviction was illegal. *EMPRESS v. F. TODD.*

[II-52]

(1). s. 188—*Furnishing false information—To obtain recruitment in Police.*]

See s. 177, No. (2).

(2). ————— "Causes...inquiry"—*Order to construct mau and chaukat.*] On the 11th July,

INDIAN PENAL CODE, s. 188—(continued.)

1882, an order under s. 521 (Act X of 1872) was issued by a Magistrate directing that the accused should repair a well belonging to him by constructing a *mau* and *chaukat* for the same within fifteen days. The order was served on the accused and the endorsement made by him was dated 18th July, 1882. On the 1st August, 1882, the police reported that the order was served on the 17th July, 1882, that although the term of the order elapsed the accused had only constructed the "*mau*" and that in regard to the "*chaukat*" he represented that it would be ready to-day or tomorrow. Thereupon the accused was charged and convicted under s. 188, Penal Code. *Held* that the conviction was bad for the following reasons: (i) There was nothing to show that the order was not served on the 18th as evidenced by the endorsement and that being so accused would have been within time till the 2nd August. The police report and the trial were therefore premature. (ii) There was nothing to show that the accused had not made the reparation by the 2nd August. (iii) Because the disobedience could not have caused any one of the facts mentioned in s. 188, Penal Code. *EMPRESS v. BENI KISHEN.*

[II-232]

(3). ————— *Order to repair gate of sarai.*] The Magistrate in this case ordered the owners of a *sarai* to repair the gate of the *sarai* within a month on the ground "that it is much apprehended that travellers' property might be stolen if the gate is not constructed. So the non-existence of the gate causes public injury." The order being not obeyed the Magistrate convicted the accused under s. 188. *Held* that mere disobedience of an order of the nature was not sufficient to warrant a conviction under s. 188, Penal Code; that in order to justify a conviction it must be established that the disobedience "causes or tends to cause, obstruction, annoyance or injury to any person lawfully employed," or "causes, or tends to cause, danger to human life, health or safety or riot or affray;" and as none of these conditions have been satisfied, the conviction was illegal. *EMPRESS v. HABIBULLAH AND OTHERS.*

[VI-251]

(4). ————— *Order under s. 518 of Act X of 1872—Temporary order.*] In 1876, a Magistrate passed an order under s. 518 of Act X of 1872 (Criminal Procedure Code) directing the *Sarao-gis* of Etah to take one of their annual religious processions along a particular route and at a particular hour. In 1886, in which year there was no fresh promulgation of the order, the *Sarao-gis* took their procession along another route and at a different hour, and for so doing some of them were convicted and sentenced under s. 188 of the Penal Code. *Held* that the conviction was wrong, the order of 1876 having a temporary operation only. *Goffi Mohun Mullik v. Taramoni Chowdaran* (J. L. R., 5

INDIAN PENAL CODE, s. 188—(*continued.*)

Calc., 7) referred to. **EMPRESS v. SHEODIN AND ANOTHER.**

[VIII-25]

(5).—*Order under ss. 133 and 148, Criminal Procedure Code.* A person against whom an order under s. 133 of the Criminal Procedure Code is passed who neglects to take any steps whatever in respect of such order within the time therein specified, either by way of compliance therewith or by way of objection thereto in the manner prescribed by law, renders himself liable to be proceeded against under s. 188 of the Indian Penal Code without its being necessary to wait until the order has been made absolute. If such order is made absolute under s. 140 of Criminal Procedure Code, further proceedings can then be had, under s. 188 of the Indian Penal Code, against the person disobeying the order absolute. When an order under s. 133 of Criminal Procedure Code has been made absolute under s. 140, *ib.*, its validity can not subsequently be questioned. *Queen Empress v. Narayana (L. L. R., 12 Mad., 475)* approved. **QUEEN EMPRESS v. BISHAMBAR LAL.**

[XI-169]

(6).—*Order not served in mode prescribed.* Held that where conditional orders required to be issued under Chapter X of the Criminal Procedure Code were not made or served on the persons charged with nuisance in the mode prescribed by the law, such persons not being called upon to perform the act required within a certain time, or to appear and justify their non-performance, or to ask for a jury, that they could not be held to be guilty of an offence under s. 188. **EMPRESS v. RAMESHAR AND OTHERS.**

[V-266]

(7).—*Cantonment rules—Owner of house.* Held that a person who was not the owner of house could not be convicted of an offence under s. 188, Penal Code, for disobedience to an order under the cantonment rules which provided that every non-resident owner of a house in the cantonment should provide a duly constituted agent for the same. **EMPRESS v. F. TODD.**

[II-52]

(8).—*Mukhtar—Disobedience.* A Mukhtar attempted to assist a Vakil in the defence of an accused person without the permission of the Magistrate. The Magistrate ordered him not to give such assistance until he received permission under s. 186 of the Criminal Procedure Code and to leave the Court. The Mukhtar did not go, but continued to assist the Vakil, and the Magistrate, noticing him, said, "Why do you not obey my order?" The Mukhtar replied, "When you issue a written order, I will obey it." The Magistrate then ordered him again to go, and he went.

INDIAN PENAL CODE, s. 188—(*continued.*)

The Mukhtar was subsequently convicted, on these facts, for disobedience to an order duly promulgated by a public servant, under s. 188, and fined Rs. 25. The Mukhtar applied to the High Court to exercise its powers of revision under s. 297 of Act X of 1872. Held quashing the conviction that s. 188, Penal Code, did not apply in the least degree to the circumstances of the case. *In re PETITION OF SULTAN AHAMED.*

[I-20]

s. 189—*Threat—Words actually used.* In a prosecution for an offence under s. 189 of the Penal Code, the witnesses differed as to the exact words used by the prisoner in threatening the public servant, though they agreed as to the general effect of those words. The Magistrate, however, considered that the offence was clearly proved, and convicted the prisoner. The Sessions Judge, on appeal, affirmed the conviction, observing that it was immaterial what the words used were, and that the intention and effect of the words were plain. Held that the Judge was mistaken in regarding it as immaterial what the words used actually were, and that, on the contrary, it was most material that those words should be before the Court to enable it to ascertain whether in fact a threat of injury to the public servant was really made by the accused. **EMPRESS v. MAHESHRI BAKHSI SINGH.**

[VI-128]

(1). s. 191.—*Making false balance sheet.*

See s. 409, No. (1).

(2).—*Filing false written statement.* A person filing a written statement in a suit is bound by law to state the truth, and if he makes a statement which is false to his knowledge or belief, or which he believes not to be true, he is guilty of giving false evidence within the meaning of s. 191 of the Penal Code. **QUEEN EMPRESS v. MEHRBAN SINGH AND OTHERS.**

[IV-52]

(3).—*Application for execution of decree—Omitting the name of one decree-holder.* Held that one of two joint decree-holders who alone applies for execution of the decree and does not mention the name of the other as required by s. 235, cl. (b), Civil Procedure Code, can not be prosecuted for an offence under s. 193, Penal Code. **EMPRESS v. BEHARI LAL.**

[VII-223]

(4).—*"Being legally...of law"—Accused person.* Held that a person seeking by an application in revision to get rid of a conviction standing against him is incapable of tendering his own affidavit in support of such application, and consequently that if he did tender such an

INDIAN PENAL CODE. s. 191—(continued)

affidavit he could not be prosecuted for false statements which might be contained therein. *Queen Empress v. Subhayya* (I. L. R., 12 Mad., 451) referred to. IN THE MATTER OF THE PETITION OF BARKAT.

[XVII-23]

(5). ————— *Statement under s. 161, Criminal Procedure Code.* S. 161 of the Code of Criminal Procedure applies to a statement made by a witness to an officer in charge of a Police Station in the course of an investigation under s. 55 and consequently such witness may be lawfully prosecuted and convicted under s. 193 of the Indian Penal Code in respect of such statement. *QUEEN EMPRESS v. BHAJAN*.

[XIII-124]

QUEEN EMPRESS v. BHAGWANTIA.

[XII-141]

(1). s. 192.—*Fabricating evidence—Report of destruction by Amin.* Held that a report made by an amin of a Civil Court deputed to give possession of certain property in execution of a decree, as to his having been obstructed in so doing, to the Court executing the decree, and a similar report made to the Police, would not even if false, amount to the fabrication of false evidence within the meaning of s. 193 of the Indian Penal Code, and consequently, where such amin was charged in the alternative with making the two reports as above and also a third and inconsistent statement in respect of which he might have been charged under s. 193, that he was wrongly charged, and that it was necessary to prove the falsity of the third statement. *QUEEN EMPRESS v. AJUDHIA PRASAD*.

[XV-102]

(2). ————— *Inadmissible evidence.* A police-officer who had suppressed a document entrusted to him to forward to his superior officer, made a false entry in his official diary that the document had been so forwarded, intending that if he were prosecuted under the Police Act for suppressing the document such entry might be used as evidence in his behalf that he had so forwarded the document. Held that, inasmuch as to constitute the offence of fabricating false evidence, defined in s. 192 of the Penal Code, the evidence fabricated must be admissible evidence, and as if such police officer had been prosecuted under the Police Act, the entry in the diary would not have been admissible in his behalf, though contrary to his intention, it might have been used against him, such police officer was improperly convicted in respect of such entry, of fabricating false evidence punishable under s. 193 of the Penal Code. Held also that such police officer's intention, in making such entry, being to screen himself from

INDIAN PENAL CODE. s. 192—(continued)

punishment, he was not punishable under s. 218 of the Code. *EMPRESS v. GAURI SHANKAR*.

[III-189]

(1). s. 193.—*"Judicial proceeding"—Telegraph authorities.—Reference to Judge.* A man died leaving some money due to him in the hands of the Telegraph authorities. P wrote a letter to those authorities claiming the money, as the sole heir of the deceased. This letter was sent to the District Judge for verification and orders. P supported his claim before the Judge by the evidence on oath of C. C's evidence being, in the opinion of the District Judge false, the District Judge, in his capacity as Sessions Judge, tried him for giving false evidence, and convicted him of that offence. Held that, as the reference to the District Judge by the Telegraph authorities of P's letter for verification, and the subsequent action in regard thereto, did not constitute "a judicial proceeding," and as the District Judge had not any authority to administer an oath to C, the conviction was illegal. *EMPRESS v. CHAIT RAM*.

[III-227]

(2). ————— *Proceedings under Chap. IV of Act XIX of 1873.* Held, that proceedings under Ch. IV of the Land Revenue Act were not "judicial proceedings" within the meaning of s. 193, Penal Code, nor statements made therein are "declarations" within the meaning of s. 199, Penal Code. *EMPRESS v. DIN DAYAL AND OTHERS*.

[V-29]

(3). ————— *Proceedings under s. 512, Criminal Procedure Code.* Where a Magistrate professing to act under s. 512, Criminal Procedure Code, recorded a deposition without proof that the accused had absconded, and that there was no immediate prospect of arresting him—held that the proceeding was not a "judicial proceeding" within the meaning of s. 4, Criminal Procedure Code, and that the witness who was examined could not be convicted under s. 193, Penal Code, for giving false evidence in such proceeding. *QUEEN EMPRESS v. MAKHNI*.

[X-100]

(4). ————— *Proceedings under Stamp Act—Alternative charge.* S. 51, Chapter VI, of Act I of 1879, enacts that "subject to such rules as may be made by the Governor-General in Council as to the evidence which the Collector may require, allowance shall be made by the Collector for impressed stamp spoiled in the cases, hereinafter mentioned, &c.," according to a rule made with reference to that section, "the Collector may require every person claiming a refund under Chapter VI of the said Act, or his duly authorised agent, to make an oral deposition on oath, &c." Held, therefore, that the Collector himself is the officer, and no other, to whom

INDIAN PENAL CODE, s. 193.—(continued.)

power is given by law to make inquiries into applications for allowances for spoiled stamps, to take evidence on oath in reference thereto, and to grant or refuse such applications, and he can not delegate his authorities in the matter. *Held*, therefore, where a person had applied for a refund under Chapter VI of Act I of 1879, and the Collector made over the application for inquiry to a Deputy Collector, that the Deputy Collector was not entitled to put the witnesses produced by the applicant on their oaths, and consequently, in reference to the statement of such witnesses, no charge under s. 131 or s. 193 of the Indian Penal Code was sustainable. s. 455 of Act X of 1872 (Criminal Procedure Code) is "no authority for framing against a person accused of giving false evidence, who has made one statement on oath on one occasion, and a directly contradictory one on oath on another occasion, a charge in "the alternative," that word, as used in that section, meaning that where the facts which can be proved make it doubtful what particular description of offence an accused person has committed, the charges may be so varied or alternated as to guard against his escaping conviction through technical difficulties. *Held*, therefore, where three persons were committed for trial jointly, charged with "having on or about the 26th September, 1881, or the 18th October, 1881, being legally bound upon oath to state the truth, knowingly on those days, regarding the same subject, made contradictory statement upon oath," and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and such persons were jointly tried on such charge, that such charge was bad for being single and joint against the three accused persons, instead of several and specific in regard to each of them; that it was further bad because it did not distinctly and in terms allege which of the statements was false; that, assuming a commitment upon so faulty a charge should be allowed to stand, the Court of Session should have prepared a fresh charge against each of the accused persons specifically setting forth the statement alleged to be false, and should then have proceeded to try each of them separately; and that, there being no evidence that either of the statements made by two of such persons was false, except that it was contradicted by the other, the charge against such persons was not sustainable, there being no sufficient evidence that either of the statements was false. **EMPRESS v. NIAZ ALI AND OTHERS.**

[II-161]

(5).—*Fabricating false evidence—Accused person.* [An accused person who fabricates a document for the purpose of using it in his defence in Court commits the offence of fabricating false evidence under s. 193, Penal Code. **QUEEN EMPRESS v. AMRIT.** "

[X-86]

INDIAN PENAL CODE, s. 193.—(continued.)

(6).—*Foolish and irrelevant statements.* [Held that to tell foolish and irrelevant falsehood would not always or necessarily amount to "giving false evidence in a judicial proceeding." It is, of course, wrong to lie, but it is not always or necessarily judicious to treat a lie, though uttered in judicial proceedings, as perjury. **EMPRESS v. NIDHI MAL.**

[VIII-218]

(7).—*Contradictory statements.* [In a charge under s. 193 of the Penal Code it is not necessary to allege which of two contradictory statements upon oath is false, but it is sufficient, (unless some satisfactory explanation of the contradiction should be established) to warrant a conviction of the offence of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement at another. *R. v. Zumeerun* (6 W. R. Cr., 65); *R. v. Palany Chetty* (4 Mad., H. C. Rep., 51) and *R. v. Mahomed Hoomayoon Shaw* (13 B. L. R., 324) followed. *Empress v. Niaz Ali* (1 L. R., 5 All., 17) overruled.

Per DUTHOIT, J.—Every possible presumption in favor of a reconciliation of the two statements should be made, and it must be found that they are absolutely irreconcilable before a conviction can be had upon the ground that one of them is necessarily false. The English cases upon this subject are irrelevant to the interpretation of the law of India, since the Indian Legislature has not followed the law of England in regard to perjury. *Trimble v. Hill* (L. R. 5 App. Cas., 342) and *Kathama Natchiar v. Dorasinga Tenger* (L. R. 2 Ind. App., 159) referred to. **QUEEN EMPRESS v. GHULET AND ANOTHER.**

[IV-258]

*Per contra***EMPRESS v. NIAZ ALI AND OTHERS.**

[II-161]

(1) s. 196.—*Using evidence known to be false.* [One Amir Singh was a tenant of the prisoner and the *jamabandi* contained the following entries "Amir Singh occupancy tenant, rent Rs. 40-9-0; term of occupancy 12 years." The prisoner succeeded in ejecting Amir Singh by process of the Revenue Court. He then leased the land to one Isher Singh for a term of two years, on a rental of Rs. 50-4-0 and a *kabuliati* to this effect was executed. Subsequently when the prisoner sued Isher Singh for rent in the Revenue Court basing his claim upon the *kabuliati* the defendant denied to have been in possession of the land. In support of his claim the prisoner produced the *kabuliati* and an attested copy of the *jamabandi* containing the following entries "Ishar Singh, tenant, rent Rs. 48-9-0; term of occupancy two years." It was found as a fact that the *jamabandi* had

INDIAN PENAL CODE, s. 196—(continued.)

been tampered with and the entries had been changed into what they at present appear. *Held* that on these facts the prisoner could not be convicted of an offence under s. 471, Penal Code, because "the original claim was a genuine one and the entry was made simply to strengthen it and without any intention to cause harm or loss to others." But he was guilty of an offence under s. 196, Penal Code, as the entries were false and material to the result of the proceedings in which the deed was used. *EMPRESS v. SIKANDAR KHAN.*

[VII-285]

(2) —————.]
See s. 463, No. (3).

s. 199—*Proceedings under Chapter X of Act XIX of 1873—"Declaration."*

See s. 193, No. (2).

(1.) s. 201—*Causing disappearance of evidence.*] In a trial upon a charge under s. 201 of the Penal Code, the accused made a statement to the effect that he was present at the commission of a murder by two other persons, that he himself took no part in the act, that before the murder was committed, one of the persons named pulled off a *razai* from the bed on which the deceased was sleeping, and that, in his presence, the *razai* was subsequently concealed in a stack. It was proved that the *razai* belonged to the deceased, that it was found concealed in a stack, and that it was pointed out by the accused to the police. The accused was convicted of concealing evidence of the murder with the intention of screening the offender from legal punishment, under s. 201 of the Penal Code. *Held* that the conviction must be quashed, inasmuch as if the *razai* had not been concealed or destroyed, its presence or existence would have been no evidence of the murder. A person who is concerned as a principal in the commission of a crime cannot be convicted of the secondary offence of concealing evidence of the crime. *EMPRESS v. LALLI.*

[V-165]

(2) ————— *Of one's own crime.*] S. 201 of the Penal Code does not apply to the case of a criminal causing disappearance of evidence of his own crimes, but only to the case of a person who screens the principal or actual offender. *Queen Empress v. Ram Soonder Shootar* (7 W. R., Cr. 52); *Reg. v. Kashinath Dinkar* (8 Bom., H. C. Rep., C. C. 126); *Empress v. Kishna* (I. L. R., 2 All. 713); *Empress v. Behala Bibi* (I. L. R., 6 Cal., 789) and *Queen Empress v. Lalli* (I. L. R., 7 All., 749) referred to. *EMPRESS v. DUNGAR SINGH AND ANOTHER.*

[VI-71]

s. 202—*Omission to give information—Theft—Lambardar.*] Certain wheat was stolen

INDIAN PENAL CODE, s. 202—(continued.)

from the grain-pit of accused who was a *Lambardar*. He did not report the theft to the Police. *Held* that as he was bound to give the information to the Police under s. 90, though not under s. 89, Criminal Procedure Code, he was rightly convicted of an offence under s. 202, Penal Code. *EMPRESS v. SHANKAR SINGH.*

[III-9]

s. 204—*Framing false report—Police officer.* A report of the commission of a dacoity was made at a *thana*. The Police officer in charge of the *thana* at first took down the report which was made to him, but subsequently destroyed that report and framed another and a false report of the commission of a totally different offence to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant. *Held* that on the above facts the Police officer was guilty of the offences punishable under s. 204 and s. 218 of the Indian Penal Code. *QUEEN EMPRESS v. MUHAMMAD SHAH KHAN AND ANOTHER.*

[XVIII-52]

s. 206. *Removal of property distrained.*] In this case two tents were distrained under the orders of the local Revenue authority for the recovery of an arrear of land revenue and were committed to the care of the three accused persons. When the time fixed for the sale of the property arrived the accused produced two other tents of inferior value and concealed or removed those distrained. On these facts the Magistrate convicted the accused of an offence under s. 206, Penal Code. *Held* that the conviction under s. 206, Penal Code, could not be sustained inasmuch as the distraint of property by a Collector under s. 153, Act XIX of 1873, is not a forfeiture under a sentence pronounced or likely to be pronounced. Also because the concealment or removal under s. 206 must be to prevent the property "from being taken" and in the present instance the property had already been taken in distraint and the removal was subsequent. *Held* further that the circumstances of the case did not necessitate ordering a fresh trial under s. 406 of the Indian Penal Code. *EMPRESS v. MURLI AND OTHERS.*

[VIII-237]

s. 209 ————— *Whole claim.*] S. 209 of the Penal Code is not limited to cases where the whole claim made by the defendant is false. *QUEEN EMPRESS v. BULAKI RAM.*

[X-I]

(1.) s. 211—*Offence falling under ss. 182 and 211—Section under which proceeding should be taken.*

See s. 182, Nos.—(4), (5), and (6).

(2). ————— *"Institute or cause to be instituted."*] One Shad given the Magistrate a petition,

INDIAN PENAL CODE, s. 211—(continued.)

praying for any enquiry into the conduct and fitness for office in the Public Police of one *B*, a *dofadar* of *Chaukidars*. He stated in his petition that he and other persons believed that *B* connived at offences of various sorts. The Magistrate, finding the statements in the petition to be untrue, convicted *S* under s. 211, Penal Code. *Held*, quashing the conviction, that *S*, in petitioning the Magistrate as he did, did not institute or cause to be instituted any criminal proceeding against *B*, nor charge him with having committed an offence, for no specific charge of an offence was made. No offence punishable under s. 211, Penal Code, had therefore been committed. *EMPRESS v. SHEOSARAN*,

[II-242]

(3).—“*And if...instituted*.”] The actual institution of criminal proceedings on a false charge is essential to the application of the latter part of s. 211, Penal Code, and if a person only makes a false charge his case falls under the first part of the section irrespective of the fact that the false charge relates to “an offence punishable with death, transportation for life, or imprisonment for 7 years or upwards.” *EMPRESS v. PIRAM RAI*.

[II-225]

QUEEN EMPRESS *v.* BISHESHAR.

[XIV-10]

(4).—] Where no criminal proceeding is instituted on a false charge of an offence of the nature described in the latter part of s. 211, Penal Code, the person making such charge is punishable only under the first part of that section. *EMPRESS v. PARAHU*.

[III-149]

(5).—*Witness*.] One *J. D.* obtained sanction from a first class Magistrate to prosecute *MK* on a charge under s. 211, Penal Code. He then presented a petition to the District Magistrate in which it was prayed that the case might proceed against *MK* and as another case against the same accused was pending in the Court of Deputy Magistrate, the present case might also be directed to be tried in the same Court. The District Magistrate rejected the petition on the ground that as *MK* was a witness in the former case, the terms of s. 211, Penal Code, can not affect him. *Held* that the mere circumstance that *MK* was a witness in the former case does not necessarily exclude him from the operation of s. 211, Penal Code. *Barkat Ullah Khan v. Rennie and another* (I. L. R., 1 All., 17) followed. *JOGRAJ DAI v. MEHNDI KHAN*.

[II-84]

s. 212—*Harbouring offender*.] To justify a conviction under s. 212 of the Penal Code, it

INDIAN PENAL CODE, s. 212—(continued.)

is necessary that there should be an offence committed and consequently an offender who has been harboured or concealed. *Empress v. Abdul Kadir* (I. L. R., 3 All., 279) referred to. *QUEEN EMPRESS v. FATEH SINGH*,

[X-73]

(1). s. 218—*Framing false report—Police officer*.]

See s. 204.

(2).—“*With intent to cause.....by law*.”—*Intention to protect himself*.]

See s. 192, No. (2).

s. 463, No. (2).

(3).—] A public servant, in charge as such of certain documents having been required to produce them, and being unable to do so, fabricated and produced similar documents with the intention of screening himself from punishment. *Held* that such fabricated documents not being records with the preparation of which such public servant as such, was charged, he could not legally be convicted under s. 218, of the Penal Code, nor, such documents not being forgeries, as they were not made with the intent specified in s. 463, could he be legally convicted under s. 471. *EMPRESS v. MAZHAR HUSAIN*.

[III-133]

(4).—] A treasury accountant was convicted of an offence under s. 218, Penal Code, under the following circumstances;—A sum of Rs. 500 which was in the treasury and was payable to a particular person through a civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as revenue deposit and that it was about to be transferred to the civil Court. Upon the first of these reports an order was signed by the treasury officer for the transfer of the money to the civil Court concerned, and to effect such transfer a cheque was prepared by the sale mohorir, which, as originally drawn up, related to the sum of Rs. 500 already mentioned. The signature of the cheque by the treasury officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of another person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court as if it had been the first Rs. 500 and to the credit of the first payee's representative

INDIAN PENAL CODE, s. 218—(continued.)

The prisoner was convicted under section 218, Penal Code, in respect of the two reports above referred to. *Held* that the prisoner's intention in making the false reports was to stave off the discovery of the previous fraud and save himself or the actual perpetrator of that fraud from legal punishment, and that having prepared the reports in a manner which he knew to be incorrect, he was rightly convicted under section 218 of the Penal Code. *Held* further that as the prisoner, who was a public servant, made these reports and assumed to make them in due course and as a part of his duty, and held them out as reports which were made by the proper officer and as no question was put in the examination of the witnesses from the office which suggested that it was not his business to make such reports, it must be inferred that he made them because it was his business to do so and as a public servant within the meaning of section 218 of the Penal Code. *Empress v. GIRDHARI LAL.*

[VI-264]

(5). —————.] A public servant who does that which, if done to save another from legal punishment, would bring the public servant within section 218, Penal Code, has equally committed the offence punishable under section 218, Penal Code, if the person whom he intends to save from legal punishment is himself. *Queen Empress v. Gauri Shankar* (I. L. R., 6 All., 42) *quoad hoc* overruled. *Queen Empress v. Girdhari Lal* (I. L. R., 8 All., 653) referred to. *QUEEN EMPRESS v. NANDKISHORE.*

[XVII-64.]

*Per contra.**QUEEN EMPRESS v. GAURI SHANKER.*

[III-189]

s. 223.—*Lawfully committed to custody.*] While a case was being investigated by A, a Police officer, under the provisions of Chapter XIV of the Criminal Procedure Code, T presented a petition to the Magistrate having jurisdiction to try the case, in which he accused W of being concerned in the commission of the offence, and prayed that he might be arrested and sent to the Police officer investigating the case. W was accordingly arrested and brought before the Magistrate, who, having examined T on oath and taken W's statement made an order on the petition to the following effect:—"As no police report has been made in this matter, and the petitioner only has presented this petition, ordered that these papers of W be sent to the District Superintendent of police and if a report of this matter be made, the case may be sent up according to rules with the papers." In accordance with this order W was taken to the District Superintendent of police and was sent by that officer to A. *Held* that

INDIAN PENAL CODE, s. 223—(continued.)

the Magistrate's order might be taken to have been passed under s. 167 of the Code, and therefore W was lawfully committed to the custody of the police and A was bound to detain him in such custody until released therefrom by due course of law and consequently A having negligently suffered W to escape, had been properly convicted under s. 223 of the Penal Code. *EMPRESS v. ASHRAF ALI.*

[III-257]

(1). s. 224.—*Resistance to lawful apprehension—Running away before arrest.*] The mere act of running away before arrest does not constitute the offence of resistance or illegal obstruction to lawful apprehension; and, consequently, where certain persons in the act of so running away trespassed in the house of another by climbing over the roof,—*held* that they did not commit the offence of lurking house-trespass, or house-breaking by night. *QUEEN EMPRESS v. KALLU AND OTHERS.*

[XI-64]

(2). —————.] *Escape from lawful custody.*] One HA, a prisoner in the Gorakhpore jail, was employed in some brickfields outside the jail. While so employed he tried to escape but after he had gone some distance re-captured. *Held* that under the circumstances the offence committed was that punishable under s. 224, Penal Code, and was not punishable under s. 47 of Act XXVI of 1870. *QUEEN EMPRESS v. HASAN ALI AND OTHERS.*

[XIV-176]

(3). —————.] A person who having been arrested on suspicion of having committed an offence, escapes from subsequent custody is none the less guilty of the offence punishable under s. 224, Penal Code, because he may happen to be afterwards acquitted of the offence for which he was under arrest at the time of his escape. *QUEEN EMPRESS v. CHAKUA.*

[XVI-151]

(4). —————.] *Convict under sentence of death—Escape—Identity.*] A, a convict under sentence of death, escaped from the jail. Eleven years after a person declaring himself to be R was produced by the police as being A. The Magistrate made an inquiry as to the identity of such person with A and, considering such identity established, sent the case to the Sessions Judge for orders, who reported the matters to the High Court. *Held* that the inquiry into the identity of the person had been conducted irregularly. The proper course was first to have taken proceedings against the person arrested and charged and tried him, as the convict A for escaping from lawful custody under s. 224. *EMPRESS v. AMAN.*

[II-77]

INDIAN PENAL CODE, s. 224—(continued.)

(5).—[The appellant was convicted by the Court of Session of escaping from lawful custody, such conviction being based on the finding that the appellant was one A, who had escaped from jail while under sentence of death. The appellant appealed on the ground that he was not A but R. The Court being satisfied that the appellant was the same A, who was sentenced to death, disallowed the appeal, affirmed the conviction under s. 224 and directed that the order of the High Court confirming the sentence of death passed upon the appellant, should be carried into execution. *EMPRESS v. AMAN.*]

[II-164]

(1). ss. 224 and 225.—*Lawful apprehension—Offence—Order directing arrest under s. 55, Criminal Procedure Code.* An order was issued to a police officer directing him to arrest K, under s. 55 of the Code of Criminal Procedure, as a person of bad livelihood. K with the assistance of three others resisted apprehension and escaped. *Held* that K was not charged with an "offence" within the meaning of that term as defined in section 40 of the Penal Code and that consequently no offence made punishable by s. 224 or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress v. Shashiti Churn Napti (I. L. R., 8 Cal., 331)* followed. *EMPRESS v. KANDHAYA AND OTHERS.*

[IV-267]

(2).—[*Arrest of defaulter under Revenue Act.*] *Held* that a defaulter in payment of Government revenue, who was arrested by order of a *Tahsildar* acting under s. 152 of the N.-W. P. Land Revenue Act, and escaped from custody, was guilty of an offence not under s. 224, but under s. 225 B of the Penal Code; and that persons rescuing him from custody were guilty of an offence under the same section. *QUEEN EMPRESS v. AKBAR SINGH.*

[X-2]

(1). s. 225.—*Lawful apprehension—Arrest by private person.* One Jokhu, a private person, arrested one J whom he saw committing theft and made him over to a village *chaukidar*. While J was in the custody of the *chaukidar* he was rescued by MS and certain other persons. *Held* that they were lawfully convicted of an offence under s. 225, as the custody of Jokhu was lawful custody in the sense of s. 225 and this custody did not become unlawful by associating the village *chaukidar*. *EMPRESS v. MURLAI SINGH AND OTHERS.*

[III-214]

(2).—s. 225 B.—*Court of Civil Judicature—Revenue Court.* A Revenue Court is a "Court of Civil Judicature" within the meaning of s. 651 of the Code of Civil Procedure. A person

INDIAN PENAL CODE, s. 225 (B)—(continued.)

therefore, who escapes from custody under the process of a Revenue Court, is punishable under that section. S. 642 of the Civil Procedure Code only protects an accused person while he is attending a Criminal Court from arrest "under that Code." *Held*, therefore, where a person, who had been convicted by a Magistrate and had been fined, was arrested in execution of the process of a Revenue Court while waiting in Court until the money to pay such fine was brought, that such person was not protected from such arrest by the provisions of that section, and that having escaped from custody under arrest, such person had properly been convicted under s. 651 for escaping from "lawful custody." *EMPRESS v. HARAKH NATH SINGH.*

[I-121]

(3).—*Lawful apprehension—Arrest without warrant of Court.* The apprehension of a judgment-debtor in execution of a decree without the officer making the apprehension having the warrant of the Court executing the decree in his possession at the time of making the apprehension is illegal; and therefore in such a case the judgment-debtor does not render himself liable to punishment under s. 651 of the Criminal Procedure Code if he escapes from the custody of the officer making the apprehension.

Quaræ. Whether a person convicted under s. 651, Civil Procedure Code, of escaping from lawful custody who is sentenced to one month's imprisonment only can under s. 588 (29) of that Code appeal. *EMPRESS v. AMAR NATH AND ANOTHER.*

[III-54]

ss. 230 & 235.—*Counterfeiting coin—Bad imitation.* The appellants were convicted of offences under ss. 230 and 235, Penal Code. On an examination of the articles counterfeited it was declared by experts that none of such articles could properly be characterized as imitations of any current coin. *Held* that as not a single piece resembled or was meant to resemble any coin stamped and issued by the authority of some Government, that is used or is now capable of being used as money, no offence under s. 231 had been committed; and as the counterfeited pieces were not coin, it necessarily followed that the implements used in their manufacture could not fall under the purview of s. 235, Penal Code. *EMPRESS v. BISHESHAR AND ANOTHER.*

[II-100]

s. 262.—*Fraudulently.* *Held* that it is incumbent upon the prosecution, where a person is charged under s. 262 of the Penal Code, to bring home to him, not only that he used the stamp with the knowledge that it had been before used, but also that he used it fraudulently or with intent to cause loss to Govern-

INDIAN PENAL CODE, s. 262—(con-
tinued.)

ment. The intent to defraud or to cause such loss can not be assumed. *EMPRESS v. NIAZ AHMAD*.

[I-56]

s. 264.—“*Fraudulently.*” *Held* that a one *tollah* below weight in a 5 seers weight only represents a fair wear and tear, and is no evidence of a fraudulent intention which is the essence of the offence made punishable under s. 264, Penal Code. *EMPRESS v. BIKKA MAL*.

[III-224]

s. 268.—*Public nuisance—Slaughter of kine.* *Held* that the slaughter of kine by Muhammadans on their own premises, though in view of passers by, is not a public nuisance within the meaning of s. 268, Penal Code. *EMPRESS v. ZAKIUDDIN AND ANOTHER*.

[VII-232]

s. 291.—*General injunction.* *Held* that the disobedience of an order or promulgation issued by a Magistrate, forbidding in general terms, any person spreading night-soil as manure on their fields so as to cause disease or annoyance, is not an offence under s. 291, Penal Code. To support a conviction under s. 291 there must be proof of an injunction to the convicted individually against repeating or continuing a particular public nuisance and it must be shown that the person convicted has repeated the same. *EMPRESS v. JOKHU AND CHETI*.

[VI-27]

(1). s. 292.—*Prints—Publisher—Servant.* The mere fact that a person is proprietor and publisher of a newspaper is not sufficient to render him criminally liable in respect of matter inserted therein by one of his servants. There must be a distinct finding that the matter complained of was inserted by the order or owing to the negligence of the proprietor. *QUEEN EMPRESS v. MUHAMMAD MOHSIN*.

[X-175]

(2).———*Obscene book—Single obscene passage—Intention.* A book may be obscene, within the meaning of the Penal Code, although it contains but a single obscene passage. The defence to a charge of selling and distributing certain obscene books was that they were sold and distributed in good faith in prosecution of a religious controversy. *Held* that the excessive obscenity of such books took away the protection which their controversial nature might otherwise have afforded them. Also that the intention of the seller and distributor must be gathered from the character of the matter contained in such books. As he had chosen to sell and distribute what was obscene it must be presumed that he intended the

INDIAN PENAL CODE, s. 292—(con-
tinued.)

natural consequences of his act, namely, corruption of the minds and prejudice of the morals of the public. It was not sufficient for him to say that his intentions were good. It was his public act that must be the test of his intentions and having done an unlawful act, it was no answer to say that he thought it lawful. *Queen v. Hicklin*, (L. R., 3 Q.B. 360); *Steele v. Brannan*, (L. R., 7 P. C., 261) followed. At the conclusion of the trial of a person for the sale and distribution of obscene books, the Court trying him ordered the destruction of certain copies of such books, voluntarily surrendered by him, under s. 418, Criminal Procedure Code. *Held* that such Court was not empowered by that section to make such an order. *EMPRESS v. INDARMAN*

[I-94]

(1). s. 295.—“*Object.*” The word “object” in s. 295, Penal Code, does not include animate objects. *QUEEN EMPRESS v. IMAM ALI AND ANOTHER*.

[VIII-17]

(2).———*Intention to insult—Removing materials of dilapidated mosque.* The defendants in this case were charged under s. 295, Penal Code, in that they (Hindu) removed some old building materials belonging to a mosque, and thereby insulted the religious feelings of Muhammadans. They were acquitted on the finding that the mosque was, or at any rate its roof was, in a rotten condition, and that no one had any particular claim to it. The complainant applied to the High Court for revision. *Held* that there was no reason to believe that defendant, in acting as he did, had any intention of insulting the religion of the Muhammadan residents of the village, or that he did so even with the knowledge that any class of persons was likely to consider the removal of the materials an insult to their religion. *JAN MUHAMMAD v. NARAIN DAS AND ANOTHER*.

[III-39]

s. 296.—*Disturbance—Hanafis and Wahabis—Amen.* A *masjid* was used by the members of a sect of Muhammadans called Hanafis according to whose tenets the word “*amen*” should be spoken in low tone of voice. While the Hanafis were at prayers, R, a Muhammadan of another sect, entered the *masjid* and in the course of the prayers according to the tenets of his sect, called out “*amen*” in a loud tone of voice; for this act he was convicted of voluntarily disturbing an assembly engaged in religious worship, an offence punishable under s. 296 of the Penal Code. The Full Bench (Mahmood, J., dissenting) ordered the case to be re-tried and that, in re-trying it, the Magistrate should have regard to the following questions, namely—
(i). Was there an assembly lawfully engaged in the performance of religious worship; (ii) Was such assembly in fact disturbed by the accused; (iii). Was such disturbance caused by acts and

INDIAN PENAL CODE s. 296^{1/2}—(continued.)

conducts on the part of the accused by which he intended to cause such disturbance, or which acts and conduct, at the time of such acts and conducts, he knew or believed to be likely to cause disturbance? *Held* by Mahmood, J., that the discussion occasioned by the act of the accused having, presumably, taken place during the interval when the prayers were not going on, the assembly was not at that time "engaged in the performance of religious worship," and was not "disturbed" within the meaning of s. 296 of the Penal Code; that, in reference to the terms of s. 39 of the Code the accused did not disturb the assembly "voluntarily," that he was justified by the Muhammadan Ecclesiastical Law in entering the mosque and joining the congregation in saying the word "*amen*" loudly if he thought fit, and his conduct fell within the purview of s. 79 of the Penal Code and was therefore not an offence under s. 296. *Beatty v. Gillbanks* (L. R., 9 Q. B. D., 308) referred to.

Also *per* Mahmood, J., that having regard to the guarantee given by the Legislature in s. 24 of Act VI of 1871 (Bengal Civil Courts Act) that the Muhammadan Law shall be administered in all questions regarding "any religious usage or institution," the Court was bound by s. 57 (1) of Act I of 1882 (Evidence Act) to take judicial notice of the Muhammadan Ecclesiastical Law, and the rules of that law need not be proved by specific evidence. *EMPRESS v. RAMZAN AND OTHERS*.

[V-117]

(1). s. 297—*Ploughing up graves.* *Held* that persons who entered upon a burial place and ploughed up the graves were liable to be convicted of the offence defined by s. 297, Penal Code, notwithstanding that their entry on the land was by the consent of the owner thereof. *QUEEN EMPRESS v. SUBHAN AND ANOTHER*.

[XVI-119]

(2).———*Stopping Tazia procession.* One *K* was convicted by the District Magistrate under s. 297 for stopping *Tazia* procession during the *Moharram*. *Held* that though it may have been an offence under s. 352 or s. 339, the offence did not fall under s. 297; the conviction must therefore be quashed and the fine refunded. *GHOSTA v. KALKA*.

[V-49]

s. 298.—*Exhibition of cow-flesh.* In this case Rahman and other Muhammadans of the village of *F* having sacrificed a cow on the occasion of the festival of the *Bakrid* proceeded to carry its flesh imman uncovered state round the village. Thereupon the Hindus of the village, through one *R N*, instituted a complaint against the accused under s. 298, Penal Code. *Held* that there can be no doubt that Rahman exhibited the cow's flesh with the deliberate intention of wounding the religious feelings of the prosecutor and other Hindus.

INDIAN PENAL CODE, s. 293—(continued.)

Muhammadans have a perfect right in law to kill their own cows, but when they do so they must take care not to commit an offence under the Indian Penal Code. *QUEEN EMPRESS v. RAHMAN*.

[XIII-144]

ss. 299 & 300.—*Intention—Knowledge.* In summing up this case, in which the prisoner charged with offences under ss. 301, 302 and 325, Penal Code, pleaded "the right of self defence, Straight, J. said to the Jury:—"Every killing is '*prima facie*' murder, if it is done with the intention of causing death or with the intention of causing bodily injury that the accused knew was likely to cause death or with the intention of causing bodily injury that in the natural and ordinary course of things would be sufficient to cause death. So much for intention. But further every killing is murder, '*prima facie*,' if the act causing the death was done with the knowledge that it was of a kind so imminently dangerous to life that the most probable result of it would be death, or bodily injury likely to cause death a man's intention is best gathered from his acts. You cannot look into his mind at the time he did a particular thing by a sort of retrospective process, and so see what his intention really was; you can only judge of it from his conduct..... *EMPRESS v. WHIR-TAKER*.

[II-172]

(2).———[] In the course of a quarrel two persons, *M* and *S*, were holding a third, *K*, as it was found with no more serious intention than that *K* should be beaten, when *C* having gone away and fetched a heavy pestle struck *K* on the head with it, so that he died; on these facts *C* was convicted of murder, and *M* and *S*, of abetment of murder. *Held* that the convictions of *M* and *S* were improper inasmuch as it was not shown that the act of *C* was a probable consequence of the acts of *M* and *S* or that they knew that their acts were likely to result in *K*'s death. *QUEEN EMPRESS v. MUNNA AND OTHERS*.

[XII-233]

(3).———*Knowledge.* Causing death by acts done with the knowledge that they were likely to cause such bodily injury as was dangerous to life was culpable homicide not amounting to murder. *Idu Beg's case* (I. L. R., 3 All., 777) and *Gora Chand Gope's case* (B. L. R., Sup. Vol., p. 451) referred to. *EMPRESS v. CHATRI*.

[IV-289]

(1) s. 300.—*Murder—Evidence.* The appellant *P* was convicted and sentenced by the Sessions Judge of murder. The substantial evidence against her consisted of (i) the fact that the deceased was last seen in her

INDIAN PENAL CODE, s. 300—(continued.)

company; (ii) a statement made by her to the committing Magistrate; (iii) the production by her, on the day after the death of the child, of almost the whole of the jewellery belonging to the deceased and worn by her when last seen. Straight, J., commenting upon the third head of evidence remarked that taken by itself it is not sufficient to prove murder, though it may be sufficient evidence of receiving stolen property. *EMPRESS v. PARBATI*.

[VII-130]

(2). ———— *Circumstantial evidence.*] In this case the corpse of a woman in an advanced state of decomposition was found in a well. Some thirteen days before this, the wife of the accused had left a village, some four miles distant from the well, in his company. The Sessions Judge, being of opinion that the corpse found in the well was that of the wife, convicted the accused of murder. *Held* that the circumstantial evidence was not sufficient to warrant a conviction. To proof of circumstantial evidence 4 things are necessary:—(i). That the circumstances from which the conclusion is drawn be fully established; (ii). That all the facts should be consistent with the hypothesis; (iii). That the circumstances should be of a conclusive nature and tendency; (iv). That the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved. In this case the existence of the first was doubtful, for it was not absolutely certain that the corpse found was that of the wife and the third and the fourth essentials were absolutely wanting. The conviction must be set aside. *EMPRESS v. HOSH NAK*.

[I-139]

(3). ———— *Discovery of corpse.*] *Held* that the recovery and identification of a murdered man's body are not absolutely essential even for a capital sentence. *Empress v. Bhagirath* (I. L. R., 3 All., 383) followed. *EMPRESS v. ROGI AND OTHERS*.

[I-112]

EMPRESS v. SEDHU AND OTHERS.

[II-160]

(4). ———— *Lathi blow.*] Observation on cases where death is caused by the violent use of a *lathi* on such part of the body that death results immediately or very soon afterwards, and on the necessity of strictly administering the law in such cases and treating them as cases of murder. *QUEEN EMPRESS v. KALLU*.

[X-74]

(5). ———— *Withholding nourishment from child.*] The prisoner was charged before the Court of Session with murder. It appeared that she, a *Barahman* woman, living under the protection of a *zamindar*, on the 19th August gave birth to a male child. The birth was reported at

INDIAN PENAL CODE, s. 300—(continued.)

the police station, the child being described as strong and healthy. On the 24th the child died, and its death was reported and the cause of death assigned being "fever and cold." The medical evidence showed that from the time of its birth to its death, the child had received no nourishment of any kind. The defence set up was, that the child was afflicted with *lock-jaw* and could not swallow. As regards this, the medical evidence showed that it was quite impossible that a child suffering from *infantile tetanus* could be for five days continuously prevented from taking food. The medical evidence further showed that the prisoner was able to nourish the child. The Sessions Judge finding that the prisoner had wilfully withheld all nourishment from the child and thus caused its death, convicted her of murder. She appealed to the High Court. The Court dismissed the appeal, observing that the evidence proved that the prisoner had wilfully withheld all nourishment from the child with the intention of causing its death and the child died in consequence, and the prisoner had therefore been rightly convicted of murder. *EMPRESS v. BATTIA*.

[III-36]

(6). ———— *Exception—Onus—Practice.*] Although, speaking generally, it is for an accused person who has taken the life of another to raise for himself any plea he may have tending to reduce the crime below that of murder, it is necessary that the witnesses for the prosecution should have told a story which can be believed in itself and that the Court is satisfied that they are not concealing circumstances which would go to reduce the offence if disclosed. Where the evidence for the prosecution on a charge of murder bore evident marks of modifications and concealments, the High Court took into consideration on behalf of the appellants a plea in reduction of the offence, though the plea had not been taken nor any evidence called in support of it before the Court of Session. *QUEEN EMPRESS v. RAM GOPAL AND OTHERS*.

[XVII-121]

(7). s. 300.—*Exception (I)—Provocation—Abuse.*] *G*, a *Brahmin*, and *D*, a *Chamar*, were prisoners in a jail and employed in digging up radishes in the garden. *G* pulled up a radish and began eating it and *D* abused him for doing so calling him *bahin-chod* or *beti-chod*, whereupon *G* struck *D* four blows with the spade which was in his hand and caused his death. *Held* that though the language used by the deceased was of a very abusive and offensive character and would be resented, the Court was not prepared to hold that it would amount to the grave and sudden provocation mentioned in exception I of s. 300, Penal Code, so as to reduce the offence to culpable homicide not amounting to murder. *EMPRESS v. GIRWAR*.

[VI-207]

INDIAN PENAL CODE, s. 300—

Exception I—(continued.)

(8).—*Disobedience of wife.* The accused returned from his field at noon and told his wife, a girl of seventeen to twenty, that he wanted his dinner. She had been ill for some time of fever, and said she would not, or could not, cook it. The accused became angry, as he was in a hurry, and picked up a small *babul* stick, which was on the ground by her, and without any intention of causing death, struck her one blow on the head from which she died in about an hour. The stick was about two and a half feet long by three fourths of an inch thick. The medical evidence was as follows:—“There were no external marks of injury: There appeared to be a slight contusion on the left side of the middle of the crown of the head: there was a slight effusion of blood under the scalp; and there was blood on the brain; she was not pregnant; the cause of death was the effusion of blood under the scalp and on the brain: this effusion of blood appeared to have been owing to a blow struck on the head: the contusion on the head appeared to have been caused by a *lathi*: a violent blow from a stick like the one before the Court might occasion such an injury: the woman appears to have been weak: she did not appear to have been ill.” Under these circumstances the accused was convicted by the Court of Session of causing death by a rash act, an offence punishable under s. 304 A, Penal Code. *Held* that the conviction must be set aside, *Empress v. Ketabdi Mandal*, (I. L. R., 4 Cal., 764). The act committed by the accused fell within the definition of ss. 299 and 300 of culpable homicide, which is murder unless covered by an exception. The death of the young woman was directly and immediately caused by the blow, and a man who intentionally strikes such a blow with a stick as is sufficient to cause death in the ordinary course of nature commits culpable homicide, although he may not have intended to cause death. There were, however, in this case, extenuating circumstances which might be admitted as bringing the case within the terms of the first of the exceptions to s. 300. The accused came home hungry expecting no doubt, to find his dinner ready, and was in a hurry, it was harvest time, to get back to his field. Under these circumstances his wife's refusal to cook his dinner accompanied, as it may have been, with words of abuse, for there was no sufficient reason for questioning the truth of the accused's statement, in this respect, was no doubt such grave and sudden provocation as deprived him for the time of the power of self-control. It would be sufficient therefore to convict the accused under s. 304 of the Penal Code. *EMPRESS V. BANSI,*

[I-105]

(9).—*Illicit connection with one's sister.* A person accused of murder under s. 302 of the Indian Penal Code pleaded in defence that he had found his sister having illicit connection with a man named Thakuri and had in a fit of

INDIAN PENAL CODE, s. 300—

Exception I—(continued.)

passion killed them both on the spot. The statement being accepted was held to be a good plea of grave and sudden provocation so as to reduce the offence to one of culpable homicide not amounting to murder. *QUEEN EMPRESS V. CHUNNI.*

[XVI-161]

(10).—*Adultery, with wife.* The accused found his wife sleeping at midnight in his own house with the very man whose society he had forbidden her: suspecting them of adultery he killed his wife. *Held* that the provocation was sufficient to bring the case within man-slaughter and not murder. It is indisputable law that if a husband discovers his wife in the act of adultery and kills either her or her paramour or both the crime is man-slaughter and not murder. In this case though they were not surprised in the very act, the circumstances were sufficient to raise a reasonable suspicion. Twelve months' punishment was therefore sufficient, *EMPRESS V. DAMARUA.*

[V-197]

(11).—*Sudden—Adultery with wife—Calling for assistance.* *Held* that the mere fact that a man, who, having found another sleeping with his wife, had killed him on the spot, called aloud at the time for assistance, did not necessarily indicate that he had not acted under grave and sudden provocation. If, however, in such a case, having called his servants to his assistance, he had compelled them to hold his wife's paramour, while he deliberately proceeded to kill him, he would not be entitled to the same amount of consideration, and his crime would properly fall under the category of murder. *EMPRESS V. ROGI AND OTHERS.*

[I-112]

(12).—*Following wife to her paramour.* Upon the trial of a person charged with the murder of his wife, it was proved that the accused had entertained well-founded suspicions that his wife had formed a criminal intimacy with another person; that one night the deceased, thinking that her husband was asleep, stealthily left his side; that the accused took up an axe and followed her, found her in conversation with her paramour in a public place, and immediately killed her. *Held* that the act of the accused constituted the crime of murder, the facts not showing “grave and sudden provocation” within the meaning of s. 300, *Exception I*, of the Penal Code, so as to reduce the offence to culpable homicide not amounting to murder. *Empress v. Damarua*, (W. N. 1885, p. 197) distinguished. *EMPRESS V. MOHAN.*

[VI-250]

(13).—*Accused person was convicted of culpable homicide not amounting to murder in respect*

INDIAN PENAL CODE, s. 300, Exception I—(continued.)

of the widow of his cousin, who lived with him. The evidence showed that the accused was seen to follow the deceased for a considerable distance with a *gandasa* or chopper, under circumstances which indicated a belief on his part that she was going to keep an assignation, and with the purpose of detecting her in doing so. He found her in the act of connection with her paramour and killed her with the chopper. *Held* that the conviction must be altered to one of murder, as the accused went deliberately in search of the provocation sought to be made the mitigation of his offence, and under the circumstances disclosed, it could not be said that he was deprived of self-control by sudden and grave provocation. *Queen Empress v. Damarua* (*W. N.*, 1885, p. 197) and *Empress v. Mohan* (*I. L. R.*, 8 *All.*, 622) referred to. **EMPRESS v. LOCHAN.**

[VI-252]

(14). **s. 300, Exception (IV)—Sudden fight.** S and certain other persons, seven in number, armed with staves some of them iron-bound staves, entered a field in which one R S and his friends were working, in order by force to make them desist from cultivating the field. A free fight ensued, in which R S received a *lathi* wound on the head at the hands of S of which he died in four days. *Held* that as it was not in evidence that the accused desired or premeditated the death of the deceased, and as there was a fight in which the parties became heated with sudden passion, and the weapons used were not unusual and were not plied with unfair advantage or peculiar cruelty, the offence came within *exception iv* of s. 300, Penal Code. **EMPRESS v. SHEONANDAN.**

[I-156]

See

EMPRESS v. GATTU AND OTHERS.**[III-32]**

(1). **s. 302—Sentence of death—Woman.** In a trial of a woman upon a charge of murdering a child for the sake of its ornaments, the Sessions Judge, after convicting the prisoner, passed sentence in the following terms:—"In consequence of her sex, sentence of death need not be passed. Nibbia will be transported for life." *Held* that the Judge had stated no reason, from a judicial point of view, why the sentence of death should not have been passed. **QUEEN EMPRESS v. NIBBIA.**

[VIII-134]

(2).—[The facts established in this case were:—A quarrel took place in the precincts of a *Thakurdwara* between R P and B about a pigeon. They were ordered out of the precincts of the place. R P at once ran away towards his house, while B walked slowly away. B had got to the door of a *Shiwala* about 150 yards from the *Thakurdwara* when R P suddenly returned from his house,

INDIAN PENAL CODE, s. 302—(continued.)

armed with a long and heavy *lathi* and ran after B who at once ran into the *Shiwala*. R P followed him into the place and struck him a blow on the head which felled him to the ground. R P was followed by P his father, and Bukhan, his uncle, armed with light *lathis*, and all three then struck several blows at the fallen B. The *post mortem* examination showed that B died by fracture of the skull. The Sessions Judge, on these facts convicted R P of murder and sentenced him to transportation for life. The remaining two accused he convicted under s. 325 and sentenced them to rigorous imprisonment for five years. *Held* (on appeal by the prisoners) that R P was properly convicted of murder, but the capital sentence should have been passed upon him. As to the other two accused *held* that as there was no legal proof of their having caused grievous hurt they should have been convicted of the offence of voluntarily causing hurt with an instrument which, used as a weapon of offence, would be likely to cause death as provided in s. 324, Penal Code. This conviction was accordingly altered into one under s. 324 and the sentence was reduced to rigorous imprisonment for three years and a fine of Rs. 100 each. **EMPRESS v. RAM PRASAD AND OTHERS.**

[III-231]

(1). **s. 304—Culpable homicide not amounting to murder—Hurt.** In the course of a trifling quarrel P held a youth called M round the waste and called to the persons round "*marlo, marlo,*" upon which A struck M on the elbow. After sometime M died in hospital from *erysipelas*, the result of the injury. *Held* that as the violence inflicted on M by A had not been such that A must have known that the injury was likely in the ordinary course of things to cause death, the offence committed was not one made punishable under s. 304 though the weapon used was an ordinary *lathi*. The hurt for which A was responsible is that punishable under s. 323, Penal Code, and that is the offence for which P was responsible as an abettor. **EMPRESS v. AFLATUN AND ANOTHER.**

[VIII-236]

(2).—[*Grievous hurt.*] The appellant, his cousin G, and others of the family, all got drunk together on the occasion of the *Holi* festival. The appellant struck G on the back with a wooden pestle (*Musal*), an instrument which, used as a weapon of offence, was likely to cause death. G fell to the ground and died half an hour afterwards. He was about nineteen years old. The medical evidence showed that death was caused by rupture of the spleen, the result of a blow or a fall, that the spleen was large and soft and easily torn; that no external marks of violence were found upon the body; and that death would not have been caused by the violence apparently used, had the spleen been in a healthy condition. The appellant did not know that his cousin's spleen was

INDIAN PENAL CODE, s. 304-^f (continued.)

diseased. On these facts the appellant was convicted by the Court of Session of culpable homicide not amounting to murder under s. 304 of the Penal Code, and sentenced to rigorous imprisonment for five years. *Held* having regard to *Empress v. Fox*, (I. L. R., 2 All., 522,) and *Empress v. O'Brien*, (I. L. R., 2 All., 766) that the conviction should have been of voluntarily causing hurt by a dangerous weapon under s. 324 of the Penal Code. The merits of the case would have been sufficiently met by a sentence of six months' imprisonment. *EMPRESS v. MULUA*.

[I-112]

(3). ————. Four men attacked and beat one *R D* with *lathis*. The beating resulted in a compound fracture of *R D's* left leg, from the effect of which apparently he died some days afterwards. It was not shown that the *lathis* used were of such a nature as to be deadly weapons, nor that *R D* was struck on any dangerous part. The Medical Officer, who, however, was not summoned as a witness in the Sessions Court, was of opinion that the fracture might have been caused by a fall. *Held* that under the above circumstances the conviction should have been under s. 325 of the Indian Penal Code and not under s. 302 or 304. *QUEEN EMPRESS v. BISHESHAR AND OTHERS*.

[XII-105]

(1.) s. 304 A—Causing death by negligence.]

See s. 300, No. (8).

(2). ————. Causing grievous hurt.] The accused while engaged in a verbal quarrel with his wife, struck her a blow on the left side with great force with a heavy stick, the result of which was that she vomited and bled from the nose, and within a little more than an hour died. Upon the *post mortem* examination it was found that her spleen was badly ruptured, almost torn across; death was caused by rupture of the spleen; there were no signs of disease of the spleen, though it was a little enlarged; there were bruises on the left side over the spleen and short ribs; there were no signs of a lengthened beating; the injury could have been caused by one severe blow or fall. *Held* that the offence committed fell under s. 325 and not under s. 304 A of the Indian Penal Code. (7 *Mad. H. C. Rep.*, 119); (*N. W. P. H. C. Rep.*, 1873, pp. 38 and 235); (I. L. R., 4 Cal., 754); (I. L. R., 2 All., 522 and 766) followed. *EMPRESS v. MIRZA EDU BEG*.

[I-132]

(3). ————. A person, without the intention to cause death, or to cause such bodily injury as was likely to cause death, or the knowledge that he was likely by this act to cause death or the intention to cause grievous hurt, or the knowledge

INDIAN PENAL CODE, s. 304 (A)—(continued.)

that he was likely by his act to cause grievous hurt, but with the intention of causing hurt, caused the death of another person by throwing a piece of a brick at him which struck him in the region of the spleen and ruptured it, the spleen being diseased. *Held* that the offence committed was not the offence of causing death by a rash or negligent act, but the offence of voluntarily causing hurt. *EMPRESS v. RANDHIR SINGH*.

[I-37]

(4). ————. *N*, a servant of a Railway Company, charged with moving some trucks by coolies on an incline, discharged this duty negligently and in consequence lost control of the trucks. Under his orders one of the coolies attempted to stop the trucks and was killed in such attempt. *Held* that *N* had caused the coolie's death by his negligence within the meaning of s. 304 A of the Penal Code. *Reg. v. Long Bottom* (3 *Cox. C. C.* 439); *Reg. v. Swindall* (2 *C. and K.* 230) and *Reg. v. Williamson* (1 *Cox. C. C.* 97) referred to. *EMPRESS v. NAND KISHORE*.

[IV-71]

(5). ————. A lessee of a Government ferry having the exclusive right of conveying passengers across a certain river at a particular spot allowed an unsound boat to be used at the ferry. In consequence of its unsoundness the boat sank while crossing the river and some of the persons in it were drowned. *Held* that the lessee of the ferry was properly convicted of the offence provided for by s. 304 A of Act No. XLV of 1860. *QUEEN EMPRESS v. BHUTAN*.

[XIV-182]

(6). ————. The prisoner had been in charge of a police station the vicinity of which had been troubled by thieves. On one occasion a thief had fired at the prisoner. It having been reported to the prisoner that three thieves were prowling about, he, with two other men, went out to patrol. They saw a man crouching under a tree, and thinking he must be a thief, the prisoner fired at him, and killed him. The man proved to be one *S*, a *hal-kara*. The prisoner wrote a false report to the effect that *S* had been killed by thieves. *Held* that on these facts the accused was guilty of an offence under s. 304 A, Penal Code. *EMPRESS v. WAZIRULZAMA KHAN*.

[I-156]

(7). ————. It appeared that the accused in this case was watching his field one dark night. Hearing a noise in the field he shouted upon, a thief ran out of it, whom he followed and struck with a stick. The thief fell down and the accused caught him and took him to the *samindar's* house. The thief became insensible there, and subsequently died from the effects of the blow which the accused had given

INDIAN PENAL CODE, s. 304 (A)—
(continued.)

him. The accused was convicted by the Magistrate on these facts of causing death by negligence, an offence punishable under s. 304 A, Penal Code. *Held* with reference to the terms of s. 304 A, that the conviction under the section was bad. *Nidamarti Nagabhushanam* (7 *Mad. H C Rep.* 119); *Empress v. Ketabdi Mandal*, (1. L. R., 4 *Calc.*, 764); *Empress v. O'Brien* (1. L. R., 2 *All.*, 766) referred to. *EMPRESS v. BHIKHAM*.

[I-103.]

(1). s. 307—*Applicability of s. 511 to attempt to commit murder.*] Section 511 of the Indian Penal Code does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307 of the said Act. A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only presented by some cause independent of his volition. *QUEEN EMPRESS v. NIDHA*.

[XI-176]

(2).—*Intention.—Knowledge.—Presumption.*] Where a woman of twenty years of age was found to have administered *datura* to three members of her family, it was *held* that she must be presumed to have known that the administration of *datura* was likely to cause death although she might not have administered it with that intention. *QUEEN EMPRESS v. TULSHA*.

[XVII-225]

(3).—*Attempt to murder—Attempt to cause grievous hurt.*] The prisoner in this case threw two bricks, described as large, at a jailor one of which struck the jailor on the shoulder. This was done by the prisoner immediately after the jailor had lodged a complaint against him; and there was no premeditation. The prisoner said at the time to the jailor that he had meant to kill him. *Held* that the facts did not justify a conviction for attempt to murder. Had murder been intended it is reasonable to suppose that the prisoner would have watched for a better opportunity and used a more deadly weapon. That much importance cannot be attached to his saying that he had meant to kill the jailor. The offence therefore was attempt to cause grievous hurt. *EMPRESS v. HUSAIN BAKHSH*.

[I-172]

(1). s. 317—*Desertion of child—Culpable homicide not amounting to murder.*] Where a woman deserted her illegitimate child of ten days old, but under circumstances in which it could and as a matter of fact, did obtain food, and the child died after four days as it appeared from the evidence from natural causes. *Held* that the mother could not properly be convicted under s. 304 of the Indian Penal Code. *QUEEN*

INDIAN PENAL CODE, s. 317—(continued.)

EMPRESS v. JEONI.

[XIII-100]

(2).—*Leaving child in charge of blind woman.*] A woman who was the mother of an illegitimate child aged at the time about six months left the child in charge of a blind woman in whose company she was, saying that she was going to get food and would return shortly. She went away to another village and did not return. Apparently she never intended to return. Upon these facts it was *held* by Blair and Aikman, JJ., *dissentiente* Knox, J., that the mother of the child could not properly be convicted of the offence defined by s. 317, Penal Code. *QUEEN EMPRESS v. MIRCHIA*.

[XVI-117]

s. 323—*Culpable homicide—Hurt.*]

See s. 304, No. (1).

s. 324—*Murder—Causing hurt by dangerous weapon.*]

See s. 302, No. (2).

(1). s. 325—*Culpable homicide—Grievous hurt.*]

See s. 304, Nos. (2) and (3).

(2).—*Causing death by negligence—Grievous hurt.*]

See s. 304 A., Nos. (2), and (3).

(3).—*Attempt to murder—Attempt to cause grievous hurt.*]

See s. 307, No. (3).

s. 330—*Abetment—Extorting confession.*]

See s. 107, No. (3).

(1) s. 332—*Causing hurt—Public servant.*] A warrant was issued by a Magistrate for the arrest of one Dalip under s. 114 of the Code of Criminal Procedure. The warrant was sent to a certain *thana* to be executed. It was there, after being copied into a book kept for that purpose at the *thana*, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the *thana*, it was discovered that Dalip was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the *thana* made a copy from the book at the *thana*, endorsed on the back the names of one Nazir Husain and some other constables, and having signed the endorsement, sent Nazir Husain and the others out with this paper to arrest Dalip. Nazir Husain and his companions arrested Dalip; but, as they were returning with him in custody, some of Dalip's friends aided by Dalip himself, attacked them, rescued Dalip and caused hurt to the Police. *Held* that the Police officers concerned in arresting Dalip under the circumstances above described were not acting in lawful discharge of their duty

INDIAN PENAL CODE, s. 332—(continued.)

within the meaning of s. 332 of the Indian Penal Code, so as to render the accused liable to conviction under that section, but inasmuch as they were acting in good faith under the colour of their office, s. 99 of the Indian Penal Code applied, and Dalip and his associates might be properly convicted under ss. 147 and 325 of the Code. The words "in the discharge of his duty as such public servant" in the earlier portion of s. 332 of the Indian Penal Code mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office. **QUEEN EMPRESS v. DALIP AND OTHERS.**

[XVI-48]

(3). —————.] Where a Police officer conducting an investigation into a case of riot sent the muharrir of the station to demand from the accused persons the delivery of certain sticks said to have been used by them in the course of the riot, but without giving him any order in writing, according to the provisions of s. 165 of the Code of Criminal Procedure authorising him to make such demand: *held* that the muharrir must nevertheless be regarded as a public servant in the discharge of his duty as such, *viz.* his duty to his superior officer, so as to render persons who resisted him and caused hurt in so doing guilty of offence provided for by s. 332 of the Indian Penal Code. **QUEEN EMPRESS v. NAND KISHORE AND OTHERS.**

[XII-1]

s. 335.—Provocation—Sudden. A husband, suspecting his wife of infidelity, hid himself so as to see her with her paramour, and having seen an improper act committed, he came out and caused grievous hurt to the wife. *Held* that, assuming the provocation to be "grave," it was no "sudden" within the meaning of s. 335 of the Penal Code. **EMPRESS v. RAMZANI.**

[IX-9]

ss. 339 and 352.—Stopping Tazia procession. *Held* that the stopping of a Tazia procession during the moharram may be an offence under s. 339 or 352, Penal Code. **GHOSITA v. KALKA.**

[V-49]

s. 352.—Act causing slight harm. The accused in this case was charged of an offence under s. 354, Penal Code, on the following facts:—The complainant, a young woman, was going with an earthen jar through a public thoroughfare, to fill water at a well, after sunrise, when the accused who was standing at his door, leaning against his *fathi*, caught hold of the complainant's hand which prevented the complainant from proceeding in the direction in which she was going. It was also alleged that the accused had solicited her to commit adultery with him. The Magistrate finding the latter part of the charge unproved convicted the accused under s. 352, Penal Code. The

INDIAN PENAL CODE, s. 352—(continued.)

Sessions Judge being of opinion that the complainant was a woman of an exceedingly questionable character and behaviour, who did not offer the slightest resistance to the accused and no offence had therefore been committed referred the case to the High Court. *Held* that though there was evidence to sustain a charge of criminal force under s. 352, Penal Code, the principle of s. 95, Penal Code, applied to the act of the accused in this case as it was a mere piece of foolish and vulgar chaff which seriously to treat as a crime would be absurd. **EMPRESS v. BHAIRON MISR.**

[VII-73]

(1). **s. 353.—Warrant of arrest—Initial.** A warrant issued for the arrest of a debtor under the provisions of s. 251 of the Civil Procedure Code, was initialled by the Munsarim of the Court, sealed with the seal of the Court, and delivered to the proper officer for execution. The debtor forcibly resisted the officer, and was tried and convicted, under s. 333 of the Penal Code, of assaulting a public servant in the execution of his duty as such. In revision, it was contended, with reference to the requirements of s. 251 of the Civil Procedure Code, that the warrant of arrest, having been initialled only, was bad and the officer could not legally execute it, and consequently no offence under s. 333 of the Penal Code had been committed. *Held* that this contention could not be allowed, and, although it was proper that the person signing a warrant should write his name in full, it could not be said that because the signature was confined to the initials of the name, it was not the duty of the officer to execute the warrant. *Held* also, with reference to s. 99 of the Penal Code, that the act of the accused did not cease to be an offence on the ground that it was done in the exercise of the right of private defence. **EMPRESS v. JANKI PRASAD AND OTHERS.**

[VI-106]

(2). ———— **Public servant—Mirdeh—Village stationery expense.** In reporting this case to the High Court the Sessions Judge observed:—The applicants in this case have been convicted under s. 353 of the Penal Code. The "*kanungo*" and a "*mirdeh*" went under orders of the *Tahsildar* to realize Re. 1 on account of village stationery expenses. The applicants are said to have assaulted them and have been convicted of doing so. There is no law under which the money could be realized from individual share-holders by distraint. Then again the order of attachment was not endorsed by the *Tahsildar*. The applicants were therefore justified under the circumstances to oppose them. *Held* that the *mirdeh* was a public servant and in obeying the order of his superior he was acting as a public servant. The conviction was therefore good. **EMPRESS v. DIWAN SINGH AND ANOTHER.**

[V-244]

INDIAN PENAL CODE—(continued.)

s. 373.—*Buying minor for prostitution.*] To constitute the offence provided for by s. 373 of the Indian Penal Code it is necessary, first, that a minor under sixteen years of age shall be bought, hired or otherwise obtained possession of, and, secondly, that the minor shall be bought hired or otherwise obtained possession of, with the intent that the same minor while still under the age of 16 years, shall be employed for the purpose of prostitution as with the knowledge that it is likely that the said minor while still under the age of 16 years will be employed or used for an unlawful and immoral purpose. The offence is complete so soon as the obtaining possession, with the requisite intention or knowledge, of the minor is accomplished, though the minor may not enter upon prostitution until years after she has attained maturity, or may never enter upon such a profession at all. *The Deputy Legal Remembrancer v. Karuna Baistobi* (I. L. R., 22 Cal., 164) approved. *QUEEN EMPRESS v. CHANDA.*

[XV-141]

s. 375.—*Rape—Consent.*] This was an appeal by one O convicted by the Court of Session of rape. From certain statements made by the complainant the Sessions Judge was of opinion that the girl had given her consent to the act and that afterwards she condemned the offence, but that in the middle (*i.e.*) at the time of the actual commission of the act of sexual penetration, she withheld her consent and this fact was proved by satisfactory circumstantial evidence. The Sessions Court therefore held that it came within the explanation to s. 375. *Held* that the Court was wrong and the offence of rape had not been committed. *EMPRESS v. DAMUA.*

[IV-91]

(1). s. 377.—*Unnatural offence—Evidence.*] *Held* where a person was tried for an unnatural offence and convicted on a charge which did not allege the time when, place where, or point to any known or unknown person with whom, the offence was committed, and without any proof of these particulars, the facts proved against him only being that he habitually wore woman's clothes and exhibited physical signs of having committed the offence, that the conviction was not sustainable. *EMPRESS v. KHAIRATI.*

[IV-26]

(2). ———— *Penetration—Medical evidence.*] The following observations were made in this case. It is very desirable in cases of this kind (unnatural offence under s. 377) that there should be some medical evidence on the record as to the condition of the *anus* of the person on whom the offence has been perpetrated, from which penetration may be inferred; for it may easily happen that what the witnesses speak of as a completed act is nothing more

INDIAN PENAL CODE, s. 377—(continued.)

than an attempt. The conviction is therefore altered into that of an attempt but the sentence remains undisturbed. *EMPRESS v. GHASITA AND ANOTHER.*

[IV-25]

(1). s. 378.—“*Dishonestly*”—*Removal of debtor's property to compel payment*] The servants of a Raja who had leased a ferry at an annual rent of Rs. 181 went to the house of the lessee to dun him for arrears of rent amounting to Rs. 40, and as he was unable to pay the amounts due, they, in spite of his remonstrances, seized and carried off his cattle valued at Rs. 130, and made them over to the Raja. *Held* that the plea that the servants had acted under a *bona fide* claim of right to take the cattle in satisfaction of the debt could not be allowed, that they had acted “dishonestly” within the meaning of s. 24, Penal Code, and had committed theft as defined in s. 378. *QUEEN EMPRESS v. SHEOMESHUR RAI AND OTHERS.*

[VIII-97]

(2). ———— *Held* that the removal by a creditor against the will of his debtor of property belonging to such debtor with the view of compelling such debtor to discharge his debt amounts to theft with the meaning of s. 379 of the Indian Penal Code. *Queen Empress v. Sumeshar Rai* (W.-N. 1888, p. 97) referred to. *Prosono Kumar Patra v. Uday Sant* (I. L. R., 22 Cal., 669) dissented from. *QUEEN EMPRESS v. AGHA MUHAMMAD YUSUF.*

[XV-233]

(3). ———— *Removal by tenant of zamindar's tree*] The accused, a tenant, cut down a tree belonging to the *zamindar* without his permission and carried it away for his own use. He asserted that the tree belonged to him. *Held* that the offence, if any, was theft and not mischief. *EMPRESS v. MOHAN.*

[I-73]

See also

EMPRESS v. BASANT RAI.

[I-64]

(4). ———— *Moveable property—Peacock—Penal Code, s. 379—Peacock not kept in confinement.*] *Held* that a peacock which had been tamed, but was not kept in confinement, might be the subject of theft as defined in s. 378, Penal Code. *QUEEN EMPRESS v. NANHE KHAN AND ANOTHER.*

[XVII-41]

(5). ———— *Possession—Joint property.*] *Held* that a person who had appropriated property belonging to him and his father jointly could be convicted of theft if the other necessary ingredients of the offence were proved and the appropriation was not in the assertion *bona*

INDIAN PENAL CODE, s. 378—(continued.)

fide of any legal claim or right. *EMPRESS v. DEBI DAS.*

[I-115]

ss. 379 & 380.—*Recent possession—Presumption.*] The accused was found in possession of property stolen in a dwelling-house immediately after the theft. He was convicted of an offence under s. 379, Penal Code, on the presumption arising from the recent possession of the property without any direct evidence. *Held* that if the presumption was to hold good, he should have been convicted under s. 380 (stealing in a dwelling-house). *EMPRESS v. CHANDAN.*

[II-143]

(1). s. 391.—*Hindus forcibly removing cow.*] Where several Hindus acting in concert forcibly removed an ox and two cows from the possession of a Muhammadan, not for the purpose of causing "wrongful gain" to themselves or "wrongful loss" to the owner of the cattle, but for the purpose of preventing the killing of the cows. *Held* that they could not properly be convicted of dacoity, but only of riot. *QUEEN EMPRESS v. RAGHUNATH RAI AND OTHERS.*

[XII-220]

(2). —————.] Where a large body of Hindus acting in concert and apparently under the influence of religious feeling attacked certain Muhammadans who were driving cattle along a public road and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently restoring such cattle to their lawful owners. *Held* that the offence of which the Hindus were guilty was dacoity under s. 395 of the Indian Penal Code, and not merely riot. *QUEEN EMPRESS v. RAM BARAN AND OTHERS.*

[XIII-142]

(1) s. 396.—*Conjointly, —Actual presence.*] In order to support a conviction under s. 396 of the Indian Penal Code, it is necessary to establish not only that the person accused under that section was committing dacoity conjointly with others, but it must be shown that the murder was committed in his presence. Hence where certain persons were shown to have been concerned in a dacoity in the course of which murder was committed, but it was not shown that they were in the house in which the dacoity was committed at the time the murder took place, and the evidence if anything, pointed to a contrary conclusion, it was *held* that the accused could not properly be convicted under s. 396, but only under s. 395 of the Indian Penal Code. *QUEEN EMPRESS v. UMRAO SINGH AND OTHERS.*

* [XIV-178]

INDIAN PENAL CODE, s. 396—(continued.)

(2). —————.] When in the commission of a dacoity a murder is committed, it matters not whether the particular dacoit charged under s. 396 of Act No. XLV of 1860 was inside the house or outside the house, or whether the murder was committed inside or outside the house so long only as the murder was committed in that dacoity. *QUEEN EMPRESS v. Umrao Singh (I. L. R., 16 All., 437)* distinguished. *QUEEN EMPRESS v. TEJA AND ANOTHER.*

[XV-12]

s. 397.—*Minimum sentence.*] *Held* that the minimum sentence under s. 397, Penal Code, (a section which must be read with ss. 392 and 395, Penal Code) is seven years' rigorous imprisonment. *EMPRESS v. RAJWANTA-*

[VII-140]

(1). s. 401.—*"Association"—"Habitually"—Kunjars.*] A gang of *Kunjars* were charged under s. 401, Penal Code. *Held* that to sustain a charge under s. 401 very clear evidence must be forthcoming as to their association and their habitual committing of theft or robbery. *EMPRESS v. JAHANGIRA AND OTHERS.*

[VI-16]

(2). —————.] This is an appeal by four persons, named K, K'S and C, convicted under s. 401, Penal Code, (belonging to a wandering gang of thieves). The case arose out of one in which a number of persons, members of a wandering gang of *Kunjars*, were convicted under s. 401, Penal Code, in 1883. That case arose out of the seizure by the police at an encampment of this band of a number of stolen cattle. Evidence was given at the trial of the appellants to show that they belonged to this band when these cattle were seized, that K' and one H were subsequently in prison under a conviction of theft; that K had been convicted of high-way robbery in 1878; and that H had been convicted of sheep-stealing in 1882. At the time of the trial the appellants were each undergoing a sentence of two years' rigorous imprisonment for receiving stolen property. *Held* that the evidence, though sufficient to prove association, was not sufficient to prove that the association was for the habitual commission of theft or robbery. The trial must be commenced *de novo*. *EMPRESS v. SHIBBA.*

[VI-15]

(1) s. 403.—*Act causing slight harm.*] It was found in this case that the accused had removed a semi-decayed branch of a tamarind tree not belonging to him, and overhanging the roof of his house, because from its position over the roof of his house it incommoded him. *Held* that the element of dishonesty being wanting no offence under s. 403, Penal Code, had been committed. The provisions of s. 95, Penal Code, should have barred a prosecution in this case. *Reg. v. Kasya bin Rawji, (5 Bomb.*

INDIAN PENAL CODE, s. 402—(continued.)

H. C. Rep., p. 35) referred to. *EMPRESS v. JIWA RAM*.

[I-100]

(2).—*Dishonestly*.] Among the property hypothecated in a bond there was included a "*rozina*" allowance, and also the arrears of that allowance which were due to the mortgagor at the time of execution of the bond, but which had not been received from the Government Treasury. The mortgagor promised in the bond that their sum, whatever it might be, should be realized by his general attorney and paid to the mortgagee. The mortgagor however realized the arrears, amounting to Rs. 3,225-12-0, but did not pay the money to the mortgagee, who, after waiting a week prosecuted the mortgagor of an offence under s. 403, Penal Code. The mortgagor admitted that he had expended the money on his own purposes, but alleged that he had done so because the mortgagee had not paid him the sum of Rs. 7,000, part of the consideration of the bond, and which was stated in the bond to have been received by the mortgagor. There was no evidence adduced on behalf of the prosecution to show that the Rs. 7,000 had been paid to the mortgagor. *Held* that assuming that there had been misappropriation by the mortgagor, it did not become criminal misappropriation as defined in s. 403, Penal Code, until it had been established that there was dishonest misappropriation. This had not been established. *EMPRESS v. PARSONAM DAS*.

[I-80]

(3).—*Joint property*.] The accused was charged before the Court of Session, with theft in a dwelling-house of certain property, or, in the alternative, with criminal misappropriation of such property. The defence was that the property was the joint property of her husband and his deceased brother L, and that she had taken it because she suspected that L's widow was going to squander it on a paramour. The Sessions Judge, being of opinion that the weight of evidence was in favor of the property belonging solely to L, but that in either case she had committed an offence in respect of the property, found her "guilty of one or other of the charges preferred against her; and he sentenced her to one year's rigorous imprisonment and to pay a fine of Rs. 150, the value of a portion of the property which was missing. *Held* (in appeal) that the evidence regarding the ownership of the property was not sufficiently worthy of credit; that portion of the sentence therefore which directed the payment of a fine by the accused was injudicious. But that there can be no doubt that joint property might be criminally misappropriated and the appropriation in this case was criminal. The conviction had best be made under s. 403, Penal Code. *EMPRESS v. PANIA*.

[I-89]

INDIAN PENAL CODE, s. 403—(continued.)

(1).—"*Property*"—*Nullius in terra*—*Bull*.]

See s. 411, No. (1).

(1) s. 405—*Trust—Person irregularly employed by clerk*.] A person employed irregularly by a clerk in charge of certain criminal records to help him in his work was *de facto* in charge of that clerk's bundle of records during his (the clerk's) absence from Court on sick-leave, and being so in charge made and delivered certain copies of depositions from the said records. It was not shown that any money was received for the copies. *Held*, that under the above circumstances the person so making the copies could not be convicted under s. 406, Indian Penal Code, because, though he might have been, within the meaning of s. 21 of the said Code a public servant, there was no such trust as was required by s. 406. *QUEEN EMPRESS v. KALIAN SINGH*.

[XI-206]

(2).—*Disposal in violation of direction*.] Where a Magistrate made over a pony which had been condemned by the Municipal authorities as unfit for work to a person professing to be the secretary of a society for the maintenance of incurable animals, and such secretary agreed to take charge of the pony, but afterwards sold it to an *ekka* driver, it was *held* that the so-called secretary was rightly convicted of the offence provided for by s. 405 of the Indian Code. *QUEEN EMPRESS v. GAURI SHANKAR*.

[XIV-197]

(3).—*General deficiency*.] An accused person may be charged with criminal breach of trust in respect of a general deficiency and it is not necessary in all cases to charge the accused with the embezzlement of a particular sum received on a certain date from some particular person. *Reg. v. Lloyd Jones*, VIII—C. and P. 283; *Reg. v. Chapman* (I C. and K, 119); *Reg. v. Wolstenholme* (XI Cox 313) and the *Queen v. Lambart* (2 Cox 309) referred to. *EMPRESS v. KELLIE*.

[XV-37]

BUDDHU v. BABU LAL.

[XVI-11]

(1) s. 408—*Tahsil peon—Census labels*.]—The accused, a *Tahsil* peon, was directed by the *Tahsildar* to have census labels made and to affix them to certain houses; he was further directed to collect 1½ annas, the cost of a label, from each house-owner. The accused however collected more than he was directed to do and obtained the materials for no price, and in this way he saved Rs. 7 which he appropriated himself. *Held* that he was guilty of cheating and not of criminal breach of trust as servant. *EMPRESS v. MULCHAND*.

[I-32]

INDIAN PENAL CODE, s. 493* (continued.)

(2).—*Trust—Servant.*—Where a master entrusts his servant with money for the payment of an open account, *i.e.*, an account of which the items have never been checked or settled, and the tradesman makes the servant a present, and the transaction amounts to a taxation of the bills and a reduction of the price by the servant, the latter obtains the reduction of his master's benefit, the money in his hands always remains the master's property, and, if he appropriates it, he commits criminal breach of trust. But where the master himself has settled the account with the tradesman for a specific sum and sends the servant with the money, and the servant, after making the payment, accepts a present from the tradesman, in that case the servant does not commit criminal breach of trust, inasmuch as the money is given to him by a person whom he believes to have a right to give it, though it may be that, according to the strict equitable doctrines of the Court of Chancery, he is bound to account to the master for the money. *Hay's case, In re Canadian oil works Corporation, (L. R. 10 Ch. App., 593)* referred to. *EMPRESS v. IMDAD KHAN.*

[VI-7]

(1). s. 409.—*Manager of bank—Dominion over property.*—When a Bank takes a deposit from its customer, it takes it on the understanding that, that deposit is not to be used to pay dividends to share-holders at a time when the Bank is insolvent and can not legally pay dividends. In the case of a Bank registered under the Indian Companies Act as a company limited by shares, and governed by the regulations contained in Table A in the first schedule to the Act, it was held that the directors had dominion over the property and the management of the funds of the Bank; that they were bound not to pay dividends except out of the profits of the Bank; and that if they dishonestly, that is, knowingly and intentionally, paid dividends to the share-holders out of deposits when there were no profits, intending to cause gain to themselves or others to which they were not entitled, or to cause wrongful loss to other persons, they were guilty of criminal breach of trust as bankers under s. 409 of the Penal Code. But that the Manager, and the Accountant or Assistant Manager, were not, within the meaning of the section, persons who were entrusted with property or with dominion over property as bankers or agents, and therefore did not come directly under s. 409, though they might be guilty of abetment under s. 409, read with s. 109, by conspiring with the Directors to commit criminal breach of trust, if they assisted the Directors to obtain the sanction of the share-holders to the illegal payment of dividends, and did so for the dishonest purpose of causing wrongful gain or wrongful loss. Whether the illegal payment of dividends under the circumstances stated could be regarded as causing wrong-

INDIAN PENAL CODE, s. 409—(continued.)

ful loss to the Bank as a corporate body *quære*. Whether moneys deposited in the Bank by its customers and not in any way ever marked could, after such deposit, be regarded as "property" of the depositors within the meaning of s. 409, *quære*. Held also that if the Directors, Manager, and Accountant dishonestly, that is to obtain wrongful gain for themselves, or, to cause wrongful loss to others, put before the share-holders balance-sheets which they knew to be materially false and misleading and likely to mislead the public as to the condition of the Bank, and concealed its true condition, and thereby induced depositors to allow their money to remain in deposit in the Bank, they were guilty of cheating in the aggravated form made punishable by s. 418 of the Penal Code and if they acted together to put forward such a false balance-sheet, they were guilty of abetment by conspiracy to cheat. *Semble*, the making of such a false balance-sheet is not an offence within s. 191 of the Penal Code, and where it is made prior to the commencement of the winding up of the company, is not an offence within s. 215 of the Indian Companies Act (VI of 1882). A balance-sheet of a company under the Indian Companies Act must be a true balance-sheet in the sense that it must represent the actual state of the company's assets and liabilities. If it falsely states the condition of the company, it is a false balance-sheet, though it follows the accounts as shown in the books of the company, and correctly represents what is in the books. A balance-sheet which showed all the debts owing to the company amounting to Rs. 28 lakhs, under the head of assets, without specifying, in accordance with the form of balance-sheet annexed to Table A, which of such debts were good and secured, which good and unsecured, and which considered bad and doubtful, and also showed a divisible balance of profits amounting to Rs. 19,000, the facts being that out of the Rs. 28 lakhs some Rs. 13 lakhs were bad and irrecoverable, and that the capital, reserve fund and other provision for bad debts had been lost, and that the company instead of making profits was and long had been insolvent, was found to be false and misleading. Having regard to the nature of the charges above referred to, the Court, under s. 239 of the Code of Criminal Procedure, rejected an application by the defence that the accused should be tried separately. The word "Europeans" in s. 451 of the Code of Criminal Procedure means persons born in Europe. A deposition on oath made by one of several accused, as a witness in a previous inquiry under ss. 162, 163 of the Indian Companies Act (VI of 1882) was admitted in evidence against himself only, and not against the other accused. The action of the defence, during the cross-examination of a witness for the Crown, in tendering a document to such witness and using the same as evidence for the defence, was held to entitle the Crown to reply, under s. 292 of the Code of Criminal

INDIAN PENAL CODE, s. 409—(continued.)

Procedure. *QUEEN EMPRESS v. MOSS AND OTHERS.*

[XIV-23]

(2).—*Incapacity of public servant.* Where a police constable was given money by the assistant *moharrir* of his *thanah* to purchase rafters and bamboos for repair of the *thanah* and was subsequently convicted of criminal breach of trust under s. 409 of the Indian Penal Code, in respect of the money so entrusted to him. *Held* that the conviction under that section was wrong as the money was not entrusted to the said constable in his capacity of a public servant, it being no part of his duty as a constable to purchase wood and bamboos, though the order was given by his superior officer and the materials were required for the repair of the *thana*: neither was the order an order of the kind contemplated by s. 23 of Act V of 1861. *IN THE MATTER OF THE PETITION OF DILDAR KHAN.*

[XI-179]

(3).—*General deficiency.* *Held* that a person accused under s. 409 of the Indian Penal Code might be legally convicted of the offence defined in that section on proof of a general deficiency in his account, and that it was not necessary that the receipt of and non-accounting for specification shall be charged and proved against him. *Queen Empress v. Kellie (L. L. R., 17 All., 153)* approved. *BUDDHU v. BABU LAL.*

[XVI-11]

QUEEN EMPRESS v. KELLIE.

[XV-37]

(4).—*Criminal Court not medium of recovering civil debts.* The accused a *kanungo* appointed to collect the rent of certain land situate in the family domains was found to have misappropriated a sum of Rs. 2,851 with the intention of causing loss to the Maharaja of Benares. After the defalcations were discovered he paid Rs. 2,051 and then because he could not pay the balance, Rs. 799, a prosecution was resorted to. The Magistrate convicted the accused to four months' rigorous imprisonment under s. 409, and to a fine of Rs. 1,000 of which Rs. 800 were to be paid to the Maharaja as compensation. *Held* that the criminal law ought not to be played with in this fashion and the Criminal Courts ought not to be made the medium of recovering civil debts. The portion of the Magistrate's order as to fine is therefore quashed. *EMPRESS v. BIRJ KUMAR LAL.*

[IV-105]

(1.) s. 411—*Stolen property—Misappropriation—Nullius proprietos.* A person was convicted and sentenced under s. 411 of the Indian Penal Code for dishonestly receiving a bull, knowing the same to have been criminally misappropriated. It was found that at the time of the alleged misappropriation, the bull had been set at large by some Hindu in accordance

INDIAN PENAL CODE, s. 411—(continued.)

with Hindu religious usages, at the time of performing funeral ceremonies. *Held* that the bull was not, at the time of the alleged misappropriation, "property" within the meaning of the Indian Penal Code, inasmuch as not only was it not the subject of ownership by any person, but the original owner had surrendered all his rights as its proprietor, that it was therefore *nullius proprietos*, and incapable of larceny being committed in respect of it; and that the conviction must be set aside. *EMPRESS v. BANDHU.*

[V-326]

EMPRESS v. NIHAL.

[VII-73]

See also

EMPRESS v. JAMURA.

[IV-87]

(2).—*Possession.* One *S R* was charged with and convicted of an offence under s. 411, Penal Code, on the ground that certain stolen property was found in his *gothaula* (a place for storing cow-dung cakes), which was not separate from his house and was not such an unprotected place that any person might put any thing into it. It appears that when the constable went into the *gothaula* to search, none of the witnesses went with him and one of the witnesses spoke to there having been, at the time of the search, a rent in the *latti*-wall sufficient to admit a man passing through. *Held* that the conviction was bad and must be set aside as it was possible that the stolen property might have been placed there without *S R*'s knowledge. *EMPRESS v. SITA RAM.*

[I-83]

(3).—*Pointing out of stolen property by accused.* The mere fact that an accused person has pointed out the spot not being a place under his control where stolen property is found concealed, is not sufficient by itself to justify the conviction of such person for having either received or retained such property knowing it to have been stolen. *Queen Empress v. Gobinda (W. N. 1895, p. 226)* *QUEEN EMPRESS v. NIRPAT.*

[XV-229]

EMPRESS v. KINHAR.

[I-94]

(4).—*Stolen property—Guilty knowledge.* *Held* that in order to sustain a conviction under s. 411 of the Indian Penal Code (retaining stolen property) it must be satisfactorily proved that the property is stolen property and that the accused received it dishonestly knowing or having reason to believe it to be stolen property. That the property was stolen must be proved in the same way as if the case was against the thief himself. The

INDIAN PENAL CODE, s. 411—(continued.)

mere fact that the accused can not account how he came in possession though suspicious, does not relieve the prosecution from proving the abovementioned ingredients. *EMPRESS v. BURKE.*

[IV-55]

(5).—*Recent possession—Guilty knowledge—Presumption.*] All that was proved against the appellant in this case was that a buffalo-cow was stolen on the night of the 31st July, 1897, and that on the 31st January, 1898, it was found in the possession of the appellant. *Held* that the evidence above noted was not sufficient to prove guilty knowledge. *QUEEN EMPRESS v. GADLU.*

[XVIII-70]

(6).—[The accused were charged under s. 411. The stolen property was a calf which had been missing no less than a year and a half before the prosecution and it was found in the possession of the accused. No report was made to the police. The prisoner's defence was that he had bought it, but he could not establish this plea by evidence. On these facts he was convicted by the Magistrate. *Held* that the facts were not sufficient to support the conviction, the possession being not recent to raise the presumption of guilty knowledge under s. 114, Evidence Act. *EMPRESS v. DALLUA.*

[VII-281]

(7).—[The accused was convicted of an offence under s. 411. The only evidence against him was that he received as a gift from a relation, who lived at a distance of eight kos, a bullock which had been stolen some days previously and which had been sold to the relation at an inadequate price. *Held* that the evidence was not sufficient to warrant a conviction. The essence of an offence under s. 411, Penal Code, is guilty knowledge and the bare fact of possession, except under very peculiar circumstances, is not enough. *EMPRESS v. RAMJAS.*

[III-17]

s. 414—*Identification of stolen property in Court*] *Held* that to sustain a conviction under s. 414 it is not necessary that the stolen property should be identified in Court. *EMPRESS v. HARJAS AND OTHERS.*

[VII-96]

(1). s. 415—*Giving false information—To obtain recruitment in Police.*]

See s. 177, No. (2).

(2).—*Tahsil peon—Census label.*]

See s. 408, No. (1).

INDIAN PENAL CODE, s. 415—(continued.)

(3).—*Purchasing stamp paper in false name.*] This accused when purchasing a stamp-paper gave his name as *H* (which was not his name) and the stamp-paper was endorsed with that name. *Held* that he could not be said to have cheated the stamp-vendor within the meaning of s. 415; his conviction therefore under s. 419 was bad and must be quashed. *EMPRESS v. NEKA.*

[IV-87]

s. 416—*Palming off woman as belonging to different caste.*] *Held* following *Queen v. Dabene Singh* (7 W. R. Cr., 55), that to palm off a young woman as belonging to a caste different to the one to which she really belongs, with the object of obtaining money, amounts to the offence of cheating by personation as defined in s. 416, Penal Code, which must be read in the light of the preceding s. 415, Penal Code. *EMPRESS v. SHEORAM AND ANOTHER.*

[II-237]

s. 418—*Cheating—Banker.*]

See s. 409, No. (1).

420.—*“Property”—Immoveable property.*] One *A*, personating himself a Court peon, proclaimed by beat of drum that a tenant had been ordered by the Court to be ousted from his holding. One *B* had aided *A* in the offence. *Held* that the provisions of s. 420, Penal Code, have no application to the delivery of immoveable property, as in the present case to the surrender of a cultivatory holding and therefore *B* could not be convicted under s. 420, Penal Code. *QUEEN EMPRESS v. ABDUL AHAD.*

[II-6.]

s. 423.—*Civil suit—Condition—Precedent.*] *Held* that the institution of a civil suit was not a condition precedent to the maintenance of a charge in the criminal Court for an offence under s. 423, Penal Code. *EMPRESS v. UMRAO SINGH*

[III-209]

(1). s. 425—*Act causing slight harm.*] The accused was convicted of mischief under s. 425, Penal Code, for taking some earth of hardly any appreciable value from an open piece of ground. *Held* that the act of the accused was governed by s. 95, Penal Code. *EMPRESS v. GULZARI LAL.*

[II-229]

(2).—*Intention to cause loss—Zaminidar—Tenant.*] A landholder charged a tenant with cutting down certain trees. The tenant admitted that he had cut down the trees, but alleged that they belonged to him and not to the landholder. The Magistrate trying the case decided that the trees belonged

INDIAN PENAL CODE, s. 425 — (continued.)

to the landholder, and convicted the tenant of mischief. The Court of Sessions, being of opinion that the tenant had cut down the trees under the impression that he had a right to do so, and that he did not intend to cause, and did not know that he was causing, loss to the landholder, held that the tenant had not committed mischief, and referred the case to the High Court. *Held* that the view of the Sessions Judge appeared to be correct, and the conviction must be quashed. *EMPRESS v. BASANT RAI.*

[I-64]

See also

EMPRESS v. MOHAN.

[I-73]

(3). ———— *Question of title.*] *Held* that a person, who in the *bona fide* belief that the construction of a wall on his land is a civil trespass on the part of the constructive, destroys the construction (even violently and forcibly,) can not be held to have committed an offence under s. 426, Penal Code. *EMPRESS v. SHANKAR LAL.*

[VII-101]

(4). ————.] The accused was charged with having committed mischief in throwing down a wall built by the complainant. The accused pleaded that the wall had been built upon land belonging to him and that it had been thrown down by the complainant himself. The Magistrate finding that it had been thrown down by the accused convicted him under s. 426. *Held* that the conviction was bad as the question of title to land had not been inquired into. *EMPRESS v. RUSTAM ALI.*

[II-209]

(5). ———— *"Any such charge, &c."—Impounding cattle.*] One R. F. was convicted by an Assistant Magistrate of causing mischief to the complainants by driving off their cattle to the pound, whereby the complainants were subjected to a fine. The Magistrate of the district was of opinion that the conviction was illegal, and reported the case to the High Court for orders. His reasons for this opinion were as follows:— "It can scarcely be said that getting cattle put into pound is causing such a change in the situation of property as diminishes its utility or value: the act does not do so *per se* and the cattle when released are as useful as ever: moreover complainants had their clear remedy under ss. 20, 21 and 22 of the Cattle Trespass Act (I of 1871): it was apparently because they did not lodge their complaint within ten days of the seizure, as they were bound to do under s. 20 of the Cattle Trespass Act that they lodged this complaint as one of mischief." The Court for the reasons stated by the Magistrate of the district, quashed the conviction. *EMPRESS v. RAMJIWAN.*

[I-158]

INDIAN PENAL CODE—(continued.)

s. 429 ———— *Property—Branded bull.*] The accused in this case was convicted of mischief under s. 429, for killing a bull which had been branded and let loose. *Held* that as the essence of mischief was "the wrongful destruction or diminution of property, and as ownership over it had caused after it was so branded and let loose, no offence under s. 429 had been committed. *EMPRESS v. JAMURA.*

[IV-87]

See also

EMPRESS v. BANDHU.

[V-326]

EMPRESS v. NIHAL.

[VII-73]

(1). s. 441—*Criminal trespass—Title in dispute.*] Certain *sir* land belonging to the accused was purchased by the complainant, at an execution-sale and leased to certain persons. When the lessees proceeded to plough the land the accused interfered with them and ploughed and sowed the land himself. It appeared that the complainant had obtained formal possession of the land but not actual. Under these circumstances the accused was convicted of criminal trespass under s. 441. *Held* that the conviction was bad. *EMPRESS v. RANDHIR.*

[II-228]

(2). ————.] The complaint in this case was that the accused had trespassed upon land the possession of which had been awarded to the complainant by a Revenue Court. It appeared that such possession was awarded under s. 40, Rent Act. But the accused asserted that the land had been assigned to the prosecutor upon partition and that he the petitioner, entered upon the land to repair certain indigo vats in his possession and he further alleged that the partition proceedings were silent as to the indigo vats. On these grounds he still claimed possession of the land. The question of title was not considered by the lower Courts. *Held*, following *Empress v. Budh Singh* (I. L. R., 2 All. 101) and *In re Govind Prasad* (I. L. R., 2 All. 465) that the facts disclosed did not amount to criminal trespass. *EMPRESS v. MUHAMMAD HUSAIN.*

[II-236]

(3). ———— *Joint property.*] The accused in this case were convicted of criminal trespass under s. 447, Penal Code, for having interfered to prevent the complainant from erecting a wall on certain land. The defence was that the land was the joint property of the complainant and the accused. *Held* that if the applicants went on to the land, in good faith believing it to be joint property to assert their right and not with the objects mentioned in the section, they are not guilty of the offence and that the fact that the applicants sued and

INDIAN PENAL CODE, s. 441—(continued.)

got a decree, by the Munsif declaring the land to be joint together with the fact that it forms part of a *sahan* before the houses of the parties, shows to a certainty that the applicant had good grounds for believing that the land was joint property. *EMPRESS v. NANAK CHAND AND OTHERS.*

[III-188]

(1). s. 442.—“*Human dwelling*”—*Uninhabited house—Intention.*] The accused was convicted of house trespass under s. 443, Penal Code. It appeared that he had entered the court-yard of an uninhabited house belonging to the complainant in order to ease himself. *Held* that the conviction was bad because the house cannot be said to be “used as a human dwelling” within the meaning of s. 442, Indian Penal Code, as well as there was nothing to show that the accused entered the house “with intent to commit an offence, or to intimidate, or to insult or to annoy” within the meaning of s. 441 of the Indian Penal Code. *EMPRESS v. SURJA.*

[II-224]

(2).—*Intention.*] The applicant *N* brought up a “famine child.” It appears that he allowed the complainant to look after the child when it was ill and that the complainant was unwilling to give it up, but the applicant entered the house of the complainant and carried the child off. *Held* that he had not committed the offence of criminal house-trespass as his intention was not to insult or annoy, &c. *EMPRESS v. NAWAB ALI.*

[V-50]

s. 451.—“*Offence*”—*Adultery—Connivance of husband.*] To sustain a conviction under s. 451 of the Indian Penal Code for the offence of house trespass with intent to commit an offence, the prospective offence being adultery, it is necessary to show that there has been no consent or connivance on the part of the husband of the woman the intent to commit adultery with whom is charged against the accused. *BRIJ BASI v. THE QUEEN EMPRESS.*

[XVI-178]

(1.) s. 457.—*Trespass in trying to escape.*

See s. 224, No. (1).

(2).—*Evidence—Presumption.*] The accused was convicted of an offence under s. 457. It was proved at his trial, that a day before he was wandering about a certain house situate at Banda, which had been broken into by night and property stolen therefrom; that immediately after the theft he left Banda under suspicious circumstance, and went to Allahabad, where he was traced in a few days and the stolen property was found in his possession, and that he gave a false account of the manner in which he came into

INDIAN PENAL CODE, s. 457—(continued.)

possession of the property. *Held* that the evidence was sufficient for a conviction under s. 457, Penal Code. *Held* further that the presumption mentioned in s. 114, illustration (a) of the Evidence Act, is not confined to theft, but applies to all crimes. *EMPRESS v. AJUDHIA.*

[II-224]

ss. 459 & 460 — *Governing incident of the offence.*] Ss. 459 and 460 of the Penal Code provide for a compound offence, the governing incident of which is that either a “lurking house-trespass” or “house-breaking,” must have been completed, in order to make a person who accompanies that offence either by causing grievous hurt or attempt to cause death or grievous hurt responsible under those sections. The sections must be construed strictly and they are not applicable where the principal act done by the accused person amounts to no more than a mere attempt to commit lurking house-trespass or house-breaking. *EMPRESS v. ISMAIL AND OTHERS.*

[VI-253]

(1) 463.—*Intention—To conceal offence.*] Where a clerk, who had committed criminal breach of trust, subsequently made false entries in an account book with the intention of concealing such offence,—*held* that the making of such entries did not constitute the offence of forgery, and he had therefore been improperly convicted under s. 465 of the Indian Penal Code. *Queen Empress v. Jageshwar Pershad (N.-W. P. H. C. Rep., 1874, p. 56); Queen Empress v. Lal Gumul (N.-W. P. H. C. Rep., 1870, p. 11).* *EMPRESS v. JIWANAND.*

[II-236]

(2).—*_____.*] A treasury accountant was convicted of offences under ss. 218 and 465 of the Penal Code under the following circumstances:—A sum of Rs. 500, which was in the treasury and was payable to a particular person through a Civil Court, was drawn out and paid away to other persons by means of forged cheques. After the withdrawal of the Rs. 500, but before such withdrawal had been discovered, the representative of the payee applied for payment. The prisoner then upon two occasions wrote reports to the effect that the Rs. 500 in question then stood at the payee's credit as revenue deposit and that it was about to be transferred to the Civil Court. Upon the first of these reports an order was signed by the treasury officer for the transfer of the money to the Civil Court concerned, and to effect such transfer a cheque was prepared by the sale-*muharir*, which, as originally drawn up, related to the sum of Rs. 500 already mentioned. The signature of the cheque by the treasury officer was delayed for some time, and meanwhile the cheque was altered by the prisoner in such a manner as to

INDIAN PENAL CODE, s. 443—(continued.)

make it relate to another deposit of Rs. 500 which had been made subsequently to the above, and to the credit of an other person. The result of this was the transfer of the second payee's Rs. 500 to the Civil Court, as if it had been the first Rs. 500, and to the credit of the first payee's representative. The prisoner was convicted under s. 465 of the Penal Code in respect of the cheque, and under s. 218 in respect of the two reports above referred to. *Held*, with respect to the charge under s. 465, that the prisoner's immediate and more probable intention,—which alone, and not his remoter and less probable intention, should be attributed to him—was not to cause wrongful loss to the second payee by delaying payment of the Rs. 500 due to her, though the act might have caused her loss, but to conceal the previous fraudulent withdrawal of the first payee's Rs. 500; that under these circumstances he could not be said to have acted "dishonestly" or "fraudulently" within the meaning of s. 24 or s. 25 of the Penal Code; and that therefore his guilt under s. 465 had not been made out, and the conviction under that section must be set aside. *EMPRESS v. GIRDHARI LAL*.

[VI-264]

(3).———*To correct a mistake.*

The vendees of a plot of land altered the number by which the land was described in the deed of sale, doing so because such number was not the right number. Having made this alteration they used the deed of sale as evidence in a suit. *Held* that the alteration of the deed did not amount to "forgery" within the meaning of s. 463 of the Indian Penal Code, nor could the deed after the alteration be designated a "forged document" as contemplated by s. 470, the intention to cause wrongful loss or wrongful gain or to defraud being wanting; nor could it be said that in using the deed, the vendees were "dishonestly" or "fraudulently" using as genuine a "forged document," and therefore the use by the vendees of the deed did not constitute an offence under s. 471 of the Indian Penal Code; further, that their use of it did not render them liable to conviction under s. 196 of that Code. Observations as to the exercise by an appellate Court of the powers conferred on it by s. 282 of Act X of 1872 (Criminal Procedure Code.) *EMPRESS v. FATTAH AND ANOTHER*.

[II-227]

(4).———*Property.*

See s. 471, No. (5).

s. 467—Valuable security. In this case the question was whether a *kabuliat* said to be forged, whereby certain tenants-at-will acknowledge themselves liable to pay enhanced rent was a valuable security within the meaning of s. 30, Penal Code. It was contended on behalf of the accused that it was not, because it had not been recorded by the *kanungo* under

INDIAN PENAL CODE, s. 467—(continued.)

s. 21 of the Rent Act and therefore did not purport "to create any right enforceable at law." *Held* that the contention was not maintainable as s. 21 of Rent Act applied to verbal agreements and not to written contracts. *Held* further that the document was a valuable security as it purported to be such though it might not have been in fact valuable security. *EMPRESS v. NASIR-UD-DIN*.

[III-59]

s. 470.—Forged document.]

See s. 463, No. (3).

(1). **s. 471.—Fraudulently and dishonestly—Intention.** The creditors of a police constable applied to the District Superintendent of police that Rs. 2 might be deducted monthly from the debtor's pay until the debt was satisfied. Upon an order being passed directing that the deduction asked for should be made, the debtor produced a receipt purporting to be a receipt for Rs. 18, the whole amount due. It subsequently appeared that the receipt was one for Rs. 8, which the debtor had altered by adding the figure "1," so as to make it appear that the receipt was for Rs. 18. *Held* that the real intent in the prisoner's mind being to induce his superior officer to refrain from the illegal act of stopping a portion of his salary, the Court in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to him, that it did not necessarily follow that he contemplated setting up the altered receipt to defeat his creditor's claim, and that therefore he ought not to have been convicted of an offence under s. 471 of the Penal Code. *EMPRESS v. SYED HUSAIN*.

[V-84]

(2).———.] In a trial upon a charge, under s. 471 of the Penal Code, of fraudulently or dishonestly using as genuine documents known to be forged, it was found that four forged receipts for the payment of rent, used by the prisoner, had been fabricated in lieu of genuine receipts which had been lost. *Held* that, with reference to the definitions of the terms "dishonestly" and "fraudulently" in ss. 24 and 25 of the Penal Code, the prisoner, upon the facts as found, had not committed the offence punishable under s. 471. *EMPRESS v. SHEO DAYAL*.

[V-85]

(3).———.]

See s. 218, No. (3).

s. 196, No. (1).

(4).———*Knows to be false—Pleader.* *Held* that unless it is found as a fact that the document filed by a pleader was known by him to be forged he can not be convicted under s. 471 (using forged documents). That the client

INDIAN PENAL CODE s. 471—(continued.)

who gave the document to the pleader was liable not as an abettor but as a principal under s. 471. *EMPRESS v. JIWAN AND ANOTHER.*

[VII-195]

(5).—“Claim”—“Property”—*Certificate.*] The term “claim” in s. 463 of the Indian Penal Code is not limited in its application to a claim to property. The term “property” in the same section will cover a written certificate. It is not necessary to constitute a forgery under s. 463 of the Indian Penal Code that the property with which it is intended that the false document shall cause a person to part should be in existence at the time when the false document was made. *Queen Empress v. Haradhan (I. L. R., 19 Calc., 380)* dissented from. *Queen Empress v. Appasami (I. L. R., 12 Mad., 154)*; and *Queen Empress v. Ganesh Khanderia and Ganesh Daulat (I. L. R., 13 Bom., 512)* approved. One *SB* presented to the Principal of Queen’s College, Benares, prepared a false certificate purporting to have been granted by the Principal of Canning College, Lucknow, to the effect that he had attended a certain proportion of a certain first year course of law lectures delivered at Canning College, *SB*, in fact never having attended such lectures. Had that certificate been a true one it would have entitled *SB* to attend a further course of law lectures at any one of several associated institutions amongst which was Queen’s College, Benares, without attending or paying the fees for the first course of lectures. On presentation of the above certificate *SB* obtained permission to attend and attended a course of second year lectures at Queen’s College, Benares, without attending or paying the fees required for the first year course. After *SB* had attended the abovementioned second year course of lectures at Queen’s College, Benares, he again presented the said false certificate to the Principal of Queen’s College with a view to his obtaining a consolidated certificate, which was necessary, as he alleged, to enable him to become a candidate in the Judge’s Court Pledership examination in Calcutta. Held that on both occasions, when he presented the false certificate to obtain admission to the second year law class at Queen’s College, Benares, and again when he endeavoured by its use to obtain the consolidated certificate in order to gain admission to the pleadership examination in Calcutta, *SB* was guilty of the offence provided by s. 471. Penal Code. *QUEEN EMPRESS v. SOSHI BHJSHAN.*

[XIII-96]

s. 486—*Counterfeit trade-mark—Defences.*] Where a person is charged with the commission of an offence under s. 486 of the Indian Penal Code and the facts mentioned on the first paragraph of s. 486 are proved, there are two alternative defences open to the accused; the first being that indicated by clauses (a) and (b)

INDIAN PENAL CODE, s. 486—(continued.)

of the section read together, and the second having that indicated by clause (c). The first defence presupposes that the person charged believed the trade-mark in question to be a genuine trade-mark. The second defence presupposes that the person charged did not know that the trade-mark in question was the trade-mark of any firm or person. *QUEEN EMPRESS v. ILAHI BAKHSI.*

[XVII-99]

(1). s. 497—*Adultery—Proof of marriage.*] *K* was accused by *D* and *P*, alleged to be *D*’s wife, of raping *P*, and was committed for trial charged in the alternative with rape or adultery. The evidence of marriage between *D* and *P* consisted of their statements that they were married to each other, and of a statement by *K* that *P* was *D*’s wife. *K* was convicted on the charge of adultery. Held that such evidence, having regard not only to s. 50 of the Evidence Act, 1872, but to the principle that strict proof should be required in all criminal cases, was not sufficient to establish the vital incident to the charge of adultery, namely, the marital relation of *D* and *P*. *Empress v. Pitambar Singh (I. L. R., 5 Calc., 566)* concurred in. *EMPRESS v. KALLU.*

[III-1]

See also

QUEEN EMPRESS v. DAL SINGH.

[XVIII-7]

(2).—*Evidence of.*] One *G* was convicted, by the Court of Session, of adultery with one *L*. The evidence against *G* consisted of the statements of *L*; the statements of witnesses who said they had seen the two talking and laughing together; the statements of witnesses as to allegations made by *L* before a *panchayat*; and of witnesses who said they had heard *G* say before the *panchayat* “that he was in fault.” Held that the fact that *G* and *L* had been seen laughing and talking together was no proof of sexual intercourse; that the allegations of *L* before the *panchayat* and the admissions of the accused should not have been admitted in evidence and that the statement of *L*, though evidence, was not reliable. The accused must be acquitted. *Empress v. Mohan Lal (I. L. R., 4 All., 46)* referred to. *EMPRESS v. GAURI.*

[III-129]

(1). s. 498—“*Such woman.*”] The words “such woman” in s. 498, Penal Code, do not mean such a woman as has been so enticed as mentioned in that section, but mean such woman whom the accused knows or has reason to believe to be the wife of any other man; the detention of such a woman with the particular intent defined in the section is one of the

INDIAN PENAL CODE, s. 498 (continued.)

offences made punishable under that section. *EMPRESS v. NIADAR.*

[VIII-217]

(2).—*Evidence of marriage.* Where a charge is made under s. 498, Penal Code, of enticing away a married woman, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman. *Empress v. Kallu* (J. L. R. 5 All., 233), approved. *QUEEN EMPRESS v. DAL SINGH.*

[XVIII-7]

(1). s. 499—*Act causing slight harm.* While a Barrister and a pleader were engaged in a case the latter made a remark conveying an imputation on the former upon which the former called the latter, "a liar" for which he was convicted of defamation. *Held* that it was doubtful whether the imputation amounted to defamation and if it did, it was covered by s. 95, Penal Code. The conviction was therefore quashed. *EMPRESS v. VANSITTART.*

[III-46]

(2).—*Civil remedy.* It appeared that in the Munsif's Court in which a matter in issue was the pecuniary status of the parties *RG* and *ML*, the pleader for the latter, one *AH*, in the course of his argument, said: "why, who was *RG*'s father. He was killed or died when he was scraping grass." At this *GR* said: "What does *AH* know of pleading.....his caste is that of a pedler." These expressions led to mutual prosecutions under ss. 499 and 500. The Magistrate convicted and fined them both. *Held* that the Magistrate ought to have refused to entertain the complaints of the parties on the ground that one was as much to blame as the other. Though the language of s. 499 is open to most elastic application, but the Magistrate will act wisely in refusing to adopt it to cases in which no real harm has been done or where a civil remedy might more appropriately be sought. *EMPRESS v. AMIR HASAN AND ANOTHER.*

[III-167]

(3).—*Harming reputation—Common abuse.* Accused was convicted by a Magistrate of defamation under s. 500, Penal Code. The defamation consisted of the use of certain abusive language specified in the proceedings as *beti ki gali, bahin ki gali*, that is to say, the use of abusive language to the complainant, having reference to his daughter. *Held* that the use of such abuse being common it could not harm the reputation of the complainant. The conviction must be quashed. *EMPRESS v. BHARI.*

[III-36]

(4).—*Outcasting, by panchayat—Good faith.* *C* was put out of caste by a panchayat

INDIAN PENAL CODE, s. 499—(continued.)

of his caste fellows on the ground that there was an improper intimacy between him and a woman of his caste. Certain persons, members of such panchayat, circulated a letter to the members of their caste generally in which, stating that *C* and such woman had been put out of caste, and the reason for the same, and requesting members of the caste not to receive them into their houses or to eat with them, they made certain statements applying equally to *C* or such woman. Such statements were defamatory within the meaning of s. 499 of the Indian Penal Code. *Held* that, if such persons were careless enough to use language which was applicable to *C*, they did so at their peril, and they could not escape the responsibility of having defamed *C* by saying that they intended such language to apply to such woman. *Held* also, on the question whether such persons had acted in good faith, that, looking to the character of such letter, the circumstances under which it was written, and to the fact that *C* had been put out of caste for the reason alleged, had such persons contended themselves with announcing the determination of the panchayat, and the grounds upon which such determination was based, they would have been protected; but, inasmuch as they did not so content themselves, but went further and made false and uncalled for statements regarding *C*, they had rightly been held not to have acted in good faith. *EMPRESS v. RAMA NAND AND OTHERS.*

[I-43]

(5).—*Publishing—Notice under s. 424, Criminal Procedure Code, contained in a cover.* *Held* by the Full Bench (Duthoit, J., dissenting) that the action of a person who sent to a public officer by post in a closed cover a notice under s. 424 of the Code of Criminal Procedure containing imputations on the character of the recipient, but which was not communicated by the accused to any third person, was not such a making or publishing of the matter complained of as to constitute offence within the terms of s. 499 of the Penal Code. *EMPRESS v. TAQI HUSSAIN.*

[IV-340]

(6).—*Defamation by father and brother—Complaint by husband.* The father and brother of a married Hindu woman were convicted of defamation on the complaint of the woman's husband for having stated that one Ajudhya had laid hold of her for the purpose or with the intention of committing adultery. *Held* that such statement amounted to defamation and was not covered by any of the exceptions to s. 499, Indian Penal Code; and that the husband, as the party aggrieved, was a proper person to lodge the complaint. *QUEEN EMPRESS v. MAIKU AND ANOTHER.*

[XI-188]

INDIAN PENAL CODE, 499—(continued.)

(7). s. 499.—Exception (5)—*Privilege of suitor.*] Where, in a criminal prosecution for defamation in respect of statements made by the accused as complainant in a criminal case, the accused pleaded *inter alia* his privilege as a suitor; *held*, that the plea was bad, inasmuch as the doctrine of the absolute privilege of statements made by suitors does not apply in India to criminal proceedings for defamation under the Indian Penal Code. *QUEEN EMPRESS v. GAJADHAR.*

[X-170]

(8). s. 499.—Exception (8)—*Good faith.*] *Held* on the evidence in this case, in which the question was whether a person accused of defamation was protected by the eighth exception to s. 499 of the Indian Penal Code, that the accused had failed to establish that he acted in good faith. *Abdul Hakim v. Tej Chandar Mukerji* (I. L. R., 3 All., 817) and *Harrison v. Bush* (25 L. J. Q. B. 25) referred to. Where the accused in a case of defamation intends to bring evidence to prove the truth of the defamatory matter, his advocate should cross-examine the complainant upon every matter upon which evidence is intended to be brought. If he does not do so, it is a subject of serious consideration whether he should subsequently be allowed to tender proof as to the material incidents of which he has not cross-examined. *EMPRESS v. DHUN SINGH.*

[IV-53]

s. 506.—*Criminal intimidation.*] A was convicted summarily of having held out threats, to both the Hindus and Muhammadans, to get them implicated and imprisoned, if they kept to the terms of an *ikrarnama* (entered by the parties to keep the peace during the *moharram* festival.) He was convicted under s. 506, Penal Code. *Held* that the conviction was right. *EMPRESS v. ATA HUSAIN.*

[VI-41]

s. 508.—*Derive displeasure.*] The accused, a Brahmin woman, two or three days after the birth of a child took it to the house of its alleged putative father and not finding the father left it there. She said that her object in going there was to evidence Jai Kishun (putative father of the child) to give her food for herself and her infant. *Held* that the facts disclosed no offence, under s. 394 A or s. 508. *EMPRESS v. GANGI.*

[VI-63]

(1). s. 511.—*Applicability of section to attempt to murder.*]

See s. 307, No. (1).

(2). ————*Preparation.*] S. 511 of the Indian Penal Code was not meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done

INDIAN PENAL CODE, s. 511—(continued.)

in the course of the attempt to commit the offence, or are done with the intent to commit it and done towards its commission. Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation is a question of fact in each case. IN THE MATTER OF THE PETITION OF R. MACCREA.

[XIII-71]

(3). ————*Forging false document.*] One C, calling himself K, the son of BK, went to a stamp-vendor, accompanied by a man named K S, and purchased from him in the name of K a stamp-paper of the value of 4 annas. The two men then went to a petition-writer and, C again giving the name of K, they asked the petition-writer to write for them a bond for Rs. 50 payable by K to KS. The petition-writer commenced to write the bond, but, his suspicions being aroused, did not finish it, but took C and KS to the nearest *thana*. *Held* that under the above circumstances K S was rightly convicted of an attempt to commit the offence defined in s. 467 of the Indian Penal Code, and C of abetment of the said attempt. *The Queen v. Ram Sarun Chowbey* (N. W. P. H. C. Rep., 1872, p. 46) referred to. *QUEEN EMPRESS v. KALYAN AND ANOTHER.*

[XIV-150]

(4). ————*House-breaking.*] The prisoners in this case were caught while engaged in removing some projecting tiles. In the opinion of the Sessions Judge "the removal of the tiles was a step towards committing house-breaking; so an attempt to commit house-breaking has been completed." *Held* that the finding was wrong. *EMPRESS v. TEJMAN.*

[VI-290]

(5). ————*Cheating.*] In a prosecution for an attempt to cheat, under ss. 417-511 of the Penal Code, the accused was charged and convicted of having at the central octroi office made false representations as to the contents of certain *kuppas* (skin vessels), the object of which was to obtain a certificate entitling him to obtain a refund of octroi duty. Prior to granting the certificate, the octroi officers examined the contents of the *kuppas* and found that the representations of the accused regarding them were untrue. In consequence of this discovery no certificate was given to him, and he was charged and convicted as above-mentioned. The procedure necessary for obtaining a refund of octroi duty was that the central office, on satisfying itself that the articles produced were of the nature stated, would grant a certificate, which certificate would have to be endorsed by the outpost clerk when he passed the goods (on which refund was claimed) out of the town, and the owner would have to take back the certificate so endorsed to the central office and present it

INDIAN PENAL CODE, s. 511—(continued.)

to be cashed. *Held* that even assuming the accused to have falsely represented the contents of the *kuppas* as alleged, he had not completed an attempt to cheat, but had only made preparation for cheating, and that the conviction must therefore be set aside. *EMPRESS v. DHUNDI.*

[VI-125]

(6).—*Attempt to cause grievous hurt.*

See s. 307, No. (3).

(7).—*Attempt to commit unnatural offence.*

See s. 377, No. (2).

LETTERS PATENT (dated 17th March, 1866).

(1). s. 10.—*Order under s. 169 of Act VI of 1882—Appeal.* No appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from an order of a single Judge of the Court refusing an application under s. 169 of Act VI of 1882, and for extension of time for serving notice of an appeal under that Act, such order not being a judgment within the meaning of s. 10 of the Letters Patent. *R WALL AND OTHERS v. J. E. HOWARD AND OTHERS.*

[XV-89]

(2).—*Order under Act V of 1881, granting probate of will—Appeal.* An appeal will lie under s. 10 of the Letters Patent of the High Court of Judicature for the North-Western Provinces from the judgment of a single Judge of the Court in appeal from an order of a District Judge granting probate of a will under Chapter V of Act No. V of 1881, and the Bench hearing such an appeal under s. 10 of the Letters Patent is not debarred from reconsidering the finding of facts of the single Judge. *UMRAO CHAND v. BINDRABAN CHAND AND ANOTHER.*

[XV-104]

(3).—*Order passed in revision under s. 25 of Act IX of 1887—Appeal.* No appeal will lie under s. 10 of the Letters Patent from an order of a single Judge of the High Court in revision under s. 25 of Act No. IX of 1887. *Naim Ullah Khan v. Ishan Ullah Khan* (J. L. R., 14 All., 232) referred to. *GAURI DATT v. PARSONAM DAS.*

[XIII-122]

(4).—*Order to which provisions of chapter XLIII, Civil Procedure Code, are applicable—Appeal.* Whether an order made by single

LETTERS PATENT, s. 10—(continued.)

Judge of the High Court directing the amendment of a decree passed in appeal by a Division Bench of which he had been a member is an order made under s. 206, read with ss. 582 and 632 of the Code of Civil Procedure, or by virtue of the inherent power which the High Court has in the exercise of its appellate civil jurisdiction, to amend its own decree, it is one to which the provisions of Chapter XLIII of the Code of Civil Procedure are applicable, and from such order no appeal under s. 10 of the Letters Patent will lie. *Hurrieh Chunder Chowdhry v. Kail Sunderi Debia* (L. R. 10 1 A., 4 S. C., J. L. R., 9 Calc., 482) discussed. *MUHAMMAD NAIM-UL-LAH KHAN v. IHSAN-UL-LAH KHAN AND OTHERS.*

[XII-14]

(5).—*Order under s. 312, Civil Procedure Code—Appeal.* Certain villages were assigned for her maintenance to a Hindu widow by members of her husband's family. Those villages were subsequently attached and sold in execution of a simple money decree against the widow. After the sale had become final the widow came forward with an objection to the attachment and sale of the assigned villages on ground that such attachment and sale were in contravention of s. 256 (2) of the Code of Civil Procedure. The first Court disallowed this objection, but on appeal to the High Court the widow got a decree allowing her objection. On appeal by the decree-holder under s. 10 of the Letters Patent, it was *held* that whether or not the widow's interest in the particular villages was capable of being attached, inasmuch as the order asked for by the widow's application was practically an order under s. 312 of the Code of Civil Procedure, an appeal under s. 10 of the Letters Patent would not lie. *BANSIDHAR v. GULAB KUAR.*

[XIV-146]

(6).—*Order under s. 601, Civil Procedure Code—Appeal.* Under s. 10 of the Letters Patent an appeal lies to the High Court from an order by a single Judge under s. 601 of the Civil Procedure Code, rejecting an application under s. 593 for leave to appeal to Her Majesty in Council. The questions whether the High Court could, by a rule of Court, fix a period of limitation for the presenting of appeals under s. 10 of the Letters Patent, and whether in calculating the period any allowance should be made for the time occupied by other proceedings taken by the appellant, are "substantial questions of law," within the meaning of s. 596 of the Code. *NAUBAT RAM v. HARNAM DAS.*

[VIII-37]

(7).—*Order refusing application to sue in forma pauperis—Appeal.* Under ss. 588 and 591, read with s. 632 of the Civil Procedure Code, no appeal lies under s. 10 of the Letters Patent for the High Court for the N. W. P. from

LETTERS PATENT, s. 10—(continued.)

an order of a single Judge refusing an application for leave to appeal *in forma pauperis*. *Achaya v. Ratnavelu* (I. L. R., 9 Mad., 253) and *in re Rajgopal* (I. L. R., 9 Mad., 447) followed. *Hurrish Chundar Chowdhry v. Kali Sunderi Deb* (I. L. R., 9 Calc., 482) distinguished. **BANNO BIBI AND OTHERS v. MEHDI HUSAIN AND OTHERS.**

[IX-70]

(8).—*Practice—Point not argued before single Judge.*] Held that in appeals under the Letters Patent, s. 10, an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing. **BIJ BHUKHAN v. DURGA DAT AND OTHERS.**

[XVIII-41]

(9).—*Power of High Court to frame rules—Limitation.*] It must be assumed that Rule I of the "Rules of practice adopted by the High Court for the North-Western Provinces on the 21st May, 1873, regarding the admission of appeals under s. 10 of the Letters Patent," which provides that such appeals must be presented to the Assistant Registrar within ninety days of the judgment appealed from, had a legal origin and was not *ultra vires* of the Court. *Harrah Singh v. Tulsi Ram Sahu*, (5 B. L. R., 47) and *Fazal Muhammad v. Phul Kuar*, (I. L. R., 2 All., 192) referred to. **NAUBUT RAM v. HARNAM DAS.**

[VI-308]

s. 12.—Original jurisdiction—Native lunatic.] The High Court has not, under s. 12 of its Charter, any original jurisdiction in respect of the persons and estates of lunatics who are natives of India. **PETITION OF JAUDHA KUAR.**

[I-172]

s. 27—Difference of opinion (s. 575, *Civil Procedure Code*).] S. 27 of the Letters Patent for the North-Western Provinces has been superseded in those cases only to which s. 575, *Civil Procedure Code*, properly and without straining language applies. There are many cases to which s. 575 even with the aid of s. 647 does not apply, and to these s. 27 of the Letters Patent is still applicable. One of the cases to which s. 575, *Civil Procedure Code*, is not applicable is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of Act XV of 1877 for not presenting the appeal within the prescribed period. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided) the opinion of the Senior Judge should under s. 27 of the Letters Patent

LETTERS PATENT, s. 27—(continued.)

prevail. **HUSAINI BEGAM v. THE COLLECTOR OF MUZAFFARNAGAR AND OTHERS.**

[IX-27]

MORTGAGE.

- (1) Construction.
- (2) Contribution.
- (3) Extinguishment of mortgage.
- (4) Usufructuary mortgage.
- (5) Miscellaneous.

(1) Construction.

(1).—*Two securities—Right to avail of the second.*] A mortgage bond provided that "if the hypothecated property was damaged or destroyed by any accident, or proved insufficient to satisfy the debt, then the debt should be recoverable from a moiety of another house belonging to the respondent." Held that the fact that the hypothecated property had been sold in satisfaction of a prior mortgage entitled the mortgagee to enforce hypothecation against the second house. **GANESH DAS v. MAYA RAM.**

[II-99]

(2).—*Usufructuary mortgage—Hypothecation.*] A *zar-i-peshgi* lease or usufructuary mortgage, for a term of five years, provided that the mortgagee should take the profits of the mortgaged property in lieu of interest, and that, if he were dispossessed, either before or after the expiry of the term, he might sue to recover the principal debt with interest. It did not, in so many words, provide that, in such case, the money should be recovered from the property. Words denoting that the property was hypothecated ran through the whole instrument. The mortgagee, having been dispossessed before the expiry of the term, sued to recover the principal debt and interest by the sale of the hypothecated property. Held that the mortgagee was entitled to recover the debt by the sale of the hypothecated property. Whenever the contract gives a pledge of property as security for money lent, there will always be a power of sale, unless a contrary intention is clearly expressed. Such is sometimes the case in usufructuary mortgages, where the mortgagee has to look only to the usufruct for his principal and interest; but such was not the character of usufructuary mortgage in this case, for the mortgagee was expressly empowered to recover the principal and interest on being dispossessed, either before or after the expiration of the term. **RAM BAKSH AND OTHERS v. NOHAR PANDEY.**

[I-63]

(3).—*Sale—Agreement to reconvey—Conditional sale.*] The co-sharers of a certain

MORTGAGE, Construction—(continued.)

estate sold it to *R*. On the same day as the vendors executed the conveyance of such estate to *R* the latter executed an instrument whereby he agreed that the vendors might redeem such estate or any portion thereof, within a certain term, on repayment of the purchase money of a proportionate share thereof and in such case the sale would be considered cancelled; provided that the vendors paid the money out of their own pockets and did not raise it by a transfer of the property and not otherwise. The heir of one of the vendors sold his share of such estate to *A* and *A* sued *R* to redeem such share. *Held* by the Full Bench (Stuart, C.J., doubting) that the nature of the transaction between *R* and his vendors must be determined by looking at both the conveyance and the agreement, and, both those documents being regarded, the transaction between them was one of mortgage, and the vendors had a right of redemption, and the proviso in the agreement was inequitable and incapable of enforcement against them or their representatives in title.

Held also by PEARSON, J., that the agreement was not of the nature of a personal contract enforceable only by the original vendors and not by their representatives; that, assuming that a transfer of the property was prohibited by the agreement, *R* could not, as implied by the Full Bench ruling in *Dookchore Rai v. Hidayat Ullah* (N.W. P. H. C. Rep., F. B., 1866-67, p. 7), treat as a nullity the sale which had been made to *A* and *A*'s right to redeem could not be reasonably denied and resisted; and that a transfer was not positively but only implicitly prohibited by the agreement, *R* merely declaring that he would not recognize the transferees as having acquired the equity of redemption or cancel his own sale-deed, and such a declaration was beyond his competence and had no legal effect. *RAM SARAN v. AMIRTA KUAR AND OTHERS.*

[I-39]

(4).—*Charge.* The material portion of the *ikrarnama* in dispute in this case was as follows:—"As the Government has granted zamindari villages to me in perpetuity, therefore I have fixed an annual allowance of Rs. 100, in cash, in perpetuity out of the profits of the said villages for my elder brother *G H*...." It did not specify the villages which had been granted to the executant by the Government. The question in this case was whether the *ikrarnama* created a charge upon those villages in respect of the allowance made to *G H*. *Held* that the terms of the *ikrarnama* were sufficiently certain to create a charge. *SITA RAM AND ANOTHER v. MUHAMMAD HUSAIN.*

[II-159]

(5).—On the 27th of September, 1867, a mortgage was made by the

MORTGAGE, Construction—(continued.)

predecessors in title of *H S* and *B* in favour of *B B*. In 1871, the mortgaged property was sold at auction-sale under a decree dated the 24th September, 1858. That decree was a money decree, but was passed on a compromise by which a certain sum agreed between the parties to be due to the plaintiff on an account stated was made payable by instalments, and the property in suit was hypothecated as security for the due payment of such instalments. The property was purchased by one *G D* who was the decree-holder. On suit by the mortgagee of the mortgage of 1867 for sale it was *held* that the representatives of the purchaser under the decree of 1858 were entitled to use the lien created by the compromise upon which that decree was based as a shield to the extent of the price which *G D* had paid for the property, but no further. *BALDEO BHARTI v. HUSHIAR SINGH AND OTHERS.*

[XV-45]

(6).—

See construction, No. (2).

(7).—*Tacking.* The mortgagor of an estate gave the mortgagee four successive bonds for the payment of money in each of which it was stipulated that, if the amount were not paid on the due date, it should take priority of the amount due under the mortgage, and redemption of the mortgage should not be claimed until it had been satisfied. The representative in title of the mortgagor subsequently sued the mortgagee for possession of such estate on payment merely of the mortgage money. *Held* that, although such bonds did not in so many words create charges on such estate, yet inasmuch as it appeared from their terms that it was the intention of the parties that the equity of redemption of such estate should be postponed until the amount of such bonds had been paid, the representative in title of the mortgagor was not entitled to possession of such estate on payment merely of the mortgage money. *ALU KHAN v. ROSHAN KHAN.*

[I-133]

(8).—*Interest a charge on the property.*

See construction, No. (48).

(9).—*Amount of share mortgaged.*

See construction, No. (49).

(2) Contribution.

(10).—*P* and *D*, in May, 1867, jointly mortgaged their respective 2 *biswas* shares of a certain village. In August, 1877, the mortgagee sued to recover the mortgage money by the sale

MORTGAGE—Construction—(continued.)

of the mortgaged property, and obtained a decree. Before this decree was executed *L* obtained a decree against *D*, in execution of which his 2 *biswas* share was put up for sale on the 20th June, 1878, and was purchased by *A*. Subsequently the mortgagee applied for execution of his decree, and *D*'s 2 *biswas* share was attached and advertized for sale in execution thereof. In order to save such share from sale *A*, on the 29th June, 1878, satisfied the mortgagee's decree. He then sued *P*, *D*'s co-mortgagor, to recover half the amount he had so paid by the sale of *P*'s 2 *biswas*. *Held* that inasmuch as when *A* discharged the whole amount of the mortgage debt, he not only became entitled to a contribution of half such amount from *P*, but having acquired the rights of the mortgagee, was competent to assert a lien on *P*'s 2 *biswas* share, *A* was entitled to a decree as claimed. **PANCHAM SINGH v. ALI AHMAD.**

[I-118]

(11).—.] *A* and *K* mortgaged their shares to *Y*. In execution of another money-decree against *K*, *Y* caused his share to be sold and purchased it himself; *Y* then transferred this share to his son who transferred it to *B*. Then *Y* sued *A* and *K* on the mortgage bond, obtained a decree, in execution of which he caused *A*'s share alone to be proclaimed for sale and in order to save it *A* was obliged to satisfy the decree. *A* then brought this suit for contribution against *K*, making *B* also a defendant, on the ground that *K*'s share in their bonds was liable for the mortgage debt. *Held* that as *A* offered no objection to the sale of *K*'s share in execution of *Y*'s money-decree and neither in the suit brought by *Y* against him and *K*, nor in the proceedings taken against him in execution of that decree did he raise any objection as to the propriety of *Y*'s conduct, he was now estopped from enforcing a lien upon the share of his co-mortgagor in the hands of third parties, purchasers for value. **KHUSHAL SINGH AND OTHERS v. DEBI.**

[I-7]

(12).—.] *SS*, who held a decree for Rs. 44,155 enforcing a joint mortgage on 31 villages, applied for its execution against one of such villages in the possession of one *Y*. The village was put up for sale realizing Rs. 14,100. *Y* thereupon sued the proprietor of another of such villages, *B*, for contribution. He obtained a decree, brought a portion of it to sale which was purchased by *RC* for Rs. 260. Subsequently *SS* took out execution of his decree against the village *B* and that village was put up for sale. Thereupon *RC* brought this suit for cancellation of such sale, so far as his purchased share in the village was concerned on the ground that such share had already been made subject to *SS*'s lien on it by its sale in satisfaction of the contribution

MORTGAGE—Construction—(continued.)

due from the owner of such villages to *Y*. *Held* that, as *SS* had received nothing out of the proceeds of sale of the portion purchased by *RC*, he cannot be said to have proceeded twice against the same property for the same debt; and therefore the plaintiff's claim based upon the ground of contribution was wrong and must be dismissed. **RAM CHAND v. SHEORAJ SINGH.**

[II-56]

(13).—.] In this case a number of villages had been mortgaged to one *B*, who subsequently acquired the mortgagor's interest in some of the villages. *A*, who had purchased the equity of redemption in four of the villages mortgaged to *B*, brought this suit to have it declared that one of the four villages mortgaged to *B*, should be held free from the lien created by the mortgage-deed of *B*, on the ground that the four villages he had purchased were liable to their proportionate share of the mortgage debt only and as two of them had already been sold, and fetched more than the proportionate share of the four taken together, the other two were absorbed from further liability on the principle of contribution. *Held* that the suit was not maintainable. **AHMAD-UD-DIN v. SHEORAJ SINGH.**

[II-38]

See also

Act IV of 1832, s. 82.

(3) Extinguishment of mortgage.

(14).—Purchase by mortgagee of the mortgaged property.] *B B* and *S D* jointly gave the appellant, on different dates, in the same year, two mortgages of a one *anna* four *pie* share of a certain village with possession, the mortgage money in each case being Rs. 181. *B B* subsequently sold his moiety of such share to the appellants, Rs. 181, or his moiety of the mortgage debts, being part of the consideration money. *S D* thereupon sued the appellant to enforce his right of pre-emption in respect of such moiety and obtained a decree. In order to raise the money for the purchase, he gave the respondents a bond in which he hypothecated the one *anna* four *pie* share. Subsequently *S D* sold a moiety of the share to the appellant, the remaining moiety of the mortgage money, Rs. 181, being part of the consideration money. After this the respondents sued on their bond, claiming the enforcement of their lien on the share. To this suit the appellant was a party, and it was defended by him. The respondents obtained a decree in that suit, in the execution of which they caused the share to be brought to sale, purchasing it themselves. In the present suit the appellant claimed from the respondent's possession of a moiety of the share under the prior mortgages to him, on the ground that the sale of a moiety to him, the consideration for which had been a moiety of the mortgage-money, had

MORTGAGE—Extinguishment—
(continued.)

been declared invalid in the respondent's suit. The suit was dismissed by the lower Courts, and the appellant appealed to the High Court. *Held* that, as in the suit brought by the respondents, the appellant did not set up his mortgages, as a matter of defence, and could not have done so, it being clear that he intended to absorb his interest as mortgagee in those of purchaser, and there being nothing to indicate that he contemplated keeping his incumbrance alive, the lower Courts had properly dismissed the appellant's suit. **FAZAL v. KESHO AND OTHERS.**

[I-6

(15). ————. [I-6] *G*, the mortgagee of certain property, having purchased a portion thereof sued (i) the mortgagor; (ii) *P*, to whom another portion of such property had been mortgaged before such property had been mortgaged to *G*, and who had purchased such portion subsequently to the mortgage of such property to *G* and *G*'s purchase; and (iii) *M* who had purchased a third portion of such property subsequently to *G*'s purchase for the enforcement of his lien on such property. *Held* by Stuart, C. J., Oldfield, J., and Straight, J., (Pearson, J., dissenting) that, inasmuch as it was the manifest intention of *P*, to keep his incumbrance alive, and it was for his benefit to do so, *P*'s purchase did not extinguish his incumbrance, and he was entitled, as prior incumbrancer, to resist *G*'s claim to bring to sale the portion of the mortgaged property purchased by him.

Held also by Oldfield, J., and Straight, J., (Pearson, J., dissenting) that *G*, notwithstanding he had purchased a portion of the mortgaged property, might throw the whole burden of his mortgage debt on the portions of the mortgaged property in the mortgagor's possession and in *M*'s possession, but he could not have thrown it on the portion of such property in *P*'s possession. **GAYA PRASAD v. KASHI PRASAD AND ANOTHER. KASHI PRASAD AND ANOTHER v. GAYA PRASAD AND OTHERS.**

[I-53

(16). ————. [I-53] The first mortgagee of certain property purchased it at an execution sale. The second mortgagee of such property subsequently sued the mortgagor and the first mortgagee to enforce his mortgage by the sale of such property. *Held* that the first mortgagee was entitled to resist such sale, by virtue of being the first mortgagee, until his mortgage debt was satisfied, and the fact that he had purchased the property mortgaged to him did not extinguish his mortgage, which must be held to subsist for his benefit. **GAYA PRASAD v. SALIK PRASAD (3, All., 682) followed. HAR PARSAD AND ANOTHER v. BHAGWAN DAS.**

[II-13

MORTGAGE—Extinguishment—
(continued.)

(17). ————. [II-59] In 1845, the proprietor of a certain estate mortgaged it to one *G R* for Rs. 400. On the 11th November, 1863, the mortgagee assigned his rights to the appellants. On the 12th November, 1868, the heirs of the mortgagor mortgaged such estate a second time to the respondent. On the 9th September, 1871, the appellant purchased the equity of redemption from the mortgagors in satisfaction of his mortgage and in consideration of other sums, aggregating in all Rs. 1,000. The respondent now sued the appellant to bring such estate to sale to satisfy his mortgage of the 12th November, 1868. *Held* following **GAYA PRASAD v. SALIK PRASAD (I. L. R., 3 All., 682)** that the appellant could resist such sale by reason of his holding the prior mortgage. **MUHAMMAD IBRAHIM v. TEKCHAND**

[II-59

(18). ————. [II-59] On the 27th June, 1873, *I* and *A* mortgaged their shares in a certain village to *B B*, who on the 21st August, 1874, obtained a decree for the recovery of his debt by sale of the mortgaged estate. On the 9th September, 1894, *I* re-mortgaged a portion of the above mentioned share to *A S* and *R B* for Rs. 600 and the two latter in their turn borrowed on the 29th January, 1875, from *D P* Rs. 300, pledging as security for the loan their rights as mortgagees in the said village. *B B*'s decree remaining unsatisfied he attached and sold the estate of *I* and *A*, and *A S* purchased it at public auction on the 21st January, 1878. In June, 1880, however, *A S* privately sold the estate, thus purchased, to *B S*. This suit was brought by *D B* as the holder of the bond of 29th January, 1875, to recover the debt from *A S* and *B S*. *Held* that under the circumstances the plaintiff was entitled to a personal decree against *A S* and against the estate of his co-debtor *R B* and to nothing more. **BHOLI SINGH v. DURGA PRASAD AND OTHERS.**

[II-66

(19). ————. [II-66] A mortgage is not extinguished by the purchase of the mortgaged property by the mortgagee, but subsists after the purchase, when it is the manifest intention of the mortgagee to keep the mortgage alive, or it is for his benefit to do so. **GAYA PRASAD v. SALIK PRASAD (I. L. R., 3 All., 682)** and **Ram Naikan v. Subboraya Mudali (7 Mad. H. C. R., 229)** followed. **MUHAMMAD IBRAHIM AND ANOTHER v. DHIRGA.**

[II-118

(20). ————. *Surety.* [II-118] In 1863 one *MU*, wife of *Z*, made a bond in favor of *BS*, hypothecating thereby 10 *biswas* of the village *T*. On the 3rd May, 1872, *Z* and his son *IS* made a bond for Rs. 2,000 in favour of *BS*, and *HD* hypothecating 6½ *biswas* of the same village. On the same date one *SH* executed a surety bond guaranteeing *Z*'s payment of the money

MORTGAGE—Extinguishment—
(continued.)

borrowed under the bond of December, 1872, and as security mortgaged a share in village AG. On the 2nd December, 1872, Z made another bond in favor of BS in which he hypothecated 10 *biswas* of T. In the meantime BS had obtained a decree on his first bond of 1863 and in execution thereof, he, on the 20th November, 1872, brought the 10 *biswas* of T to sale which were bought by Z with money lent him by BS. Again on his last bond of December, 1872, BS got a decree in 1877, caused the 10 *biswas* of village T to be sold and purchased it himself. The present suit was brought by BS and HD on the bond of May, 1872, against the obligor of the bond, the heirs of SH the surety and KB and MD, purchasers of the property mortgaged in the original and the surety bonds. The plaintiffs claimed to recover the money by the sale of the properties mortgaged in the two bonds. The lower Court dismissed the suit in respect of the heirs of SH the surety and the share in village AG mortgaged in the surety bond and in respect of MD and 6½ *biswas* of T purchased by her. It decreed the rest of the claim. The plaintiffs appealed to the High Court. *Held*, (i) that the sale of the 20th November, 1872, under the bond of 1863, and Z's purchase cannot be regarded as operating in defeasance of the joint bond of May, 1872, as the decree obtained was a simple money decree. (ii) That the purchase by BS in enforcement of his subsequent charge of December, 1872, had the effect of satisfying and extinguishing the earlier incumbrance of May, 1872, notwithstanding the fact of HD being jointly interested with BS in the bond of May, 1872. (iii) That the surety bond was a guarantee for Z alone and for any personal obligation by him under the bond of May, 1872. But as the only prayer in this suit was for enforcement of lien against the hypothecated property and as further the enforcement of a personal obligation against Z was barred by time the suit against the heirs of SH and the property hypothecated in the surety bond was not maintainable. The decree of the Court below was therefore affirmed except as to costs. BHUP SINGH AND ANOTHER v. ZAINUL-AB-DIN AND OTHERS.

[VI-279]

(21).—*Filing receipt of liquidation under mistake.* Certain properties were mortgaged to A, B and C respectively and the mortgagee obtained a decree to enforce his lien. A portion of the property mortgaged to them all was brought to auction-sale in execution of the decree of C and purchased by A. A, thinking that it had been sold in execution of his own decree, on purchasing the property filed a receipt for the liquidation of his decree. B then sought to bring the share to sale in execution of his decree to which A successfully objected. This was a suit by B against A to establish his right to bring such share to sale. *Held* that the claim should be decreed,

MORTGAGE—Extinguishment—
(continued.)

and that A's decree should be thought to have been extinguished by the filing of the receipt. RAM PRASAD AND OTHERS v. INTIZAM BEGAM AND OTHERS.

[II-14]

(22).—*Sale—Enforcement of subsequent mortgage—Cancelment by prior mortgagee of his lien.* RK and AP were own brothers. RR, RN and PD were the three sons of RK, and RC was the son of AP. In 1872 one A gave the three sons of RK and RC, a bond for Rs. 12,000, in which he hypothecated certain immoveable property. In 1878 A gave RC and PD a bond for Rs. 3,000 in which he hypothecated the same property. In 1878 PD, one of the obligees of the bond of 1873, claiming to be the heir of the other obligee RC, sued upon that bond claiming the enforcement of the hypothecation contained in that bond subject to the prior hypothecation contained in the bond of 1872. He obtained a decree in 1878. Subsequently in that same year the heirs of AP, and of RK brought a suit upon the bond of 1872 claiming the enforcement of the hypothecation contained in that bond. They also obtained a decree in 1878. While that suit was pending execution of the former decree was taken out and the property was sold and purchased by MH, a distant relative of the judgment-debtor. He purchased in entire ignorance of the prior charge on the property. Subsequently the property was advertised for sale in execution of the subsequent decree. MH objected to the sale and his objection was allowed. The heirs of RC and RR and RN brought the present suit against MH and PD to establish their right to bring the property to sale in execution of that decree. *Held* that having regard to the relation between the parties and the fact that the plaintiffs were actually, though not in name, as much interested in the mortgage, for Rs. 3,000, as in that for Rs. 12,000, that there was an obligation upon them at the time of the prior sale to disclose the lien held by them under the prior mortgage and the present suit was therefore not maintainable. LACHMI NARAIN AND OTHERS v. HUSAIN KHAN AND ANOTHER.

[I-91]

(23).—*Proclamation of prior lien.* Certain mortgagees holding several mortgages of different dates or varying proportions of the same property which was held jointly by the mortgagors, obtained a decree under the last of such mortgages and sold the property mortgaged in execution thereof. Before sale the mortgagees applied to the Court executing the decree to give notice of their prior mortgages; but the Court did not do so. *Held* that the mortgagees had done all in their power to give notice of the prior incumbrances on the property sold and that they were not precluded, as against a *bond fide* purchaser at the auction-sale from afterwards

MORTGAGE—Extinguishment—(continued.)

suing on the former mortgage-deeds. **ABDUL ALI KHAN v. KHET SINGH AND OTHERS.**

[XI-88]

(24). —————.] Where one of several co-mortgagees brought to sale and himself purchased under a separate decree a portion of the property jointly mortgaged to himself and others, notice of the joint mortgagee's lien having been proclaimed at the sale. *Held* that whatever effect such separate sale and purchase might have on the lien of that particular mortgagee under the joint mortgage it could not affect the lien of the other joint mortgagees. **KARAN SINGH AND ANOTHER v. LACHMI NARAIN.**

[XII-101]

See also

Act IV of 1882, s. 101.

(4) **Usufructuary mortgage.**

(25). —————.] *Covenant to sue for mortgage money in case of dispossession—Auction sale.* A usufructuary mortgage deed provided that the mortgagee could sue for the mortgage debt before the expiry of the term of the mortgage if he were dispossessed of such land or any portion thereof. *Held* that the mere sale of such land "in execution of a decree against the mortgagor," subject to the mortgagee's right as such, did not entitle the mortgagee to sue for the debt until the purchaser dispossessed him. **JANKI SINGH v. SHEOMANGAL SINGH.**

[I-59]

(26). —————.] *Private sale.* In 1860 the owners of a certain share of an undivided village mortgaged their share to A. The mortgage-deed provided that A should have possession over the share and should enjoy the profits in lieu of interest and if his possession was disturbed he could sue for the mortgage-debt with interest at 12 per cent. Subsequently the mortgagors sold their share to the landholders of the village who withheld the profits for five years. *Held* that a cause of action had accrued to A to maintain the suit for the mortgage money with interest at 12 per cent. **KHUSHALI RAM AND OTHERS v. MAKUNDI.**

[II-99]

(27). —————.] *Held* that in the case of a usufructuary mortgage where the mortgage-deed contained no covenant that the mortgagee may call in his money though ordinarily no suit for the recovery of the money can be brought; but where as in the present case the mortgagor or his representatives failed to deliver possession or to secure quiet possession of the property the mortgagee can sue for the mortgage money. **LALJI MAL AND ANOTHER v. MOHAN LAL.**

[I-71]

MORTGAGE—Usufructuary—(continued.)

(28). —————.] *Suit for enforcement of lien—Decree for money.* A usufructuary mortgagee, the mortgagor having broken his agreement to give him possession of the mortgaged property, sued the mortgagor to recover the principal mortgage money and interest by enforcement of lien. The property was not hypothecated as security for mortgage-money. *Held* that it was inequitable to dismiss the suit for that reason, the defendant having been guilty of a breach of the contract of mortgage, for which the plaintiff was entitled for compensation: that, although the plaintiff did not expressly claim such relief yet, regard being had to the pleadings and evidence in the case, the suit might be treated as one for such relief; and that in estimating the compensation which should be awarded, the principal mortgage-money with interest at the rate specified in the contract of mortgage might fairly be taken as a reasonable guide. **MAHESH SINGH AND OTHERS v. CHAUHAN SINGH.**

[II-31]

(29). —————.] An instrument of mortgage provided that the mortgagor should deliver possession of the mortgage property to the mortgagee, and the latter should retain possession, setting off profits against interest, until the former should redeem, by payment of the principal sum, which they were at liberty to do in the month of *Jaith* in any year they pleased. The mortgagors having failed to deliver possession of the mortgaged property, the mortgagee sued them for the principal sum and interest, asking for enforcement of lien. The instrument of mortgage did not contain a hypothecation of the property. *Held* that although the suit, so far as it sought enforcement of lien, wholly failed, there being no hypothecation of the property, yet it was not equitable or proper that, as regards the money claim the mortgagee should be relegated to a fresh suit, inasmuch as a cause of action was disclosed, whether the suit was regarded as one for compensation in damages for breach of contract or for money had and received for the plaintiff's use, or for money lent, and the suit should be determined on its merits. **SHEO NARAIN v. JAIGOBIND AND OTHERS.**

[II-33]

(30). —————.] *Accounts—Revenue.* Under the terms of a mortgage the loan was repayable on a certain date with interest at 12 per cent per annum. Failing to repay the debt, the mortgagor was bound to put the mortgagee in possession of the land mortgaged as security, and thereafter, pending the mortgage tenure, to pay himself the revenue payable to the Government, and he was also bound, in the event of revenue payments being made by the mortgagee, to repay the same with interest before claiming to redeem the land. The mortgagee was put in possession of the land, and

MORTGAGE—Usufructuary—
(continued.)

was afterwards obliged to pay the revenue thereof. *Held* that in a suit for redemption of the land brought on the allegation that the principal and interest of the mortgage consideration had been recovered from the usufruct and a surplus had been realized in excess thereof, that the revenue payments made by the mortgagee should, under the terms of the mortgage, be considered as part of the original mortgage money repayable before redemption of the land could be claimed. The account should therefore show on the one side the original mortgage-money and the payments of revenue with the interest thereon, and on the other the mesne profits realized by the mortgagee. **CHITBAHAL RAI AND OTHERS v. GAYA RAI AND ANOTHER.**

[I-66]

(31). —————.] Where a mortgagee has been compelled to pay Government revenue which should have been paid by the mortgagor the mortgagee may either add the amount which he has so been made to pay to the amount of the mortgage debt under s. 72 of the Transfer of Property Act, 1882, or he may sue the mortgagor separately, to recover the amount so paid. If, however, he has sued separately and obtained a decree against his mortgagor, he cannot then add the amount due to the mortgage debt; his two remedies are not concurrent. **IMDAD HASAN KHAN v. BADRI PRASAD AND ANOTHER.**

[XVIII-90]

(32). —————. *Conditional sale.*] The conditions of a conditional sale of certain land were:—That the conditional vendees might recover the balance of any interest fixed, which the profits of the land mortgaged did not meet, with interest on such interest. The accounts were to be adjusted annually. That the estate should be managed by the servants of both. That Rs. 435 *per annum* should be paid out of the collections for the wages of such servants. That the mortgagor should receive half of this sum for the payment of her servants. That the mortgagees should not be liable for rents not recovered and that the mortgagor should pay rent on the *sir* land held by her. The appellants, the conditional vendees, sued to recover a sum as interest on the consideration money, together with interest on such sum, alleging that the profits of the estate had not sufficed to satisfy the interest on the consideration money. The High Court in remanding the case for a finding on the following issues observed as follows:—ISSUES:—(i) Whether the appellants could charge against the respondent the sums set down for the salaries of her servants? (ii) Whether the appellants had been rightly charged with sums not recovered from tenants? (iii) Whether the appellants should not have credit for the rent of respondent's *sir*-land? OBSERVATIONS:—If the respondent's agents and servants were associated with those of the ap-

MORTGAGE—Usufructuary—
(continued.)

pellants in the management of the estate; or supposing this was not the case, if the deficit in the collections was due to the respondent's own default and not to the action of the appellants, who did not usurp the entire control of the estate, or were not guilty of fraudulent conduct, the appellants could not be held liable for losses. As to the first issue, it was necessary to find, in the first place that the sums were paid, and secondly whether they were paid after dismissal of the servants or after the respondent had intimated that they should not be paid. As to the rents on the respondent's *sir* lands the respondent had to pay these rents into the general account. **MADAN GOPAL AND ANOTHER v. MANZUAR BEGAM.**

[I-10]

(33). —————. *Construction of deed.*] Where the time for filing objections under s. 56 of the Civil Procedure Code expired on a day when the Court was closed and objections were filed on the day the Court re-opened, *held* that such objections were filed within time. On the 16th March, 1874, *L* gave *M* a mortgage on certain land for Rs. 24,000 for a term of ten years by which it was provided, *inter alia*, that the mortgagee should take the profits of the land in lieu of the interest; that the mortgagee should grant a lease of the land to the mortgagor the latter, paying the former the profits of the land every harvest in lieu of interest, that if the mortgagor failed to pay the mortgagee the profits of the land by the end of any year, he should pay interest on the principal amount of the mortgage at the rate of one *per cent.* calculated from the date of the mortgage and in such case the mortgagee should have no claim to the profits; and that, if the mortgagor failed to pay the mortgagee the profits by the end of any year, the mortgagee should be at liberty to cancel the lease and to enter on the land, and collect the rents thereof, and apply the same to payment. On 21st March, 1874, *M* gave *L* a lease of the land, under which Rs. 1,980 was the sum agreed to be payable annually as profits in lieu of interest. In 1879, *M*, who had not been paid any profits, sought to enforce in the Revenue Courts the condition as to entry on the land but was successfully resisted by *L*'s widow. On the 16th January, 1880, *M* sued *L*'s widow for interest on the principal amount of the mortgage at the rate of one *per cent.* calculated from the date of the mortgage to the date of suit, claiming the same by virtue of the provisions of the mortgage, on the ground that he had not been paid any profits. *Held* that the mortgage and lease transactions must be regarded as one and indivisible and the questions at issue between the parties be dealt with *qua* mortgagor and mortgagee; that so regarding such transactions and dealing with such questions *M* and *L* did not stand in the position of "landholders and tenant," and the proceedings of

MORTGAGE,—(continued.)

1879 in the Revenue Courts were had without jurisdiction; also that, although, looking at the terms of the contract of mortgage, it was the intention of the parties that, on the mortgagor failing to pay the mortgagee the profits by the end of any year, the latter should in the first place seek possession of the land, yet as *M* had never obtained possession, but on the contrary had been resisted when he sought to obtain it, his present claim for interest was maintainable. The Court directed that so much of the interest as was due at *L*'s death should be recoverable from such property of his as had come into his widow's hand; and as to the rest, which related to the period during which the widow had been in possession and in receipt of the profits, that it should be recoverable from her personally. *BAGHELIN v. MATHURA PRASAD.*

[II-71]

(31).—*Mortgagee's possession after the term fixed.*] The respondent was in possession of a *zamindari* share belonging to the appellants as security for a loan. On the 28th April, 1862, the appellants having borrowed a further sum executed in favour of the respondent, an instrument the material portion of which was as follows:—“We make a trust of our 8 *anna* share, in favour of *B* (respondent), for a term of 11 years; he shall remain in possession, shall be entrusted with the profits and leases of the property . . . Should we after the expiration of 11 years pay the principal and interest at one *per cent* in one lump sum the share shall be redeemed in the month of *Jaiith*.” This suit for possession of the share was brought by the appellant in 1881, *i. e.* eight years after the period fixed, on the ground that the principal and interest had been satisfied out of the profits. He contended that after the expiry of the 11 years the respondent became a mortgagee and accountable as such. *Held* that it must be held that the respondent's possession, even after the expiry of the 11 years continued upon the same terms and under the same obligation as he had occupied it before and that the share could not be released except in *Jaiith* of any year upon the payment of the lump amount of principal and interest. *GHASI AND ANOTHER v. BALLABH RAM.*

[II-137]

(35).—*Right of mortgagee to sue for possession.*] The respondent executed a mortgage deed in favor of the appellant, in which he agreed to give the appellant possession of a village *H* as security for the repayment of certain moneys; and for the repayment of the balance paid by the appellant out of the sale proceeds of a house on account of a certain debt; it being stipulated that the appellant should sell the house under the powers of a *mukhtarnama* which the respondent undertook to execute. No such instrument was

MORTGAGE,—(continued.)

executed by the respondent, and such house was not sold. The appellant sued the respondent for possession of *H* according to the terms of the mortgage-deed alleging that he had satisfied such debt. The original Court gave him a decree for possession of *H* only until such loan had been repaid, holding that he had failed to prove that he had satisfied such debt, and was therefore not entitled to retain *H* on account thereof; and the lower appellate Court affirmed this decree. The appellant appealed to the High Court. *Held* that as no part of the sale proceeds of the house had been or could be applied to the liquidation of such debt, the appellant was not entitled to retain *H*, as security for the repayment of a balance which had not and could not be paid by him on account of such debt. If he had paid such debt otherwise than out of the sale proceeds of such house, he might be entitled to recover the money but not to retain *H* as security for repayment under the deed on which his claim was based. *KRISHNA RAO v. APA SHASTRI.*

[I-13]

(39).—*Right to pay off mortgagee before term fixed.*] Certain land was usufructually mortgaged to *A*. It was subsequently sold to him, the consideration of sale being in part the mortgage-money. Between the dates of the mortgage and the sale to *A*, the land was usufructually mortgaged to *B* for a term of years, who obtained possession. *A* brought this suit against *B* and the mortgagors for possession of the land as purchaser claiming to have the mortgage to *B* set aside as fraudulent, or, if it was found to be valid, to be allowed to satisfy it. *Held* that the mortgage to *B* having been found not to be fraudulent, he could not be compelled to take the money before the expiry of the term for which the mortgage was given. *Held* further that plaintiff could not in appeal change his ground and say that he was a prior mortgagee, and that his mortgage had not merged in the sale (a claim inconsistent with the one taken by the plaintiff). *BALDEO PRASAD v. BALDEO SINGH AND OTHERS.*

[III-40]

(5). Miscellaneous cases.

(37).—*Condition against alienation—Necessary parties.*] A transfer of mortgaged property in breach of a condition against alienation is valid except in so far as it encroaches upon the right of the mortgagee, and with this reservation, such a condition does not bind the property so as to prevent the acquisition of a valid title by the transferee. *Chuni v. Thakur Das* (I. L. R., 1 All., 126); *Mul Chand v. Bal Gobind* (I. L. R., 1 All., 610) and *Lachmin Narain v. Kateshar Nath* (I. L. R., 2 All., 826) observed on. It is not absolutely necessary for the first mortgagee of property, when suing to

MORTGAGE,—(continued.)

enforce his mortgage, to make the second mortgagee a party to the suit. If the second mortgagee is not made a party to the suit, he is not bound by the decree, which the first mortgagee may obtain for the sale of the property, but can redeem the property before it is sold; but if he does not redeem, and the property is sold in execution of the decree, his mortgage will be defeated, unless he can show some fraud or collusion which would entitle him to defeat the first mortgage or to have it postponed to his own. The ruling of Turner, J., in *Khub Chand v. Kalian Das* (I. L. R., 1 All., 240) followed. In July, 1874, a usufructuary mortgage of certain immoveable property was made to *D*. In July 1875, a portion of such property was again mortgaged to *D*. The instrument of mortgage on this occasion contained a condition against alienation. In July, 1877, the whole property was mortgaged to *N*. In October, 1877, it was again mortgaged to *D*. *N* sued the mortgagor on his mortgage in July, 1877, and on the 29th September, 1879, obtained a decree against him for the sale of the property. In October, 1879, the mortgagor sold the property to *D* in satisfaction of his mortgages of July, 1875, and October, 1877. *D* did not offer to redeem *N*'s mortgage, and on the 20th November, 1880, the property was put up for sale in execution of *N*'s decree (*D*'s objection to the sale having been previously disallowed) and was purchased by *A. D*, who was still in possession under his mortgage of July, 1874, then used *A* for a declaration of his proprietary right to the property claiming by virtue of his mortgages and the sale of October, 1879. *Held*, applying the rules stated above that *N*'s mortgage of July, 1877, could not affect *D*'s right under his mortgage of July, 1875, but *N* took subject to such mortgage; nor could the auction-sale of the 20th November, 1880, which took place in enforcement of *N*'s mortgage affect *D*'s prior mortgages; and therefore the condition against alienation made in *D*'s favor had no prejudicial effect on the right of *A* under his auction-purchase. That the purchase by *D* of October, 1879, did not extinguish his prior mortgages but such mortgages were still subsisting, and *A* purchased subject to them. That there having been no fraud or collusion on *N*'s part, *A* must be held to have purchased subject only to *D*'s prior mortgages and not subject to *D*'s mortgage of October, 1877. *Held* also that, as *D*'s purchase of October, 1879, was made without *N* having had an opportunity of redeeming *D*'s prior mortgages, *D*'s purchase was subject to *N*'s mortgage of July, 1877, and therefore could not deprive *A* of what he had purchased at the auction-sale of the 20th November, 1880. *Held*, therefore, that all the relief, that *D* was entitled to was a declaration that, as prior mortgagee under the mortgage of July, 1874, and July, 1875, he was entitled as against *A*, to retain possession of the property, until such mortgages were satisfied. *MUHAMMAD ISRAHIM AND ANOTHER v. DHIRJA*.

[II-118]

MORTGAGE,—(continued.)

(38).—[.] *U* gave a simple mortgage on a house. During the currency of this mortgage *A* gave *U* Rs. 100 as earnest money in consideration of which *U* promised that she would sell the house to *A* in case she desired to sell it and would not sell or mortgage it to any one else. *U* however subsequently to the agreement gave a usufructuary mortgage of the house to *B*. *A* thereupon brought the suit to set aside the mortgage to *B* and for possession of the house. *Held* that whatever remedies *A* might have against *U* his suit for possession against *B* was not maintainable there being no privity of any kind between *U* and *B*. *MUHAMMAD HUSAIN v. MUMTAZ BEGAM AND ANOTHER*.

[III-134]

(39).—[Joint security.] *Held* that where one of three joint co-lenders brings a suit for his share of the money by enforcement of lien on the property mortgaged to secure the whole of the joint debt, obtains a decree, causes the property to be sold and purchases it himself, he is liable to satisfy the claims of the other two and if he does not satisfy them the other two would be at liberty to enforce it by re-selling the property mortgaged. *KHAIRA v. SATIAN*.

[I-29]

(40).—[.] The co-sharers of an estate mortgaged it for a certain amount. The deed of mortgage contained a detail of the shares received by each co-sharer, of the mortgage-money, and also a detail of the share of each co-sharer of such estate. It did not contain a condition that each co-sharer might redeem his share by the payment of the share of the mortgage money he had received. *Held* that the mortgagors were jointly liable for the whole sum advanced and each mortgagor was not liable only to the extent of the money received by him. *SUKHNANDAN PRASAD v. Gopi CHARAN*.

[I-11]

(41).—[First and second mortgagees—Rights of.] *C* mortgaged certain property to *D* by a bond dated in 1870. *D* brought a suit on the mortgage bond, and obtained a decree in 1874 which provided that the decretal money should be paid by instalment and in case of default the mortgaged property should be sold. The money not having been paid the property was sold and purchased by *B*. It appears however that *C* and *D* had joined in mortgaging the same property to *A* in 1876. This is a suit by *A* to bring the property to sale. *Held* that *B* could not resist the sale. *RAMTAHAL RAM v. KEWAL RAI AND ANOTHER*.

[III-233]

(42).—[Second mortgagee purchasing rights of first—Auction-purchaser.] *K* brought

MORTGAGE, — (continued.)

to sale in execution of a simple decree for money which he held against *P* certain property and purchased it himself. The property was subject to a mortgage at the time it was sold. Subsequently a decree was obtained against *P* enforcing this mortgage, of which *K* became the holder. *K* sought to have this decree executed, not against the mortgaged property, but against other property belonging to *P*. *Held* that if *K* purchased the property knowing that it was mortgaged, or if in consequence of the mortgage he purchased it for a less sum than it would otherwise have fetched, it would be inequitable to allow him to obtain satisfaction of the decree out of the other property of *P*. *GULAB SINGH v. PEMIAN*.

[III-56]

(43). — [One *AD*, proprietor of an estate comprising thirteen villages, by a deed dated in 1866, mortgaged the same to one *BR*, who obtained a decree thereupon on 16th December, 1872. In the meantime *AD* had given another mortgage of the same estate to one *SB* by a deed dated in 1867. *SB* also obtained a decree on his bond on the 6th July, 1872, and on 20th March, 1874, twelve villages of the estate were sold in execution of his decree. Three of these villages *SB* himself purchased, the remaining nine were purchased by *AB*. *SS*, the heir of *SB*, on the 29th July, 1875, purchased *BR*'s unexecuted and unsatisfied decree of the 16th December, 1872, and thus stood in the shoes of *BR*, the decree-holder, under the prior mortgage, and *SB* the second mortgagee and purchaser of 3 villages of the estate. Taking out execution of the decree under the prior mortgage *SS* sought to sell over again the estate including the 9 villages in the hands of *AB*. *AB* successfully objected in the execution proceedings; thereupon *SS* brought the present suit against *AB* to establish his right to bring the estate to sale. The defendant contended that the suit was bad inasmuch as it was really a suit by a judgment-debtor who had purchased the decree to enforce the decree against himself and his co-judgment-debtors. *Held* that this contention was not sound. But as the plaintiff in the relief he sought, had not specified what amount he should himself contribute towards the discharge of the decree on account of his purchase of the three villages, if a decree were given in his favor, it would be enforceable against the defendant alone. The suit was therefore dismissed on this ground. *Digambari Dibia v. Ishan Chandra Sen*, (B. L. R., F. B. R., 938) referred to. *SHEO SARAN SINGH v. AJUDHIA BAKHSH SINGH*.

[I-186]

(44). — *Tenant at fixed rate—Mortgage—Sale for arrears of rent.* *H*, a tenant at fixed rate in March, 1879, usufructually mortgaged a portion of his land to *RD*. The debt

MORTGAGE.—(continued.)

for which this mortgage was made was incurred to pay arrears of rent due by him. In July, 1879, a decree was passed against *H* for arrears of rent in execution of which *H*'s right in such land was sold in November, 1879, and purchased by *SD*, with notice of the mortgage. *SD* obtained formal possession on 8th June, 1880. On 11th June *H* sowed the land whereupon *SD* brought this suit against *H* and *RD* for possession of the land. *Held* that the suit would not lie until *SD* had redeemed the mortgage. *SAMSHAL DUBEY v. HAZARI MISR AND RAM DAS*

[II-11]

(45). — *Two independent mortgages on same property—Separate suit.* There is nothing to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit. *SUNDAR SINGH AND OTHERS v. BHOLU AND OTHERS*.

[XVIII-53]

(46). — *Redemption—Evidence of mortgage.* This was a suit for redemption. The plaintiffs did not produce the mortgage-deed or a certified copy of it; they alleged that the mortgage-deed was in possession of the defendants, but took no steps under Chapter X, Civil Procedure Code, to procure the discovery or production of the deed, or to lay in any other way the foundation of a right to have secondary evidence admitted in regard to the fact and contents of the deed. They called witnesses to prove the mortgage and produced a *jamabandi* for a certain year in which the names of their ancestors were recorded as holding the land. The lower appellate Court observing that not one of the parties had personal knowledge of the mortgage and that the names of the mortgagors only appeared in one *jamabandi* held that the evidence was too slight to justify a decree for redemption. *Held* that under the circumstances the suit had been properly dismissed. *SHEO BARAKH AND OTHERS v. SHEO BHIKH AND OTHERS*

[II-131]

(47). — *Foreclosure—Conditional decree.* One *M* sued to have certain foreclosure proceedings obtained by *B* set aside and to redeem the land and on the 12th April, 1878, obtained a decree setting aside the foreclosure proceedings and for possession of the land conditional on the payment of Rs. 216. *K* did not deposit the money within three years of the date. On the 9th March, 1881, *A* attached the land in execution of a decree of his against *M* as the property of *M*. *B* successfully objected. Thereupon this suit was brought by *A* against *B* for a declaration of his right to attach the property. *Held* that *M* had not a subsisting right in the property at the

MORTGAGE.—(*continued.*)

date of the attachment, therefore it could not be attached. **ABDUL KADIR v. BAHAL AND ANOTHER.**

[II-117]

(48).—*Foreclosure—Notice.* A Hindu having died without leaving any issue, his widow *B* succeeded to his estate, but she caused the name of her mother-in-law *X* to be recorded as proprietor and after her death that of *C* whom she said she had adopted. *X* mortgaged the property to *A* by a deed of conditional sale who applied for foreclosure and *X* having died caused the notice of the foreclosure to be served on the father of *C* who was a minor at the time. The sale having been made absolute, *A* brought this suit for possession of the property against *B* as guardian of *C*. It was found by the lower Court that at the time of causing the name of *X* and *C* to be entered *B* had not surrendered her right. *Held* that under the circumstances the notice of foreclosure should have been served on *B*. **GANGA SINGH v. JHUMMAN LAL.**

[I-72]

(49).—*Exchange—Right of mortgagor in exchanged property.* In 1865, *N* was in possession of six shops in a market place at Etawah. He was in possession of two as mortgagee, and of the remaining four as proprietor. The Municipal Committee of Etawah having decided to establish the market in a fresh place, and to use the site of the old market for other purposes, arranged with *N* to take the sites of his six shops in the old market place, and to give him in lieu of them, sites for six shops in a new. Under this arrangement, he built six shops in the new market place. Subsequently the mortgagor of one of the old shops claimed possession of one of the six new ones on payment of the mortgage-money and cost of constructing the shop. *Held* that the claim could not be allowed, inasmuch as it could be justified only by proof of an agreement binding upon the parties at the time when the transaction occurred that some specific one among the new shops should be substituted for the old one which was the subject of the mortgage and it had not been found that any such agreement was made. **NIDHI LAL v. MAZHAR HUSAIN, AND OTHERS.**

[V-68]

MUHAMMADAN LAW.

1. Debts.
2. Dower.
3. Gift.
4. Guardian.
5. Inheritance.
6. Kula.

MUHAMMADAN LAW?—(*continued.*)

7. Marriage.
8. Pre-emption.
9. Restitution of conjugal rights.
10. Sister.
11. Wakf.
12. Wife.
13. Will.

(1) Debts.

(1).—*Liability of heirs—For debts of propositus.* A Muhammadan died leaving two sons and two daughters. The two sons sold the whole estate left by the deceased. The purchasers, as part of the consideration money for such sale, paid certain debts, for which the property was liable in the hands of the heirs. *Held* in a suit brought by the two daughters for recovery of their share of the estate, against the purchasers that the daughters were entitled to a decree conditional on their paying to the purchasers their proportionate share of the debt for which the estate was liable. **Hamir Singh v. Zakia (I. L. R., 1 All., 57), followed.** **GULSHERE KHAN AND ANOTHER v. NAUSEY KHAN.**

[I-16]

(2).—*_____.* *A* obtained a decree against one of the heirs of a deceased person for the recovery of a debt due from the deceased person from his estate. *B* and *C*, the other heirs of the deceased, were no parties to the decree. Their objections in the execution department having been disallowed, they brought this regular suit for a declaration that their share in the estate was not liable to be attached and sold in execution of the decree. *Held* that the mere fact that they were not parties to the decree could not protect the property unless they showed that the property was not liable. **TONDAI RAM v. NUR BIBI AND ANOTHER.**

[III-182]

(3).—*_____.* *Held* that the mere fact, that the plaintiff (an heir to a deceased Muhammadan seeking to recover his inheritance) had omitted to offer to pay in his plaint a proportionate share of the debt due by the estate of the deceased, was no reason for dismissal of the plaint. The Court can render the decree subject to a condition as to the payment of the debt. **BADULLAH v. MAKUND RAM AND ANOTHER.**

[VII-239]

(4).—*_____.* A Muhammadan on his death left, among other heirs, a widow *I* and a daughter *M*. Subsequently *I* died and was succeeded by *M*. The

MUHAMMADAN LAW, Debts,—(cont'd.)

plaintiff represents this daughter by purchase and sues to recover the estate from the defendant who is purchaser in execution of a decree obtained against *M* as representing the estate of her deceased father. The lower Court has given a decree in favor of the plaintiff for a share inherited by *M* from her mother on payment of a proportionate amount of the debt for which the estate was sold. The appeal by plaintiff refers to two points. (i) Is the plaintiff entitled to recover the estate without payment of the debt? (ii) What was the share inherited by *M* from her mother? *Held* as to the first question that the defendant being a *bonâ fide* purchaser in execution of a decree against *M* as representing the estate the plaintiff who represents *M* can only recover by payment of the proportionate share of the debt. *Jafri Begam v. Amir Muhammad Khan*, (I. L. R. 7 All., 822) followed. As to the second point *held* that it was not taken in sufficient time to allow the Court below or to permit this Court to entertain it *WILAYAT HUSAIN AND ANOTHER v. SAIYYAD HUSAIN*

[VII-59]

(5). ————. Upon the death of a Muhammadan intestate, who leaves unpaid debts, whether large or small, with reference to the value of his estate, the ownership of such estate devolves immediately on his heirs, and such devolution is not contingent upon, and suspended till payment of such debts. A decree relative to his debts passed in a contentious or non-contentious suit against only such heirs of a deceased Muhammadan debtor as are in possession of the whole or part of his estate, does not bind the other heirs who by reason of absence or other cause are out of possession, so as to convey to the auction-purchaser, in execution of such a decree, the rights and interests of such heirs as were not parties to the decree. In execution of a decree for a debt due by a Muhammadan intestate, which was passed against such of the heirs of the deceased as were in possession of the debtor's estate, the decree-holder put up for sale and purchased certain property which formed part of the said estate. One of the heirs, who was out of possession, and who was not a party to these proceedings, brought a suit against the decree-holder for recovery of a share of the property sold in execution of the decree, by right of inheritance. *Held* by the Full Bench that the plaintiff was not entitled to recover from the auction-purchaser in execution of the decree possession of his share in the property sold, without such recovery of possession being rendered contingent upon payment by him of his proportionate share of the ancestor's debt for which the decree was passed and in satisfaction whereof the sale took place. *Wahidunnissa v. Sheobrathun* (6 B. L. R., 54); *Assamathem Nessa Bibi v. Roy Lutchnaepul Singh* (I. L. R., 4 Calc., 142); *Mazhar Ali v. Budh*

MUHAMMADAN LAW, Debts,—(cont'd.)

Singh (I. L. R., 7 All., 297); *Bachman v. Bachman* (I. L. R., 6 All., 583); *Kamir Singh v. Musammât Zakia* (I. L. R., 1 All., 57) and *Muttijyan v. Ahmad Ali* (I. L. R., 8 Calc., 370) referred to. *JAFRI BEGAM v. AMIR MUHAMMAD KHAN*.

[V-248,

(6). ————.] A creditor of *A*, a deceased Muhammadan, under a hypothecation bond, obtained a decree on the 20th December, 1876, for recovery of the debt by enforcement of lien against *M*, one of *A*'s heirs, who alone was in possession of the estate; and in execution of the decree, the whole estate was sold by auction on the 21st March, 1878, and purchased by the decree-holder himself. *J*, another of *A*'s heirs, was not a party to these proceedings. On *J*'s death, her son and heir *A H* conveyed to *M A* the rights and interests inherited by him from his mother, namely, her share in *A*'s estate. The purchaser of the share thereupon brought a suit against the decree-holder for its recovery. *Held* that, immediately upon the death of *A*, the share of his estate claimed in the suit devolved upon *J*; that, she being no party to the decree of the 20th December, 1876, her share in the property could not be affected by that decree, nor by the execution sale of the 21st March, 1878; that upon her death that share devolved upon her son, who conveyed his rights to the plaintiff; that the plaintiff was therefore entitled to recover possession of the share which he had purchased; but that he could not do so without payment to the defendant of his proportionate share of the debts of *A* which were paid off from the proceeds of the auction-sale of the 21st March, 1878. *Jafri Begam v. Amir Muhammad Khan* (W. N. 1885, p. 248) followed. *SAIYAD MUHAMMAD AWAIS v. HAR SAHAI*.

[V-172

(7). ————.] A Muhammadan died leaving as his heirs a widow, a son and two daughters. His heirs divided his property among themselves. The plaintiffs in this suit, the holders of a promissory note for Rs. 25, executed by the deceased, sued his widow and son only for the entire amount due on such promissory note. The defendants urged that, under the circumstances, they were liable for a proportionate amount of the debt and not for the whole. *Held* that under the Muhammadan law the heirs of a deceased person are permitted to divide the estate, notwithstanding that a small debt due by the estate of the deceased is outstanding; and creditors have a right to sue the heirs in possession, for recovery of a debt; but they are allowed to have recourse to a single heir only when all the effects of the deceased are in the hands of that heir. In this case as the defendants were in possession only of their share of the estate, they were not liable to the plaintiffs for the whole debt due to them by

MUHAMMADAN LAW, Debts,—

(continued.)

the deceased. See *Hamir Singh v. Zakia* (I. L. R., 1 All., 57). *PRITHI PAL AND OTHERS v. HUSSAINI JAN AND ANOTHER.*

[II-70]

(2). Dower.

(8).—*Possession over husband's estate in lieu of dower—Lawful possession—Lien.* A Muhammadan widow lawfully in possession of her husband's estate occupies a position analogous to that of mortgagee, and her possession cannot be disturbed until her dower debt has been satisfied, and after her death her heirs are entitled to succeed her in such possession, and if wrongfully deprived thereof, to maintain a suit for its recovery. *Held* that the ruling of the Court in *Baland Khan v. Janee* (N.-W. P. H. C. Rep., 1870, p. 319), that where a defendant is found to be in possession of landed property in lieu of dower, and it is held that the plaintiff is not entitled to sue for possession of the property until such claim for dower has been satisfied, it is not necessary to determine the question of the amount of such dower, the matter being one which could be settled properly in a suit for an account of what was due as dower, was not applicable to a case where the plaintiff seeking to recover possession did not claim as heirs of the widow's husband, but as heirs of the widow herself, and where the decree for possession passed in their favour would remain undisturbed even if an amount less than that fixed by the lower appellate Court were found to be what was due as dower. *AZIZULLAH KHAN AND OTHERS v. AHMAD ALI KHAN AND OTHERS.*

[V-54]

(9).—*Where a Muhammadan widow is in possession of the property of her deceased husband her dower or any part of it being due and unpaid, she is entitled as against the other co-heirs of her husband to retain possession of such property until her dower debt is paid. It is immaterial to such widow's right to retain possession that such possession was obtained originally without the consent of the other co-heirs.* *Musammal Bebee Bachan v. Sheikh Hamid Hossein* (14 Moo. I. A., 377); *Aziz-ullah Khan v. Ahmad Ali Khan* (I. L. R., 7 All., 353) and *Bibee Tajim v. Syud Wahed Ali* (22 W. R., 118) referred to. *AMANI BEGAM AND ANOTHER v. MUHAMMAD KARIM ULLAH KHAN.*

[XIV-52]

(10).—*If a Muhammadan widow entitled to dower has not obtained lawfully, that is, by contract with her husband, by his putting her into possession, or by her being allowed with the consent of the heirs on his death to take possession in lieu of dower and thus to obtain a lien for her dower, she cannot obtain that lien by taking possession adversely to the other heirs of property to the*

MUHAMMADAN LAW, Dower,—

(continued.)

possession of which they, and she in respect of her share in the inheritance, are entitled. *AMANAT-UN-NISSA AND ANOTHER v. BASHIR-UN-NISSA AND ANOTHER.*

[XV-7]

(11).—*Onus.* When a Muhammadan widow is in possession, and has been for sometime in undisturbed possession of property which had been of her husband in his life-time, and dower is admitted or proved to be due to her, it lies upon the heir who claims partition without payment of his proportion of dower to prove that the Muhammadan widow was not let into possession by her husband in lieu of dower or did not obtain possession in lieu of dower after her husband's death with the consent or by the acquiescence of the heirs. *MUHAMMAD KARIM-ULLAH KHAN v. AMANI BEGAM AND OTHERS.*

[XV-16]

(12).—*Adverse possession.* Where a Muhammadan widow is in possession of immoveable property of her deceased husband as security for her dower debt her possession cannot become adverse as against the other heirs of her husband until the dower debt is paid. *ALI HASSAN KHAN AND ANOTHER v. AHMEDJI BIBI AND OTHERS.*

[XIII-103]

(13).—*Widow's power of alienation.* *Held* that a purchaser of a deceased husband's estate from a Muhammadan widow, in possession thereof pending payment of her dower, is not entitled to plead non-satisfaction of her dower debt to a claim by her husband's heir for their share of his inheritance as the widow's right to dower is personal to herself and does not pass to a purchaser of the estate. *Bebee Bachan v. Hamid Hossein* (14 Moo. I. A., 377); *Bazayet Hossein v. Dooli Chund* (I. L. R., 4 Cal., 402) referred to. *ALI MUHAMMAD KHAN v. AZIZULLAH KHAN AND OTHERS.*

[III-204]

(14).—*A Muhammadan widow in possession of immoveable property of her late husband in lieu of her dower has no power to mortgage such property.* *CHAUHI BIBI v. SHAMS-UN-NISSA BIBI AND OTHERS.*

[XIV-193]

(15).—*A Muhammadan widow in possession of immoveable property of her late husband in lieu of her dower has no power to sell such property.* *BANDE HASAN AND OTHERS v. ASGHARI JAN AND OTHERS.*

[XIV-196]

(16).—*Widow's lien—Personal right—Heirs.* The lien which a Muhammadan widow whose dower is unpaid may obtain on lands

MUHAMMADAN LAW, Dower—

(continued.)

which have belonged to her deceased husband is a purely personal right and does not survive to her heirs. *Ali Muhammad Khan v. Azizullah Khan* (I. L. R., 16 All., 50) and *Ajuba Begam v. Nazir Ahmad* (W. N., 1890, p. 115) referred to. *HADI ALI v. AKBAR ALI*.

[XVIII-32]

(17).—*Prompt—Deferred.*] The dictum in Macnaghten's Principles of Muhammadan law, Chapter. VII, art. 22, to the effect that where it may not have been expressed whether the payment of dower is to be prompt or deferred, it must be held that the whole is due on demand, has been adopted and approved by the Privy Council in *Mirza Bedar Bukht Muhammad Ali Bahadoor v. Minza Khurram Bukht Yahya Ali Khan Bahadoor* (19 W. R., 315). *Eidan v. Mazhar Husain* (I. L. R., 1 All., 483) referred to. *INAYAT HUSAIN v. MUHAMMAD HUSAIN*.

[IX-153]

(18).—*Sale in lieu of—Validity.*] A genuine sale made for good and valid consideration to one creditor, even if effected to delay and defeat another, apart from cases in which either insolvency or bankruptcy is involved, is not void. If a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction can not be assailed, though the effect of it is to give the selected creditor a preference. *Wood v. Dixie* (VII Q. B., 892); *Chove v. Baylis* (31 L. R. Ch. VII, 757) and the authorities collected in the notes to *Twyne's case*, V. I., *Smiths L. C.*, 12, referred to. Pending a suit for recovery of a debt, the defendant who was a Muhammadan, executed a deed of sale, dated in June, 1882, of a four annas *zamindari* share in favour of his wife, the consideration recited therein being the amount of the vendee's deferred dower debt. Subsequently the creditor obtained a simple money decree against the defendant, and in execution thereof attached the four annas share. The vendee objected to the attachment, on the basis of her sale-deed, but her objection was disallowed on the ground that the instrument was collusive. She thereupon brought a suit against the judgment-creditor for a declaration of her right, and to set aside the attachment order. Held that if there was in fact a subsisting debt due for dower from the husband to the wife, and he transferred and she accepted the four annas share in satisfaction of it, the transaction was a perfectly legitimate one, and no Court had any power to disturb it. It was for the defendant, the judgment-creditor, to establish either that the deferred dower-debt did not constitute such a present consideration as would support the sale, or that the transaction was merely colourable and a fictitious one, which was never intended to have

MUHAMMADAN LAW, Dower—

(continued.)

operation or effect, either as a transfer of the property or an extinguishment for the dower debt; and that, despite what appeared in the sale-deed, the parties remained in precisely the same position as before it was executed—the four annas still remaining the property of the vendor, and as such liable to the attachment. Held applying the general principles of the Muhammadan law as to deferred debts, that there was good consideration for the sale of June, 1882, and that, in the absence of proof of fraud of the kind above indicated, the vendee was entitled to maintain it, and to succeed in the suit. *SUBA BIBI v. BALGOBIND DAS*.

[VI-51]

(19).—*Power of husband to add to dower.*] Held that according to Muhammadan law a husband may make an addition to the dower already fixed and such addition is as valid as the original. (*Tagore Law Lecture*, I B., 73, p. 344-50). *BUNYADI BEGAM v. MUHAMMAD ASHIGAR ALI AND OTHERS*.

[V-19]

(20).—*Suit for—Transfer pendente lite.*] While a suit for the dower debt due to a Muhammadan widow was pending on behalf of her heirs, the heirs of her deceased husband mortgaged certain property which had been of the deceased in his life-time. The heirs of the widow obtained a decree which could only be executed against the assets of the deceased husband. Held that this decree took priority over the mortgagee's decree and a sale held in execution thereof. *Bazayet Hossein v. Dooli Chund* (I. L. R., 4 Calc., 402) followed. *KASIN KHAN AND OTHERS v. MUHAMMAD YAR KHAN*.

[XVII-135]**(3). Gift.**

(21).—*Condition against alienation.*] The owner of a house made a gift thereof to certain persons "for their residence, and that of their heirs, generation after generations," declaring that if the donees sold or mortgaged the house, he and his heirs should have a "claim" to the house, but not otherwise. Held that under Muhammadan law, whether that by which the *Shias* or that by which the *Sunnis* were governed the house passed by the gift to the donees absolutely, the declarations by the donor as to the effect of an alienation by the donees being in the nature of a recommendation, and not having the effect of limiting the estates in the house itself. *NASIR HUSAIN v. SUGHRA BEGAM AND OTHERS*.

[III-106]

(22).—*Hiba-bil-iwaz—Seisen.*] The fundamental conception of *hiba-bil-iwaz*, or a gift for an exchange, as understood in the Muhammadan law, is that it is a transaction made

MUHAMMADAN LAW, Gift.—

(continued.)

up of two separate acts of donation, *i. e.* of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-irwaz* to its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Muhammadan law provides. A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Muhammadan law. *Kasim Husain v. Shagif-un-nissa*, (I. L. R., 5 All., 285); *Sahib-un-nissa Bibi v. Hafiza Bibi* (I. L. R., 9 All., 213); and *Shaikh Ibrahim v. Shaikh Suleman*, (I. L. R., 9 Bom., 146) distinguished. *Mohin-ud-din v. Manchershah* (I. L. R., 6 Bom., 650; *Mullick Abdool Guffoor v. Muleka*, (I. L. R., 10 Calc., 1112); *Shahazadee Hazara Begum v. Khaja Hossein Ali Khan*, (12 W. R., 498) referred to. **RAHIM BAKHS V. MUHAMMAD HASAN.**

[VIII-268]

(23).—*Hiba-ba-shart-il-irwaz—Seisen.*] A sued B on the allegation that in consideration of her promising to marry B's relative C and to reside in his house, B promised to give her a one-third share of a joint and undivided estate called *mauza X*; that he did execute a deed of gift in her favor and the plaintiff married C accordingly, but that afterwards the defendant made a gift of the property to another person. On these allegations she sued for possession of the property. Held that the gift was of the nature called *hiba-i-ba-shart-il-irwaz* and being not accompanied with possession was vitiated which is not the case in cases of *hiba-bil-irwaz*. **TULSA BEGUM V. WAZIRULLAH KHAN AND ANOTHER.**

[IV-66]

(24).—*Seisen.*] A deed, which was found in effect to be a deed of gift comprising *zamin-dari* and other property, was executed on the 22nd of May 1890. It was registered on the 24th of May and the donor died on the 26th. The deed recited "I have placed the aforesaid vendees in proprietary possession of the aforesaid property as my representatives." Mutation of names was subsequently obtained by one of the donees in his favor on the basis of the same deed. Held that this was a valid and effectual gift under the Muhammadan law. *Mahommed Buksh Khan v. Hosseini Bibi* (I. L. R., 15 I. A., 81) and *Sheikh Muhammed Muntaz Ahmad v. Zubaida Jan* (I. L. R., 16 I. A., 205, S. C. I. L. R., 11 All., 460) referred to. **SAJJAD AHMED KHAN V. KADRI BEGAM.**

[XV-123]

MUHAMMADAN LAW, Gift.—

(continued.)

(25).—*Maraz-ul-maut—Will in favor of heir.*] Held that a gift made in *maraz-ul-maut* takes effect as a will and is therefore invalid if made in favor of an heir. **MUHAMMAD WAZIR JAN V. SAIFYAD ALTAH ALI.**

[VII-32]

(26).—[] According to Muhammadan law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, *i. e.*, has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death. *Labbi Bibi v. Bibun Bibi* (N. W. P. H. C. Rep., 1874, p. 159) followed. Held therefore, where at the time of a gift the donor had suffered from a certain sickness for more than a year, and was in full possession of his senses, and there was no immediate apprehension of his death, and he died shortly after making the gift, but whether from such sickness or from some other cause it was not possible to say, that under these circumstances the gift was not invalid according to Muhammadan law. **GULSHERE KHAN V. MARIAM BEGAM AND ANOTHER.**

[I-48]

AMIRAN BIBI V. MAN BIBI.

[XVIII-104]

(27).—*Musha.*] Held that a *musha* gift of property in its nature divisible and capable of physical partition was invalid under the Muhammadan law. **UMAT ALI V. WATAN ALI.**

[VII-58]

(28).—[]. B owned a one-twelfth share of a *muafi* estate and a dwelling house. As owner of the dwelling house, she owed a share in a staircase, privy, and door, which were held by her jointly with the owners of adjoining dwelling houses. She made a gift of her property, transferring the dominion over it to the donees, but reserving the income of the share of the *muafi* estate for life, and stipulating against its alienation. Held that the gift of the one-twelfth share of the *muafi* estate, being a gift of a specific share, was not open to objection under Muhammadan law, and such gift was not vitiated by the mere reservation of the income of the share, or by the condition against alienation. *Nurwab Umjad Ally Khan v. Mohumdee Begam*, (11 Moo. I. A., 517) followed. Held also that the gift was not invalid under Muhammadan law, so far as it related to the staircase, privy, and door, as these things, though undivided property, were incapable of division, and a gift of part of an indivisible thing was valid under that law. **KASIM HUSAIN AND OTHERS V. SHARIFUNNISA.**

[III-31]

(29).—[] A pension of the nature described in Act XXIII of 1871 (Pensions Act) s. 7, clause (2) was drawn by a

MUHAMMADAN LAW, — Gift.

(continued.)

Muhammadan in whose name alone it was recorded in the Government registers, for himself and the other members of his family who up to the time of his death, received their shares from him. Shortly before he died he executed a deed of gift in favor of his wife which purported to assign to her the whole pension. No mutation of names was effected in the Government registers, but the deed of gift and the *sanads* in respect of which the pension had originally been granted were handed over to the donee. After the death of the donor, one of his sisters brought a suit against his widow to establish her right (i) to receive the share in the pension which she had inherited from her father and received up to her brother's death, and (ii) as heir to her brother himself to the share which he had inherited. It was contended on her behalf that the deed of gift was in any case ineffectual as an assignment of more than the donor's own interest, and further that it was invalid even as an assignment of his own share, inasmuch as under the Pensions Act the pension could not be made the subject of gift, and under the Muhammadan law it was "*musha*" and not transferable and actual delivery or transfer of possession was, under the same law, essential to the completion of the gift, but no such delivery or transfer had been effected. In defence it was pleaded (*inter alia*) that the suit was barred by limitation. *Held* that it was doubtful whether in such a case and as between such parties the Limitation Act would be applicable at all, but that assuming it to be so, either art. 127 or art. 131 of the second schedule should be applied, and, the plaintiff having received her share within 12 years, the suit was brought in time. *Held* that the deed of gift was not a good assignment in law of the interest of the plaintiff, who was not a party thereto, and the defendant could take nothing more than the donor's own interest. *Held* that whatever might be the Muhammadan law apart from the Pensions Act under s. 7 of the Act, the pension or any interest in it was capable of being alienated by way of gift, the subject of the gift being not the cash, but the right to have the pension paid. *Held* that there was no force in the contention that the gift became void because the right was not divided inasmuch as in the case of a right to receive a pension the rights of the individuals who are the heirs become at once divided and separate at the death of the sole owner; and in this case the shares were definite and ascertained and required no further separation than was already effected upon the sole owner's death. *Held* that the rule of the Muhammadan law as to the invalidity of gifts purporting to pass, more than the donor was entitled to, was based upon the principle of *musha* or undivided part, and had no application to cases where the donor's interest itself was separate; and that even if it were the strict Muhammadan law that

MUHAMMADAN LAW, — Gift.

(continued.)

where a man having a definite ascertained interest in a pension, and intending at any rate to pass his interest to his wife, purported to give her more than he was entitled to, he failed to give her any interest at all. s. 24 of the Bengal Civil Courts Act (VI of 1871) did not make it obligatory to apply the strict Muhammadan law as to gifts in transactions of modern times. *Held* that although according to the Muhammadan law possession was necessary to perfect a gift where the nature of the transaction was such that possession was possible, possession of a right to receive pension could only be given by handing over the documents of title connected with the pension or assigning the right to receive the pension, that the gift in this case was perfect as soon as the deed was executed and handed over with the other papers to the donee; and that the mutation of names was merely a thing which would follow on the perfection of the title, and did not in itself go to make or form part of the title. *HAFIZA BIBI v. SAHIBUNNISSA BIBI.*

[VII-22]

(30).—[*Absolute transfer—Life interest—Construction.*] In 1841 certain land was purchased in the name of *NW*, son of *DH*. In 1861 a dispute arose between *NW* and *DH* as to the entry of names in respect of such land. In 1869 *NW* preferred a petition in which, after reciting that he was the actual purchaser of the land in dispute, that his father had no claim in it, that his father improperly wanted to give it to two of his other sons and that his father had threatened him with the curse of his displeasure in the next world, he stated as follows,—"Therefore, with a view to avert the displeasure of my father, and also in order to protect the rights of other co-sharers, I myself have relinquished in favor of my father's person all the rights I have in the land." *DH* subsequently sold the land to the wives of his two other sons. The widow, and son of *NW*, who had died in the meantime, brought this suit against *DH* and his vendees for a declaration that the transfer in favor of *DH* enured for *DH*'s life only. *Held* that, taking all the circumstances into consideration, it was an absolute transfer in favor of the father and not a life-interest only. *KHAIRUNNISSA BIBI AND ANOTHER v. DILRUBA HUSAIN AND OTHERS.*

[II-168]

(4). Guardian.

(31).—[*Guardian—Power of alienation.*] Where a Muhammadan sold immoveable property in which his minor daughter was entitled to a three anna share, and it was found that the sale was for the benefit of the father alone and that the minor was in no way benefited by it. *Held* that the daughter on attaining majority was entitled to have the sale so far as it affected her interest in the property, set aside. *Kali Dutt Jha v. Abdul Ali* (I. L. R., 16 Cal.) 627 referred to; *Girraj Bahsh v. Kazi Hamid Ali*

MUHAMMADAN LAW,—Guardian. (continued.)

(I. L. R. 9 All., 340) distinguished. BISHNATH SINGH v. ASHRAF-UN-NISSA.

[XIV-89

(32). —————.] *Held* that the mother of a Muhammadan minor could not alienate his share of the paternal estate in order to pay debts incurred by herself and not for the benefit of the minor and that the minor could avoid it without paying the debt. ZOHRA BIBI AND ANOTHER v. AJUDHIA AND OTHERS.

[II-130

(33). —————.] One S K, a Muhammadan, left at his death two sons and two daughters, by a deceased wife, a wife and four sons by her. Sometime after the death of S K, his second wife, on behalf of herself and her 4 sons, relinquished their shares in the inheritance, in favor of the two sons of the first wife. This suit was brought by one of the 4 sons of the second wife for the recovery of one third of the property left by S K, on the allegation that his mother had no right to relinquish his share of the inheritance. *Held* that A was not bound by the relinquishment, but that he could recover his share only, *i. e.* what would have been his share at the death of his father, the relinquishment being good as to the remainder. YAKUB ALI AND ANOTHERS v. HAYAT KHAN.

[III-115

(34). —————.] *Held* that a Muhammadan widow is not entitled to deal with the property of the other members of the family, though her name alone might be recorded in the revenue papers in respect of the whole property left by her husband. Her position is like that of any other heir and even where her children are minors she can not exercise any power of disposition with reference to their property. SITA RAM v. WILAYATI BEGAM AND OTHERS.

[VI-101

(5). Inheritance.

(35). —————.] *Shia law—Barren widow.* According to the Muhammadan law governing the *Shia* sect, a widow to be entitled to inherit out of her husband's land, must have a child of her husband living at the date of his death. *Aslloo v. Umdatun-nissa* (20 W. R. Civ. R., 300) referred to. *Ram Prasad v. Abdul Karim* (I. L. R., 9 All., 513) distinguished. HUSAIN KHAN v. UMEDI BIBI AND ANOTHER.

[IX-192

(36). —————.] *Held* following *Musammat Toonjan v. Musammat Mehndi Begum* (N. W. P. H. C. Rep., 1868, p. 137) that the childless widow of a *Shia* Muhammadan, though she takes nothing out of her deceased husband's land, inherits a share of the buildings left by him. UMARDARAZ ALI KHAN

MUHAMMADAN LAW,—Inheritance. (continued.)

AND OTHERS v. WILAYAT ALI KHAN AND ANOTHER.

[XVII-34

(37). —————.] *Residuary—Distant kindred.* *Held* that a maternal half-uncle, being "distant kindred of the lowest degree" cannot succeed to the property of the deceased in the presence of a paternal second cousin who is a residuary. SYED ALI v. NAIZ ALI.

[V-277

(38). —————.] One B, a Muhammadan lady, was in possession of two out of nine *sihams* in a certain village, of one *siham* as a *mutawalli* and of the other in her own right of inheritance. On her death her husband A R got his name recorded in the revenue registers as the sole heir of his wife. Thereupon the plaintiffs brought this suit for proprietary possession of one of the two *sihams* by right of inheritance and by cancellation of a mortgage-deed executed by A R in favor of certain persons, and also for possession of the other *siham* as *mutawallis*. The plaintiffs came into Court on the allegation that they were the reversionary heirs of B and that A R had no right to inherit from the lady as he had divorced her before her death. The suit was resisted by A R on the grounds that the plaintiffs were not the reversionary heirs of B and that the plaintiffs' allegation as to his having divorced B was false. It was resisted by the mortgagors on the ground that the mortgage was executed *bona fide* for a valuable consideration. The lower Court dismissed the suit as against the mortgagees; but as against A R it dismissed the suit in respect of $\frac{1}{2}$ *siham* finding that the divorce was not proved and A R was therefore entitled to a half in the proprietary right of his wife. The rest of the plaintiffs' claim was decreed as against A R. A R appealed to the High Court. *Held* (on the evidence) that the plaintiffs had failed to prove that they were the residuary heirs of B or in the line of male descent from A S, B's grandfather, for the expenses of whose *urs* the other one *siham* had been dedicated, the plaintiff was therefore not entitled to any part of the property sued either as an heir or as a *mutawalli*. The suit must therefore be dismissed *in toto*. ABDUL RAHMAN v. KAMR-UD-DIN AND OTHERS.

[IV-353

(39). —————.] *Missing person.* *Held* that where a person dies to whom one who is "missing" is an heir, his share is to be reserved until it is determined whether he is dead or alive and it is not until the time has arrived when his death may be presumed under the Muhammadan law that the share can be

MUHAMMADAN LAW,—Inheritance.

(continued.)
 claimed or divided among his heirs. *GIRDHARI LAL AND ANOTHER v. LADO BEGAM.*

[II-105]

(40).—*Acknowledgment of son.* Held by *Petheram, C. J.*, that, according to the Muhammadan law, the effect of an acknowledgment by a Muhammadan that a particular person, born of the acknowledger's wife before marriage, is his son in fact, though the acknowledger may never have treated him as a legitimate son or intended to give him the *status* of legitimacy, is to confer upon such person the *status* of a son capable of inheriting as legitimate, unless conditions exist which make it impossible that such person can have been the acknowledger's son in fact. *Ashruf-ood-Dowlah Ahmad Hossein v. Hyder Hossein Khan* (11 Moo. I. A., 94); *Muhammad Azmat Ali Khan v. Lalli Begum* (I. L. R., 8 Calc., 422); *Sadakat Hossein v. Mahomed Yusuf* (I. L. R., 10 Calc. 663) referred to. In a suit for possession by right of inheritance, of a share of the property of a deceased Muhammadan by a person alleging himself to be a son of the deceased the defendants pleaded that the plaintiff was not a son but step-son, having been born of the deceased's wife before her marriage. The plaintiff filed certain letters and other documents in which the deceased in express terms referred to him as his son; and he contended that these references amounted to acknowledgments of him as a son made by the deceased, which, under the Muhammadan law, entitled him to inherit as a legitimate son. Held by *Petheram, C. J.*, (*Brodhurst, J.* dissenting) that the acknowledgment by the deceased of the plaintiff as his son in fact conferred upon the latter the *status* of a legitimate son capable of inheriting the deceased's estate although the evidence showed that the deceased never treated him as a legitimate son, or intended to give him the *status* of legitimacy. Held by *Brodhurst, J.*, *contra*, that the documents above referred to did not show more than that the deceased regarded the plaintiff as his step-son; that the plaintiff was never called his son except by courtesy and in the sense in which a European would ordinarily describe his step-son as his son; and that there was no sufficient evidence of the acknowledgment from which an inference was fairly to be deduced that the deceased ever intended to recognise the plaintiff, and give him the *status* of a son capable of inheriting. *Sadakat Hossein v. Mahomed Yusuf* (I. L. R., 10 Calc., 633) referred to. *MUHAMMAD ALLAHADAD KHAN v. ISMAIL KHAN AND OTHERS.*

[VI-78]

(41).—*—* Held that a Muhammadan could not, by acknowledging him as his son, render legitimate a child whose mother at the time of his birth he could not have married by reason of her being the wife of another man. *Muhammad Aladad*

MUHAMMADAN LAW,—Inheritance.

(continued.)

Khan v. Muhammad Ismail Khan, (I. L. R., 10 All., 289) followed. *LIAQAT ALI AND OTHERS v. KARIM-UN-NISSA AND OTHERS.*

[XIII-167]

(42).—*Agreement between heirs to alter share.* The parties to this suit, Muhammadans, who were disputing as to the right of succession to the estate of two deceased persons, came to an arrangement amongst themselves by which they divided the property. Held that though the distribution thus made was contrary to what the parties would have got under the fixed rules of inheritance, was nevertheless valid. *NUR ALI AND OTHERS v. IMAMAN.*

[IV-40]

(6) *Khula.*

(43).—*—* Held that a suit by a Muhammadan wife to compel her husband to give her a *khula* divorce is not maintainable. *MARIAM BIBI v. NUR MUHAMMAD.*

[II-83]

(7) *Marriage.*

(44).—*Guardian.* Held that the marriage of a Muhammadan minor (girl) without the consent of her legal guardian (paternal uncle) though contracted by her mother and sequenced in by the guardian was illegal and could be set aside at the instance of the legal guardian. *MUHAMMAD ALI v. NIDHI BIBI.*

[III-248]

(45).—*Shia law—Marriage between Muhammadan woman and Christian.* A Muhammadan woman of the *Shia* sect cannot contract a valid marriage according to Muhammadan rites with a Christian. *BAKHSI KISHEN PRASAD AND OTHERS v. THAKUR DAS AND OTHERS.*

[XVII-91]

(8) *Pre-emption.*

See cases under pre-emption.

(9.) *Restitution of conjugal rights.*

(46).—*Payment of dower—Condition precedent.* According to the Muhammadan law, marriage is a civil contract upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at

MUHAMMADAN LAW,—Restitution of conjugal rights, (*continued*.)

any time after marriage, the wife is under no obligation to make such demand at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for co-habitation on the part of the husband without her consent; but, although she may plead non-payment, the husband's right to claim co-habitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to co-habitation does not accrue. The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid; and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to co-habit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principles recognised by Courts of Equity under the general category of compensation or lien when pleaded by a defendant in resistance or modification of the plaintiff's claim. It is a general rule of interpretation of the Muhammadan law, that, in cases of difference of opinion among the Jurisconsults Imam Abu Hanifa and his two disciples Qazi Abu Yusuf and Imam Muhammad, the opinion of the majority must be followed; and, in the application of legal principles to temporal matters, the opinion of Qazi Abu Yusuf is entitled to the greatest weight. *Moonshee Buzloor Ruheem v. Shums-oon-nissa Begum* (11, *Moo. I. A.* 551); *Mulleeka v. Fumela* (*L. R. Sup. Vol., Ind. Ap.*, 135); *Ranee Khajooroonissa v. Ranee Ryeesoonissa* (*L. R. 2 Ind. App.*, 235); *Nawab Bahadur Jung Khan v. Uzeez Begum* (*N.-W. P., S. D. A. Rep.*, 1843-46, p. 180); *Faun Beebee v. Sheikh Moonshee Be-paree* (3 *W. R. C. R.*, 93); *Gatha Ram Mistree v. Moohila Kochin Attiah Doomoonee* (14 *B. L. R.*, 298) and *Eidan v. Mazhar Husain* (1 *L. R.*, 1 *All.*, 483) referred to, *Sheikh Abdool Shukkoar v. Raheem-oon-nissa* (*N.-W. P. H. C. Rep.*, 1874, p. 95); *Wilayat Husain v. Allah Rakhi* (1 *L. R.*, 2 *All.*, 831); *Nusrat Husain v. Hamidan* (1 *L. R.*, 4 *All.*, 205) and *Nasir Khan v. Umrao* (*W. N.* 1882, p. 96) overruled. In a suit brought by a husband for restitution of

MUHAMMADAN LAW,—Restitution of conjugal rights, (*continued*.)

conjugal right, the parties being Sunni Muhammadans governed by the Hanafi Law the defendant pleaded that the suit was not maintainable as the plaintiff had not paid her dower-debt. The plaintiff thereupon deposited the whole of the dower-debt in Court. It appeared that the defendant's dower had been fixed without any specification as to whether it was to be wholly or partly prompt. It also appeared that she had attained majority before the marriage and that she had cohabited with the plaintiff for three months after marriage and there was no evidence that she had ever demanded payment of her dower before the suit was filed or that she had refused cohabitation on the ground of non-payment. Besides the plea already mentioned, she also relied upon allegations of divorce and cruelty, but these allegations were found to be untrue. The lower appellate Court dismissed the suit, holding that inasmuch as the plaintiff had not paid the dower-debt at the time when he brought his suit, he had no cause of action under the provisions of the Muhammadan law. *Held* by the Full Bench that the lower appellate Court's view of the Muhammadan law relating to conjugal rights and the husband's obligation to pay dower, was erroneous; and that the plaintiff, under the circumstances of the case, had a right to maintain the suit. **ABDUL KADIR v. SALIMA AND ANOTHER.**

[VI-53]

(47). —————.] *Held* that a suit for the recovery of a wife, where the plaintiff has not before the institution of the suit, paid or tendered her dower was not maintainable and the proper course was to dismiss the suit and not to give the plaintiff a decree conditional on the payment of the same. *Sheikh Abdool Shukkoar v. Raheem-oon-nissa*, (*N.-W. P. H. C. Rep.*, 1874, p. 94) and *Wilayat Husain v. Allah Rakhi* (1 *L. R.*, 2 *All.*, 831) followed. **NAZIR KHAN v. UMRAO AND ANOTHER.**

[II-96]

(48). —————.] *Sunni woman—Shia husband.* A woman of the Sunni sect of Muhammadans marrying a man of the Shia sect is entitled to the privilege secured to her married position by the law of her sect, and does not thereby become governed by the Shia law. *Held* therefore where a husband sued to recover his wife, the one being a Shia, and the other a Sunni, that, the wife's dower being "exigible" dower, and not having been paid, the suit was not maintainable under Sunni law. **NASRAT HUSAIN v. HAMIDAN AND OTHERS.**

[II-15]

(49). —————.] *Violence.* *Held* that, there having been a valid marriage, cohabitation after marriage of a peaceful character for a year, an offer on the part of the plaintiff, no proof of violence and no proof of apprehension of danger, the plaintiff's suit for restitution must

MUHAMMADAN LAW—Restitution of Conjugal rights—(continued.)

be decreed. **MAHBUB JAN AND OTHERS v. ABDUL KARIM.**

[VI-218]

(50).———.] In a suit for restitution of conjugal rights brought by the husband the plaintiff's claim ought not to be decreed when it appears that there is imminent danger of the wife being subjected to bodily violence if compelled to return to her husband. **BEGAM v. KHUDA BAKHSH.**

[XII-77]

(10) Sister.

(51).———Possession of brother—Adverse possession.] This was a suit by a Muhammadan sister against her brother for her share in the estate left by her father. The lower appellate Court dismissed the claim holding that the burden of proving possession within twelve years from the date of the institution of the suit was on her, and that she had failed to satisfy it. *Held* that it was for the defendant to show that his possession was for twelve years, prior to the institution of the suit adverse to his sister. **IZZATUNNISSA v. MUHAMMAD TAQI.**

[I-90]

(52).———.] *X*, a Muhammadan lady and owner of a house, left after her death two sons *A* and *B* and two daughters *C* and *D*. Subsequently *B*'s rights and interests in the house were sold in execution of a decree against him and purchased by *A*. *A* was however resisted in taking possession of the house purchased by him, by his sister *C* who claimed ½th share of the house as her inheritance from her mother. Hence this suit under s. 331 of the Code of Civil Procedure, between *A* as plaintiff and *C* as defendant. It has been found as a fact that *X* had divided the house by a partition wall between her two sons and that the brothers had exercised rights of ownership over it by making repairs, &c. *Held* that the possession of the brothers after the death of the mother would under the circumstances of the case be presumed to be adverse, and more than 12 years having elapsed since her death the right of the sisters in the house was extinguished. **HIDAYAT-UN-NISSA v. AHSAN ALI.**

[IV-296]

(53).———.] *Held* that the circumstance that the name of a brother alone is entered in the Government records as the owner of the estate does not go very far and is certainly not conclusive to show that his sisters had no engagement of their shares. **FAZL KARIM v. UMDA BIBI AND OTHERS.**

[IV-171]

INAYAT HUSEN AND OTHERS v. ALI HUSEN AND OTHERS.

[XVIII-19]

MUHAMMADAN LAW—Restitution of Conjugal rights—(continued.)**(11) Wakf.**

(54).———Shia law—Directory provisions—Provisions in derogation of endowment.] A Muhammadan of the Shia sect while creating an endowment of certain portions of his *zamin-dari* property, after stating specifically the uses to which the income arising from the endowed property was to be applied, went on to say: "The said Musammat, the *mutawalli*, (who is the childless wife of the *wagif*) shall be bound to maintain herself as well as myself with the money that remains after the *muharram* expenses and to allow me to be inconvenienced in any way and to live with me until my death leading a respectable and pure life, and when I die to reside in my house." *Held* that the clause above quoted amounted merely to a direction on the part of the *wagif* as to the manner in which he wished the *mutawalli* to dispose of the wages paid to her as such, and was not a provision in derogation of the endowment—an "eating out of the profits" by the *wagif*—which might be repugnant to the Shia law. **ZULFIQAR ALI KHAN v. SHIRIN BEGAM.**

[XIV-5]

(55).———Dedication for charitable purposes—To preserve the estate.] Where a Muhammadan of the Shia sect during his last illness executed a document purporting to come into operation after his death, which document provided in a most complete manner of the devolution of his property, with the intention apparently for preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowance for the other members, and of maintaining the dignity of the *riyat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties. *Held* that such a document could not be construed as creating a *wagf*. Though it was not impossible that a document creating a *wagf* might contain provision also for the family of the settler, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses; but the object of the executant was evidently merely the maintenance of the family estate and of the dignity of the *riyat*. *Sheikh Mahomed Ahsanilla Choudhry v. Amarchand Kundu* (L. R., 17 I. A., 28) followed. *Ranee Khujooroonissa v. Mussammat Roushunjahan* (L. R. 3, I. A., 291) and *Nizamuddin Gulam v. Abdul Gafur* (L. R., 13, Bom., 264) referred to. **MURTAZAI BIBI AND ANOTHER v. JUMA BIBI AND OTHERS.**

[XI-13]

MUHAMMADAN LAW,—Wakf, (continued.)

(56).—*Provision for maintenance of kindred.*] The fact that the grantor of a *wakf* has in the deed of constituting the same made some provision for the maintenance of his kindred and descendants will not render the *wakf* invalid. *Sheikh Mahomed Ahsanullah Chowdhury v. Amarchand Kundu* (L. R., 17 I. A., 28) and *Muzhurool Hug v. Pukraj Dittarey Mohapatra* (13 W. R., 235) referred to. DEOKI PRASAD AND OTHERS *v.* INAIT-ULLAH.

[XII-48]

(57).—*Dedication to charitable purposes.*] In determining whether a disposition of property made by a Muhammadan is or is not a valid *wakif* the intention of the *wakif* may be interpreted by reference to custom prevailing at the time the *wakif* was made; and if there is found to be a substantial dedication of the property dealt with to charitable uses that dedication will constitute a valid *wakif*. *Mahomed Ahsanullah Chowdhury v. Amarchand Kundu* (L. R., 17 Cal., 498) and *Abul Fata Mahomed Ishaq v. Russomoy Dhur Chowdhury* (L. R., 22 I. A., 76) referred to. Although under the Muhammadan ecclesiastical law it is not binding to distribute alms or to make any kindred charity in connection with the ceremonies of *fateha* and *kadam sharif*, according to the custom amongst *Sunni* Muhammadans in India the distribution of sweetmeats and other eatables to the poor and other visitors has become an integral part of the ceremony connected with *fateha*. PHUL CHAND *v.* ARBARYAR KHAN AND ANOTHER.

[XVII-49]

(58).—*Dedication of tar and khajur trees.* Held that intoxicating liquors cannot form a valid subject of *wakif* under the Muhammadan law, but there is nothing in the principles of that law to prevent tar and khajur trees from forming a lawful subject of *wakif*. MUHAMMAD ZIA-UL-HAQ AND ANOTHER *v.* BASANTA AND OTHERS.

[II-147]

(59).—*Seisen.*] According to the law of *Sunni* Muhammadans it is essential to the validity of a *wakf*, that the *wakif* should actually divest himself of possession of the *wakf* property. Hence where a *Sunni* Muhammadan executed and registered what purported to be a deed of *wakf* but never acted upon it and retained possession until his death of the property dealt with by the deed, which property subsequently passed to his two sons by inheritance. Held that no valid *wakf* of the property mentioned in the deed was constituted. MUHAMMAD AZIZ-UDDIN AHMAD KHAN *v.* THE LEGAL REMEMBRANCER TO GOVERNMENT, N.-W. P. AND OUDH.

-[XIII-109]

MUHAMMADAN LAW,—Wakf, (continued.)

(60).—*Masjid—Wahabis—Amin.*] According to the Muhammadan law, a mosque cannot be dedicated or appropriated exclusively to any particular school or sect of *Sunni* Muhammadans. It is a place where all Muhammadans are entitled to go and perform their devotions as of right, according to their conscience. No one sect or portion of the Muhammadan community can restrain any other from the exercise of this right. Members of the *Muhammadi* or *Wahabi* sect are Muhammadans, and as such entitled to perform their devotions in a mosque, though they may differ from the majority of *Sunni* Muhammadans on particular points. But any Muhammadan would commit a criminal offence who not in the *bona fide* performance of his duties, but *malafide*, for the purpose of disturbing others engaged in their devotions, made any demonstration, oral or otherwise, in a mosque, and disturbance was the result. So held by the Full Bench. *Queen Empress v. Ramzan* (L. R., 7, 461) referred to.

Per MAHMOOD, J.—According to the Muhammadan ecclesiastical law, the word "*Amin*" must be said and should be pronounced at the end of the prayer ending with *Sura-i-Fateha*; but there is no authority for holding that it should be pronounced in a loud or in a low tone of voice, and (provided no disturbance of the public peace is caused) a Muhammadan pronouncing the word loudly, in the honest exercise of conscience, commits no offence or civil wrong. ATA-ULLAH AND ANOTHER *v.* AZIM-ULLAH AND ANOTHER.

[X-179]

(12) Wife.

(61).—*Unity of interest.*] Held that the Muhammadan law does not recognize any such principle as the unity of ownership between the husband and wife. JAMALUDDIN AND ANOTHER *v.* KAMALUDDIN.

[VII-260]

(13) Will.

(62).—*Shia law—Words used to constitute will.*] Under the law applicable to the *Shia* sect of Muhammadans a bequest may be constituted by the use of any expression that sufficiently indicates the intention of the testator. BODHA BIBI *v.* HAIDRI BEGAM AND OTHERS.

[XIV-36]

(63).—*Consent of heirs.*] This was a suit by a Muhammadan widow for her share of the estate left by her husband. It was resisted by the defendants, (the other heirs of the deceased) on the ground that the deceased had made a will under which the plaintiff was entitled only to an allowance of Rs. 20 per month, and that the plaintiff had acquiesced therein by receiving

MUHAMMADAN LAW,—Will (continued.)

the allowance for about 15 years. It appeared that the Court below did not insist on the production by the defendants of the account-books of the estate, which under s. 130 of Act X of 1877 they had been called upon to produce. The account-books, it was alleged by the plaintiff, disproved the fact of such acquiescence. *Held* that the disposition contained in the will was valid, if the heirs, after the testator's death, consented to it, but not otherwise. The plaintiff was entitled to the production of the account-books. **HAMIDA BEGAM v. AHMAD SHAH AND OTHERS.**

[I-163]

(64).—*Waqf-bil-wasiyat.* According to the law applicable to the *Shia* sect of Muhammadans a *waqf-bil-wasiyat*, or testamentary *waqf* is not valid unless actual delivery of possession of the appropriated property is made by the *waqif* (or appropriator) himself to the *mutawalli* (or superintendent appointed by the *waqif*). According to the same law the death of the *waqif* before actual delivery of possession of the appropriated property by him to the *mutawalli* or the beneficiaries of the trust renders the *waqf* null and void *ab initio*. Consequently, where the *waqif* dies, as mentioned above, before actual delivery of possession of the appropriated property, the consent of his heirs to the testamentary *waqf* cannot validate such *waqf*. Distinction between *waqf-bil-wasiyat* and *wasiyat-bil-waqf* explained. **AGHA ALI KHAN AND ANOTHER v. ALTAF HASAN KHAN AND ANOTHER.**

[XII-187]

(65).—*Gift—Maraz-ul-maut*

See No. (24).

PRACTICE—CIVIL.

- (1). Pleadings.
- (2). Suit based on one ground, decree on another.
- (3). Relief not asked for in plaint.
- (4). Suit based on one ground, appeal on another.
- (5). Plea first raised in second appeal.
- (6). Plea not taken in memorandum of appeal.
- (7). Plea that judgment is perverse.
- (8). Pardah ladies.
- (9). Miscellaneous cases.

PRACTICE—CIVIL, (continued.)**PRACTICE—CIVIL.**

(1). Pleadings.

(1).—*Strictness in construing.* *Held* that pleadings in the Indian Courts must not be construed with the same strictness as in English Courts. *H. H. The Nawab Nazim v. Umrao Begam* (21 W. R., 60) referred to. **NATHA SINGH AND ANOTHER v. JODHA SINGH AND OTHERS.**

[IV-140]

(2). Suit based on one ground, decree on another.

(2).—*Exclusive title—joint title.* This was a suit for possession of certain land as the separate private property of the plaintiff and for the demolition of a wall erected thereon by the defendant. The lower Court's finding, that the land was the joint property of the plaintiff and the defendant, decreed the second relief claimed. It was contended in appeal that this was a relief which the Court could not give. *Held* that when a Court sees that a person is entitled to a relief which he asks, although on grounds other than those put forward in the plaint, it should give that relief, particularly if the refusing to grant such relief will operate as a bar to any future claim. **ULFAT RAI AND ANOTHER v. SUKHPAL RAI.**

[VII-43]

(3).—*Title—Possession.* *Held* that in a suit for a declaration of title to be maintained in possession of certain property as hereinafore, though the plaintiff fails to prove the allegation he came into Court with, he is nevertheless competent to maintain the suit as against a trespasser, by falling back on the *prima facie* title shown by him by proof of his possession. **MUHAMMAD YUSUF v. SUKH NATH**

[VII-55]

(4).—*Fraud—Undue influence.* The plaintiffs in a suit denounced in the plaint their two signatures to a sale-deed as forgeries, and never alleged that they witnessed it under pressure. The Court of first instance found them to be genuine, and the lower appellate Court, while agreeing with the Court below in its findings upon the question of the genuineness of the signatures, observed that they were obtained under pressure, and so reversed the decree of the Court below. On second appeal to the High Court, *held* that Courts are not to raise important and serious issues in a case for the parties when they have not raised it themselves by their own pleadings in the cause. **WALI-ULLAH KHAN AND ANOTHER v. MUHAMMAD ISRAR-ULLAH KHAN AND OTHERS.**

[VIII-242]

PRACTICE, — CIVIL, — Suit-based on one ground, decree on another
(continued.)

(5). — *One fraud — Different fraud.* Although in a suit based upon fraud it is, ordinarily speaking, incumbent upon the plaintiff to substantiate completely by his evidence the precise fraud alleged in the plaint, it is nevertheless competent to the Court to grant the plaintiff a decree upon the basis of a fraud disclosed by the facts given in evidence, even if such facts do not constitute a fraud to the full extent alleged in the plaint, provided that the case so disclosed by the evidence is not inconsistent with the case set up in the plaint. *GANGA RAM v. DWARKA PRASAD AND ANOTHER.*

[XIV-6

(6). — *Damages — Rent.* A sued B for the possession of certain land by virtue of a deed of sale and for compensation for the period they were out of possession. The lower appellate Court finding that the proprietary rights alone in the land were sold dismissed the suit for possession but gave him a decree for damages because B had paid no rent as tenant. Held that to give such a decree would be to entirely change the nature of the suit. *NATHU RAI AND OTHERS v. MAN RAM RAI AND OTHERS.*

[II-57

(7). — *Account stated — General account.* Held that where a suit on accounts stated failed because the plaintiff could not establish it, the plaintiff was not on such ground debarred from recovering such sums of money as had been advanced by him to the defendant within three years next before the institution of the suit. *RAM PRASAD v. JAMNA.*

[II-93

(8). — *Agency — Misfeasance.* A Bank sued H, its agent, who had appointed N to act in the matter of the agency, for money belonging to it which H had paid N for the purposes of the agency and which was not accounted for by N claiming the same on the ground that N had been appointed to act as a sub-agent without authority. The lower appellate Court found that N had been appointed by H to act in the matter of the agency with authority, but, instead of dismissing the suit with reference to this finding gave the plaintiff Bank a decree against H on the ground that he had not exercised ordinary prudence in selecting N as an agent for his principal. Held, that inasmuch as the plaintiff Bank had not claimed relief on the ground that H had failed in his duty in naming N as an agent for his principal, but on the ground that N had been appointed without authority, and failed to prove its case, the suit should have been dismissed. *HAMILTON v. THE LAND MORTGAGE BANK OF INDIA.*

[III-99

PRACTICE, — CIVIL — Suit-based on one ground, decree on another,
(continued.)

(9). — *Lease — Another title.* This was a suit to eject the defendant from certain rooms and to recover arrears of rent, on the allegation that the rooms belonged to a temple of which the plaintiff was a superintendent and that the defendant had taken a lease of the rooms from the plaintiff. Defendant denied the lease as well as plaintiff's title as superintendent. The original Court found both the issues in favor of the plaintiff and decreed the claim. The lower appellate Court on the other hand found the first allegation (lease) to be false but decreed the plaintiff's claim on other grounds. Held that this was contrary to law and practice. A plaintiff who fails to prove the case he sets up, cannot be allowed to succeed upon another case not disclosed in his pleadings. *BAJRANG DAS v. NAND LAL.*

[IV-285

(10). — *Partition — Another ground.* The respondents sued the appellants for possession or maintenance of possession of certain lands by virtue of a partition alleged to have taken place in 1868. The Court of first instance dismissed the suit on the ground that the respondent had failed to establish such partition. The lower appellate Court agreed with the Court of first instance that there had been no such partition, but gave the respondents a decree upon grounds which they had not made the foundation of their suit. Held that the lower appellate Court was not competent when the respondents had failed to establish the case set up by them, to give them a decree upon grounds which they had not made the basis of their suit. *BISHESHAR DAS v. RAM JAISERI DAS AND OTHERS.*

[I-158

(3) Relief not asked for in plaint.

(11). — *Claim to redeem one mortgage — Decree to redeem another.* A plaintiff is only entitled to succeed upon the cause of action alleged by him in his plaint. So where plaintiffs came into Court alleging a mortgage of the year 1854 made by their predecessor in title in favor of the defendant and seeking to redeem the mortgage of 1854, and it was found that the plaintiffs had failed to prove the mortgage of 1854, it was held that the plaintiffs were not entitled in that suit to a decree for redemption of other mortgages which might be found to subsist between the parties, but which formed no part of the cause of action upon which the plaintiffs came in to Court. *Read v. Brown* (L. R., 22 Q. B. D., 128); *Murti v. Bhola Ram* (I. L. R., 16 All., 165); *Salima Bibi v. Sheikh Muhammad* (I. L. R. 12 All., 131); *Ratan Kuar v. Jiwan Singh* (I. L. R., 1 All., 194); *Parmanand Misr v. Shih Lal* (I. L. R., 11 All., 438); *Zingari Singh v. Bhagwan Singh* (W. N. 1889, p. 187); *Krishna Pillai v. Ranga Sami Pillai* (I. L. R., 18 Mad., 462); *Govind Rao Deshmukh v. Raghu Desh-*

PRACTICE—CIVIL—Relief not asked for in plaint, (continued)

mukh (I. L. R. 8 Bom. 543); and *Eshen Chunder Singh v. Shama Churn Bhutto* (11 Moo. I. A., 7) referred to. *Lakshman Bhisajl Sirsekar v. Hari Dinkar Desai*, (I. L. R. 4 Bom., 584); and *Chimnaji v. Sakaram* (I. L. R., 17 Bom., 365) dissented from. **SHEO PARSAD AND ANOTHER v. LALIT KUAR.**

[XVI-132]

(12).—*Suit for exclusive possession—Decree for joint possession.* It is competent to a Court in a suit in which the plaintiff claims exclusive possession of immovable property to give a decree for joint possession thereof. *Khagendra Narain Chowdhry v. Matangini Debi* (I. L. R., 17 Calc., 814) followed. See also *Wahid Alam v. Safat Alam* (W. N. 1890, p. 130—E. D.). **RAM CHANDAR RAO AND ANOTHER v. MADHO RAO.**

[XI-45]

RAMBHOWAN v. RAMBARAN.

[X-166]

WAHID ALAM v. SAFAT ALAM AND OTHERS.

[X-130]

(13).—*Suit for exclusive possession.* Although under certain circumstances in a suit for exclusive possession of immovable property a decree for joint possession may be given, nevertheless such a decree should not be given unless the plaintiff asks for it and the evidence shows that he is entitled to it. **ANTU SINGH AND OTHERS v. MANDIL SINGH AND OTHERS.**

[XIII-177]

(14).—*Decree for partition.* Where in a suit for possession of immovable property each party claimed that he was entitled to sole and exclusive possession. *Held* that it was not competent to the Court to decree partition of the property in suit whether the pleadings were not amended. **GAJADHAR AND ANOTHER v. GAYA DIN.**

[XIII-103]

(15).—*Redemption on payment of certain sum—Decree on payment of larger sum.* This was a suit by a mortgagor, for the redemption of certain property, on the payment of Rs. 20, which he alleged to be the mortgage money. The defendant mortgagee alleged that the land had been mortgaged for Rs. 400. The lower appellate Court dismissed the suit on the ground that the plaintiff had failed to substantiate his allegation that the land had been mortgaged for Rs. 20. *Held* that the decree of the Court below was correct. It was not bound to determine what the actual amount of the mortgage

PRACTICE—CIVIL—Relief not asked for in plaint, (continued.)

money was as the plaintiff appellants did not ask for an account, nor did they offer to pay any such sum as would be found by the Court. **BHAGWANDIN AND OTHERS v. BACHHU AND OTHERS.**

[II-137]

(16).—*Suit for a whole house—Decree for half.* *K S* and *J S* were co-sharers by purchase of a certain house. *K S* gave the appellant simple mortgage of the whole house and subsequently sold it to the respondent. This was a suit by the appellant against *K S* and the respondent, to enforce his mortgage on the house. The Court of first instance decreed the claim but the lower appellate Court reversed that decree and dismissed the suit on the ground that the mortgage of the whole house without the consent of *J S*, the other co-sharer, was invalid. In second appeal the appellant contended that he should be granted a decree in respect of a moiety of the house. The Court observed that the lower appellate Court's reasons for reversing the decree of the Court of first instance could not be approved. At the same time, however, the appellant ought not to be given a decree for a moiety of the house as (i) there was nothing on the record to show what the extent of *K S*'s interest in the house was; (ii) to give a decree under the circumstances of this case for a moiety or other portion of the house would be practically to alter the character and plain terms of the contract on which the appellant based his claim in this suit. **CHAIN SUKH v. ABU ALI.**

[I-22]

(17).—*Suit for sale—Personal decree.* *Held* that as the plaintiff in this case had asked only for the sale of the mortgaged property the lower Courts had travelled beyond the legitimate scope of the plaint by imposing a personal liability on the appellant, defendant. **NUR MUHAMMAD v. RATAN RAI.**

[I-139]

(18).—*Suit for money—Decree for enforcement of lien.* In a suit for money due on a bond in which certain immovable property was hypothecated, although the plaintiffs made a subsequent auction-purchase also a defendant and stated in the plaint the fact of its having been hypothecated and so purchased, they failed to ask for the enforcement of the hypothecation. *Held* that although as a general rule no relief other than that asked for in the plaint should be given, but having regard to the circumstances of the case, the High Court would not interfere with the order of the lower appellate Court enforcing the hypothecation. **HAR NARAIN v. BUDHU AND ANOTHER.**

[I-10]

PRACTICE,--CIVIL--Relief not asked for in plaint, (continued.)

(19).—*Suit as mortgagee—Decree as proprietor.*] This was a suit by a mortgagee under a usufructuary mortgage against the widow of the mortgagor and two *patta* holders from her, to be put in possession of the *sir* land of the mortgagor upon the ground that the widow who had become an exproprietary tenant in respect of the *sir* lands had illegally transferred her rights as occupancy tenant to the two other defendants. The suit was dismissed by the Court below on the ground that as a mortgagee the plaintiff had no *locus standi* to maintain the suit. In second appeal it was contended by the plaintiff that he is really only seeking to protect his proprietary interest in the *sir* which may be damaged by the transfer of the cultivation of the land, and that as a temporary *zamindar* the plaintiff has a right to restrain the widow from sub-letting her occupancy right. *Held* that this is not the ground upon which the plaintiff has brought his suit nor is it the relief which he has asked for. **MUHAMMAD ALADAT KHAN v. NARPAT AND OTHERS.**

[VII-130]

(20).—*Suit for possession—Declaratory decree.*] On the death of one *DD*, his brother-in-law *US* succeeded to his estate by virtue of a will. On the death of *US*, his two widows and the widow of *DD* took possession of the estate jointly. The present suit was brought against the three ladies by *J M* who claimed the property as heir to *DD* on the allegation that the will created only a life interest in favor of *US* and that the widow of *DD* had disentitled herself to possession by disputing the plaintiff's title. *Held* that if the will created only a life interest in favor of *US* the estate, on his death, would go to the widow of *DD*, otherwise to the widows of *US* and the plaintiff was on neither construction of the will entitled to succeed. *Held* further that in the suit as brought the plaintiff could not get a declaration that he will be entitled to possession of the estate after the death of *DD*'s widow as the declaration was not specifically claimed in the plaint. A mere vague prayer for "any other relief which, in the opinion of the Court, may now or hereafter be necessary for the plaintiff" was not sufficient. **NAULAKHI KUAR AND OTHERS v. JAI MANGAL SINGH.**

[V-279]

(4). Suit based on one ground, appeal on another.

(21).—*Will—Reversionary right.*] The appellant, whose suit for possession and establishment of title as regards the estate of a deceased Hindu, against his widow and her brother, based on a nuncupative will by the deceased in favor of the plaintiff, was dismissed by both the lower Courts, on the ground

PRACTICE,--CIVIL--Suit based on one ground, appeal on another, (continued.)

that the will was not proved, contended in second appeal that he being the next and the only reversioner to the estate of the deceased was at least entitled to a decree in the terms of illustration (2) to s. 42 of the Specific Relief Act as the widow had made a gift of the estate in her brother's favor. *Held* that to grant the relief would be to decree in a plaintiff's favor what he did not ask for in his plaint, and upon different grounds to those upon which he based his claim. **BALBHADDAR v. SURTI AND ANOTHER.**

[I-93]

(22).—*Tenancy—Trespass.*] The plaintiff came into Court on the allegation that she was the owner of a certain house and that the defendants were her tenants at a certain rent, and she sought to eject the defendants for non-payment of rent. The Court of first instance having found her allegations of tenancy to be untrue, she then in appeal endeavoured to support a plea that the defendants were trespassers, such plea having formed no part of the original case. *Held* that the plaintiff could not under the circumstances be heard in support of a new plea of which the defendants had had no notice until the case was in appeal. *Lakshminihai v. Hari-bin Raoji*: (9 Bom. H. C. Rep., 6) cited. **NAIKU KHAN AND ANOTHER v. GAYANI KUAR.**

[XIII-69]

(23).—*Adoption—Inheritance.*] The respondents claimed possession of certain land as heir to one *RR*, deceased, who, they alleged, died without leaving issue. The appellants resisted the suit on the ground that one *AR*, whom they represented, had been adopted by *RR*. The case turned on the question of this adoption. The Court of first instance found in favour of the appellants, and the lower appellate Court against them. On second appeal the appellants set up as a defence to the suit, for the first time, that one of them was a nearer heir to *RR* than the respondents, and had therefore a better title to *RR*'s estate than the respondents. *Held* that it was too late to raise an entirely new defence. **RAGHUNANDAN RAI AND OTHERS v. SUT RAM RAI AND ANOTHER.**

[I-72]

(24).—*Exclusive title—Joint possession.* Where a plaintiff who had sought to eject the defendants as trespassers from certain land, and whose suit had been dismissed by both the lower Courts, pleaded in second appeal that the decrees of the lower Courts nevertheless showed that he was entitled to a decree for joint possession with the defendants of the property in suit; the Court under the circumstances declined to grant the plaintiff's prayer for a decree for joint possession. **JAI RAJ MAL v. NIADAR AND OTHERS.**

[XIII-196]

PRACTICE—CIVIL— Suit based on one ground, appeal on another, (*continued.*)

(25).—*Dower liquidated—Dower lien.*] This was a suit by the husband of a Muhammadan lady against her mother and brother to recover the share of his wife in the property left by her father on the allegation that the dower of the widow was only 500 pice and 2 gold *dinars* and that it had been paid. It was found by the Court below that the dower was Rs. 35,000 and that it had not been paid. *Held* that the plaintiff could not in second appeal contend that the widow had only a limited interest in the property in her possession, *viz.*, to remain in possession till the dower was paid. **MUHAMMADYAR AND ANOTHER v. WILAYAT ALI AND OTHERS.**

[II-139]

(26).—*Transfer in lieu of dower—Possession in lieu of dower.* A brought this suit to have certain property declared not to be liable to be sold in execution of a decree obtained against her husband, on the ground that the property had been transferred to her before the death of her husband, in consideration of a dower-debt and she was since then in possession. The lower Court held the transfer not proved. *Held* that A could not be allowed in appeal to change her ground and say that she was lawfully in possession and had a claim for a lawful dower-debt. **AMIR BIBI v. NATHMAL DAS.**

[III-147]

(27).—*Pre-emption—No sale—No custom.*] This suit for pre-emption founded on custom was resisted in the Court of first instance on the sole ground that the property was practically never sold, that the transaction did not really amount to a sale. On appeal by the vendee defendant from the decree of the first Court in favor of the plaintiff, it was for the first time contended that the custom of pre-emption had not been proved by the plaintiff. The lower appellate Court allowed the contention and dismissed the suit on the ground that the custom was not proved. The plaintiffs appealed to the High Court on the ground that as the vendee defendant did not dispute the custom of pre-emption in the first Court the suit should not have been dismissed. The High Court thinking that the plaintiff might have been prejudiced in the trial of that issue remanded the case for the retrial of the issue. The lower appellate Court retried the issue and found that the custom was not proved. The plaintiffs-appellants objected to the finding on the ground that the issue should not have been remanded as it was not raised in the pleadings in the Court of first instance. *Held* that as the existence of the custom was a very material question and as from the papers before him it was very doubtful whether the alleged custom prevailed in the locality, the District Judge was right in framing and trying that issue and this Court in remitting that issue for retrial. The

PRACTICE—CIVIL— Suit based on one ground, appeal on another, (*continued.*)

appeal must be dismissed. **ANJANI KUMAR LAL AND ANOTHER v. SHANKAR AND OTHERS.**

[V-126]

(28).—*Decree—Fraud.*] The property in dispute which originally belonged to one S D, was, after the death of his widow, taken possession of by A S who had married a daughter of a brother of S D. A S died and his first wife having predeceased him, M, his second wife, took possession of the property. Her right to do so was, in 1874, resisted by one G S, a collateral relation, and the then next heir of S D. The dispute was put in suit but by a consent decree the parties divided the property equally between them. Subsequently G S died and thereupon M took possession of the remaining moiety of the property and then transferred her rights and interests in it to K A, the present defendant. K L, who was next in succession to S D, brought the present suit for possession of the property and *mesne* profits against M and her vendee K A. The suit was resisted by K A in the lower Courts on the grounds that the plaintiff was not the heir of G S, and that the consent decree of 1874 was null and void by reason of fraud and collusion by the parties who suffered it. The lower Courts decreed the plaintiff's claim. In second appeal the defendant K A contended that a decree for the entire property was erroneous inasmuch as the plaintiff's suit in respect of half of it was barred by the consent decree of 1874. *Held* that the plea was not open to the defendant in second appeal. **KHAIRAT ALI v. KISHEN LAL.**

[I-II]

(29).—*Joint family—Exclusive title.*] In this case 4 out of 5 joint owners of an ancestral house united in selling a portion of it to A. The fifth, say, B, resisted the vendee's claim to possession on the single ground that the property originally belonged to one X and he had purchased it from X. This was found against him by both the lower Courts, and in second appeal, for the first time, he wanted to turn his ground and to plead that the house being joint, a sale without his co-parcener's consent was illegal. *Held* that he could not at this stage of the suit be allowed to change his defence so radically. **PATI RAM v. AMBA PRASAD.**

[VI-88]

(30).—*Joint family—Exclusive title.*] The plaintiff alleging himself to be joint in estate with A, his grand uncle, sued to set aside an absolute gift of the house in suit made by A in favour of his wife, as also the subsequent sale of the house by the wife to the defendant. The lower appellate Court finding that A was separate in estate from plaintiff and the sole and exclusive owner of the house, held the gift to the wife and the sale by her to defendant

PRACTICE—CIVIL—Suit based on one ground, appeal on another, (continued.)

valid and dismissed the suit. On appeal to this Court plaintiff contended that he was the heir of the donee and that under the deed of gift she had no power to alienate. *Held* that the case put forward in second appeal being totally different from that which was originally put forward and tried, the appeal should be dismissed. *Held* further that from the wording of the deed of gift it appeared that the husband intended to give and did give to his wife an heritable estate in, and power of alienation over, the property, the subject of the gift, and therefore the sale by the wife was valid. *Kunbehari Dhar v. Prem Chand Datt* (I. L. R., 5 Cal., 684) referred to. *KANHIA v. MAHIN LAL*.

[VIII-181]

(31).—*No mortgage—Foreclosure invalid*. This was a suit for possession of certain property based on a conditional mortgage which had been foreclosed and on an agreement made at the time of the foreclosure by the defendant to transfer the land to the plaintiffs. The defendant met the suit in the Court below by denying the mortgage-deed as well as the agreement. In second appeal the defendant for the first time pleaded that the foreclosure proceedings were invalid. *Held* that the plea could not be for the first time urged in second appeal. *BHADORIN GUARDIAN OF KUAR MOHINDER SINGH, A MINOR, v. LACHMAN SINGH*.

[II-103]

(32).—*Respondent setting up new case in appeal*.] A respondent to a second appeal, defendant in the suit, should not be allowed to set up in a second appeal a case involving findings of fact, which case he has never set up in either of the lower Courts. *KESHO TEWARI v. RADHE KISHAN*.

[XVIII-107]

(5) Plea first raised in second appeal.

(33).—*Plea going to root of suit—Fresh evidence*.] Although speaking generally, questions which have not been raised either in the Court of first instance or in the lower appellate Court, and more particularly questions of law which involve findings of fact should not be allowed to be raised in second appeal before the High Court, yet where the question goes directly to the root of the plaintiff's title to maintain the suit, and is a pure question of law arising upon admitted facts, the High Court should not, because it was not raised in the Court below, refuse to consider it in second appeal. *DHARAM DAS v. NAND LAL SINGH AND OTHERS*.

[IX-78]

(34).—*Legal plea—Fresh evidence*.] The uniform practice of the Court is to allow legal plea for the first time to be taken in

PRACTICE—CIVIL—Plea first raised in second appeal, (continued.)

second appeal only when they require no new points of fact for determination and when those pleas can be disposed of on the materials on the record. *MAHABIR TIWARI AND ANOTHER v. JHANGUR AND ANOTHER*.

[VII-213]

(35).—*Plea of res-judicata*.] In this appeal the High Court allowed to be argued before it a ground of appeal raising a question of *res-judicata* which had not been raised in either of the Courts below, and referred issues to the lower appellate Court to ascertain if such plea were well-founded. *Muhammad Ismail v. Chatter Singh* (I. L. R., 4 All., 69) referred to. *TEK NARAIN RAI AND OTHERS v. DHONDH BAHADUR RAI AND OTHERS*.

[XVIII-104]

(36).—*Plea as to deficiency in court-fees*.] The plaintiffs suing in respect of certain plots of land by mistake undervalued their claim with regard to the said land and in consequence paid an insufficient court-fee on their plaint. This mistake was not discovered until after limitation had expired, and when discovered the deficiency was at once made good. *Held* that no plea as to the deficiency in the court-fee having been raised by the defendant before the decision of the suit in the Court of first instance, such plea could not be raised for the first time in appeal. *WILAYAT ALI KHAN v. UMAR DARAZ ALI KHAN AND OTHERS*.

[XVII-33]

(37).—*Plea that suit was barred by s. 244, Civil Procedure Code*.] An objection to the decree of the lower appellate Court, and in accordance with the ruling of the Full Bench in *Seth Chand Mal v. Durga Dei* (W. N., 1890, 137) that under s. 244 of the Code of Civil Procedure the plaintiff-respondent's remedy was not by suit but by appeal in the execution department, was allowed as a matter of law going to the very root of the suit, though not taken in the memorandum of second appeal. But inasmuch as that Full Bench ruling reversed previous decisions of the High Court, in reliance on which the plaintiff had brought his suit and as the question of jurisdiction was only raised at the stage of second appeal, the High Court dismissed the suit without costs in every Court. *ISHRI DAT v. MAHABIR PRASAD*.

[X-133]

(38).—*Plea of limitation—Fresh evidence*. *Held* that a plea of limitation urged for the first time in second appeal, and which rests upon the interpretation of a particular instalment bond and which would render it necessary to take evidence as to special local usage of writing instalment bonds could not be entertained. *Held* further that a finding of fact

PRACTICE—CIVIL—Plea first raised in second appeal, (continued.)

could not be disturbed in second appeal. *ATMA RAM v. SARDAR KUAR AND ANOTHER.*

[IV-327]

(39).—*Plea as to frame of suit.* This was a suit by one of the heirs of a Muhamadan wife against the heirs of her husband for his share of her dower. The plaintiff also was an heir of the husband and he therefore left out a portion of the dower in consideration of the estate which had come to him. The parties were jointly in possession of the whole estate. The plaintiff had not obtained a certificate under Act XXVII of 1860 qualifying him to collect the debts due on the wife's estate, nor had he brought the suit in the form of an administration suit. *Held* that the failure of the plaintiff to obtain a certificate, and to frame the suit as an administration suit, though serious objections, could not be given effect to, in second appeal, as the case had been heard out between the parties, on the merits, on apparently ample materials, and the suit had been tried by the District Judge as an administration suit and the defendants had not taken those objections in the Courts below. *HAKIM-UN-NISSA AND ANOTHER v. ABDULLA.*

[VIII-202]

(40).—*Held* that a suit should not be dismissed on the simple ground that the plaint did not give the boundaries or limits of the land sued for, specially where the objection was not taken in the Court of first instance, and the appellant had filed with his plaint a copy of the sale certificate which gave the particulars of the land out of which the appellant sought to obtain a share. The Judge might have under the circumstances examined the appellant to clear up the point. *AWANDA RAI v. NAIGU RAI.*

[II-242]

(41).—*Plea that respondent had confessed judgment.* *Held* that an objection taken for the first time in second appeal to the effect that one of the respondents had confessed judgment and the suit against him should therefore have been decreed, could not be entertained. *DWARKA AND ANOTHER v. RAMDHANI AND OTHERS.*

[III-158]**(6) Plea not taken in memorandum of appeal.**

(42).—*Plea of res-judicata.* A plea of *res-judicata* may be taken orally in second appeal even though it is not entered on the memorandum of appeal, inasmuch as such a plea involves a question of jurisdiction which a Court is bound to entertain whenever such

PRACTICE—CIVIL—Plea not taken in memorandum of appeal, (continued.)

question comes to its notice. *BRIJBASI RAI AND OTHERS v. SHIVATAHLU RAI AND OTHERS.*

[XI-10]

(43).—*Plea of deficient court-fees.* A plea that the memorandum of appeal in the lower appellate Court was insufficiently stamped and that such deficiency was not made good within the period of limitation is not a plea which can be raised at the hearing of second appeal when it has not been taken in the memorandum of appeal. *RAM KISHAN UPADHIA v. DIPA UPADHIA AND OTHERS.*

[XI-166]

(44).—*Plea as to frame of suit.* At the hearing of the second appeal the appellants desired to urge that the suit was not maintainable with reference to the provisions of s. 43 of Act X of 1877. The appellants had taken this objection in the Court of first instance, but they had not taken it when they appealed from the decree of the Court of first instance and they had not taken it in their memorandum of second appeal. The Court refused under these circumstances to entertain the objection. *JHIMAL AND ANOTHER v. BECHU NARAIN SINGH.*

[I²-144]

(45).—*Plea that order under s. 32, Civil Procedure Code, was bad.* Where an order adding a defendant under s. 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh v. Chakardhari Singh (I. L. R. 15 All., 119)* referred to. Where there is a subsisting decree in a previous suit which as regards the subject matter of a subsequent suit would take effect under s. 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. *Karamali Rahimbhoy v. Rahimbhoy Habibbhoy (I. L. R., 13 Bom., 137)* referred to. *BANSI LAL AND OTHERS v. RAMJI LAL AND ANOTHER.*

[XVIII-75]**(7) Plea that judgment is perverse.**

(46).—*In* this second appeal the only plea was that "the judgment of the lower appellate Court is based on mere conjecture and not supported by the evidence on the record." The appellants however had not caused the evidence relied upon by them to be translated. *Held* that the appeal must be dismissed. *AJUDHIA PRASAD v. MOHAN LAL.*

[VI-167]

PRACTICE—CIVIL—Plea that Judgment is perverse, (continued.)

(47). ————.] In this second appeal the plea taken is that "The finding of the Court below on the *factum* of adoption is based on pure conjectures and is perverse" a plea contemplated in *Nivath Singh v. Bhikki Singh* (1. L. R., 7 All., 649). Time was given to the appellant to prepare a paper-book containing all the evidence in the case in order to enable the Court to see if the contention had force. That order was not complied with. *Held* that the appeal must under these circumstances be dismissed. **HEMRAJ v. PARTAB SINGH AND ANOTHER.**

[VI-166]

(48). ————.] It is not competent to an appellant in second appeal under a ground that the judgment of the lower appellate Court is perverse, to raise any question of law. **JAWALA PRASAD v. BINDA CHARAN AND ANOTHER.**

[XII-8]

(49). ————.] *A* obtained a decree against *B* for 2 *bighas* 5 *biswas* 10 *dhurs* out of the 3 *bighas* claimed. *B* appealed and the lower appellate Court modified the original decree by giving to the plaintiffs something more than was given to them by the first Court. *Held* that the lower appellate Court was not seized of the whole case, as the plaintiff had not appealed, and consequently could not award more than what had been given to the plaintiff by the first Court. **ISHRI MAL AND OTHERS v. BHAGWAN MAL AND OTHERS.**

[VII-214]

(8) Parda Ladies.

(50). ————*Fiduciary relation—Onus.*] *A* sued *B* (a *parda* lady) on a bond executed and registered on her behalf by her husband under a registered *mukhta namah-Am* or general power of attorney. The defence was that she had not borrowed any money from *A*, nor had her attorney given her any thing nor had she authorized him to execute the particular bond. *Held* that having regard to the facts that the defendant had never denied the execution of the power of attorney, nor had she ever said that she did not know what the power contained and also to the facts that the *mukhtarnama* was registered with all the formalities required by the law and after the necessary acknowledgment by the defendant, the plaintiff's case should be decreed. *Sudisht Lal v. Sheobarat Koer* (1. L. R., 7 Calc., 245) distinguished. **UDIT RAM v. KHATUN DAULAT.**

[III-24]

(51). ————.] *Held* following the fulings of the Privy Council that *parda* ladies are not bound by documents

PRACTICE—CIVIL—Parda Ladies, (continued.)

alleged to have been executed by them or on their behalf by a third person, (i) unless clear and strict proof of the agent's authority is given, (ii) (*Azeezunnisan v. Bagur Khan*, 2 *Sutherland's Judgment of the P. C.*, p. 572); unless the Court is satisfied that the transaction was explained to her and that she knew what she was doing specially when there was no consideration. *Ashgar Ali v. Delroos Banoo Begum* (1. L. R., 3 Calc., 324 &c. &c. 13 Moo., 1. A., p. 419) (17. W. R., p. 523); *Behari Lal v. Habiba Bibi W. N.*, 1886, p. 91.) **KANIZ FATIMA v. ABBAS ALI AND OTHERS.**

[VII-84]

(52). ————.] One Raja Khairati Lal died in 1866 possessed of considerable property, both moveable and immoveable. He left surviving him a widow, Rani Hulas Kuar, who died in 1878, a daughter, Rani Achhan Kuar, married to one Raja Lalji and two grandsons, sons of Achhan Kuar, Kuār Inayet Singh and Kuar Shamsher Bahadur, the latter of whom died sometime subsequent to 1881, as did also his father Raja Lalji. In December, 1877, a mortgage-deed was executed over certain of the ancestral property of the family of Khairati Lal, ostensible executants being Raja Lalji for himself, and Hulas Kuar, Achhan Kuar and Inayet Singh through Lalji as their general attorney. This deed was to secure a debt of Rs. 10,000 stated to be to some small extent for an advance in cash, and as to the balance in respect of certain previous debts and interest thereon. At the date of this bond both Inayet Singh and Shamsher Bahadur were minors. In April, 1881, Hulas Kuar having in the mean while died, and Inayet Singh having attained majority, but Shamsher Bahadur being still a minor, a second bond of a similar nature to the former was executed by Lalji, Achhan Kuar, and Inayet Singh for Rs. 20,000, this sum being recited as composed of various debts of earlier date with interest thereon, of an advance to pay Government revenue, an advance for expenses of the marriage of Lalji's daughter and a very small balance in cash. It was not shown that the debts secured by either of these two bonds were debts incurred for legal necessity by the widow or daughter of Khairatilal, or that the mortgagees after due inquiry had had reasonable grounds for believing that such necessity existed, nor was it shown that the mortgages were entered into with the consent of all the husband's kindred under circumstances which might raise a valid presumption that the debts secured by them were properly incurred. It was further not shown that the power of attorney under which Lalji purported to act in executing the bond of 1877, on behalf of Hulas Rai, Achhan Kuar and Inayet Singh was ever properly explained to the proposed executants or that they understood its import; nor was it shown that either of the bonds were duly explained to and compre-

PRACTICE—CIVIL—Parda ladies,
(continued.)

hended by the professed executants other than Lalji himself, in manner required by law in the case of documents executed by *pardah nashin* women; nor, though at the date of the execution of the second bond Inayet Singh had attained the age of majority, did it appear that he signed the bond with any clear knowledge of its contents, or of the liability which he was professing to incur thereby, or otherwise, than through the influence brought to bear on him by his father, Lalji. *Held*, on suit by the mortgagees to bring to sale the ancestral property which had been of Khairat Lal in his life-time, in enforcement of the two mortgages above mentioned, that the mortgages were not binding on the alleged executants or on the ancestral property at the date of suit in the hands of Achhan Kuar. It is absolutely necessary, before holding that a *pardah nashin* lady or her property is liable on a contract alleged to have been made by her, or in consequence of an alleged execution by her of a general power of attorney, to be reasonably satisfied that the liability she was incurring and the nature of the transaction were explained to her; and more particularly is this the case if it is sought, by reason of her having executed a document, to fix her and her property with a liability to pay a debt, which, if the document had not been executed by her or by an agent appointed by her with adequate power, could not have been enforced against her or her property. It is also necessary when money lenders in this country seek to enforce against the property of a Hindu family a contract of mortgage made by a reversioner who, although of age at the time, was then still of tender years and without experience of business, for the Court, when the question is raised, to be satisfied that the reversioner understood the nature of the transaction and the effect of the contract which he was entering into, or that the reversioner or the family property, in which the reversioner had an estate in expectancy only, was liable for the debt in respect of which the mortgage is sought to be enforced and that no unfair advantage was taken of the reversioner's youth and inexperience. **ACHHAN KUAR AND ANOTHER v. THAKUR DAS AND OTHERS.**

[XV-24]

See also

MARIAM BIBI v. SAKINA AND OTHERS.

[XI-213]

BEHARI LAL v. HABIBA BIBI AND OTHERS.

[VI-91]

(9) Miscellaneous.

(53).—*Plea first raised in revision.* A suit for Rs. 219-5 was brought in the Munsif's Court and decreed. On appeal the lower appellate Court affirmed the decree of the first Court. The defendant applied to the High

PRACTICE—CIVIL—Miscellaneous,
(continued.)

Court for revision and for the first time objected that the Munsif had no jurisdiction inasmuch as at the time of the institution of the suit, neither the defendant was actually and voluntarily residing, nor did the cause of action arise, within his jurisdiction. *Held* that this was a question that could only be decided upon evidence, and for this reason also should have been raised in the Courts below. **SHAM SUNDAR v. MENDHAI.**

[VI-188]

(54).—*Inconsistent reliefs.* *Held* that the fact that a plaintiff claims in his plaint two alternative reliefs which are inconsistent with each other is no ground in itself for the dismissal of the suit. *Tyappa v. Kamalakhshamma* (I. L. R., 13. Mad., 549) dissented from. *Mahomed Buksh Khan v. Hossini Bibi* (L. R., 15. I. A., 86) referred to. **JINO v. MANON.**

[XVI-1]

(55).—*Power of appellate Court to reverse part of decree not appealed against.* This suit to recover money due under a bond by the sale of the hypothecated property against the obligees of the bond and one K, a transferee of the hypothecated property, was dismissed as against K but decreed as against the obligees on a confession of judgment. On appeal by the plaintiff as regards the exemption of K from liability the whole suit was dismissed by the lower appellate Court. *Held* that the lower appellate Court was not justified in disturbing the decree against the confessing defendants who were not before it in appeal. **MATA DAYAL v. JOKHU AND OTHERS.**

[I-157]

See

SITA RAM AND ANOTHER v. BANNO BIBI.

[I-40]

(56).—*Disposal of suit on preliminary point—Trial on merits.* *Held* that when the Court is satisfied that a suit must be dismissed on a preliminary point it should not enter into the merits of the case. **RADHA v. JAGANNATH.**

[III-57]

MANNA LAL AND OTHERS v. HUSAIN ALI AND OTHERS.

[III-64]

KESHO DAS AND ANOTHER v. BANKATESH.

[IV-46]

(57).—*Quantum of evidence.* When the quantum of evidence required from either party is to be considered, regard must be had to the opportunities which each party may

PRACTICE—CIVIL—Miscellaneous,
(continued).

naturally be supposed to have of giving evidence. *Raja Kishen, Dutt Ram Pande v. Narendar Bahadoor Singh* (L. R., 31 A. 85) and *Parm-anand Misr v. Sahib Ali* (L. R., 11 All., 438) referred to. *JANKI PRASAD v. RAI PARTAB CHAND BAHADUR.*

[XVII-129]

(58).—*Judge not bound by previous finding.*] A Judge who has to decide a case has seisin of the whole case, and is in no way bound by any findings whether of fact or of law which may have been come to by his predecessor in office. *AMIR KAZIM AND ANOTHER v. ZAINAB BEGAM.*

[XVII-152]

(59).—*Rulings—Binding on lower Courts.*] A Court subordinate to a High Court is bound to follow the ruling of the High Court to which it is subordinate. *SHEO NARAIN RAI AND OTHERS v. SHEOPAL RAI AND OTHERS.*

[XIV-14]

IMAM ALI AND OTHERS v. SAADAT ALI AND OTHERS.

[II-106]

(60).—*Suit on tampered on.*] This was a suit to recover the balance due on a bond. A receipt of Rs. 100 was endorsed on the bond. The plaintiffs contended that the defendants had altered the figures from Rs. 50 to Rs. 100 while the defendants alleged that the original figures were Rs. 1,550. The first Court found that the original figures were Rs. 1,550 and had been altered by some one in the plaintiff's interest. The Court accordingly struck out the sum of Rs. 1,550 and gave the plaintiff's a decree for the balance. The lower appellate Court dismissed the whole suit on the ground that the bond having been tampered with could not be made the basis of a suit at all. In this second appeal it was contended that the Judge was wrong in wholly setting aside the decree of the first Court. *Held* that the lower appellate Court had jurisdiction to question the propriety of the entire decree of the first Court. The appeal must be dismissed. *BILASO v. JHABBA LAL AND ANOTHER.*

[V-269]

(61).—*Refund of talabana.*] While the appeal in this case, which related to the execution of a decree, was pending, the appellants applied that execution of the decree might be stayed pending the appeal. Notice was directed to be given to the respondent to show cause why the application should not be granted. The appellants deposited the talabana leviable for the service of such notice. Before the notice was issued the appeal was heard and decided. An application on behalf of the

PRACTICE—CIVIL—Miscellaneous,
(continued.)

appellant was made for the refund of the talabana deposited. The Court observed that the talabana had not been applied to its proper purpose, process not having been served, there was no objection to its being refunded. *NATHU SINGH AND ANOTHER v. BHOPAT RAM.*

[I-74]

(62).—*Filing petition without order of Court.*] The vakils in Courts below sometimes file documents such as a petition to summon witnesses without any order by the Judge, for the purpose of falsely suggesting to the appellate Court that the first Court has refused to hear evidence. *Held* that such a practice was a contempt of this Court on behalf of the vakils below to attempt to impose upon this Court a plea in appeal false to the knowledge of that vakil. *MOTI GIR AND ANOTHER v. NIDHA.*

[VII-198]

(63).—*Advocate appearing as litigant.*] In cases where a barrister or pleader appears before the Court as a litigant in person he must not address the Court from the advocate's table or in robes, but from the same place and in the same way as any ordinary member of the public. *In re WEST HOPETOWN TEA COMPANY, LIMITED*

[VII-7]

(64).—*Vakalatnama—Reference to arbitration.*] The matters in dispute between the parties in this case were referred to the determination of an arbitrator. The arbitrator not making his award within the time fixed by the Court, the Court took the case from the hands of the arbitrator and fixed a day for trying and deciding the case. The order fixing the date was signed by the pleaders for the parties. Upon the date fixed, neither party appearing either in person or by pleader, the suit was dismissed under s. 157, Civil Procedure Code. That decree being confirmed on appeal the plaintiff preferred this second appeal to set aside the *ex parte* decree on the ground that their vakil having become *functus officio* by reason of the reference to arbitration was incompetent to take notice of the date fixed. *Held* that the mere fact of a reference to arbitration made by a Court under s. 508, Civil Procedure Code, would not have the effect of disabling the vakils of the parties from representing them further in the suit. *BHAGWAT RAI AND OTHERS v. NAND KUMAR.*

[VIII-199]

(65).—*Advocate—Instructions.*] *Held* that an advocate admitted on the roll of the High Court can take instructions directly from the client and can "act" for him. *BAKHTAWAR SINGH v. SANT LAL AND ANOTHER.*

[VII-153]

PRACTICE—CIVIL—Miscellaneous,
(continued.)

(63).—*Power of appellate Court to alter document before subordinate Court.* There is no authority by which a superior Court can amend or suggest alterations in a document on the record of a suit pending in a Court subordinate to it. *GUMAN SINGH AND OTHERS v. KANHAI RAM AND OTHERS.*

[XII-57]

(64).—*Wholesale rejection of oral testimony.* Held that nothing is more dangerous than for the idea to gain currency among the subordinate judiciary, that because there is a good deal of false swearing in the Courts, therefore all oral evidence is necessarily to be disregarded except in very rare instances. Oral evidence if uncontradicted should not be thrown away on mere suspicion. *DURGA PRASAD v. RAM DIN SAHU AND OTHERS.*

[VII-69]

(65).—*Witnesses—Failure to examine.* In a suit for money due under a bond the plaintiff tendered three witnesses in the Court of first instance to prove execution of the bond. That Court having examined one of such witnesses declined to examine the others, being satisfied on his evidence of the genuineness of the bond, and passed a decree in favour of the plaintiff. On appeal by the defendant the lower appellate Court disposed of the sole issue in the appeal, viz. execution or non-execution in the following words:—"I do not think the claim made out by the plaintiff on his own evidence." Held that under the circumstances above described it was competent to the High Court in second appeal to act under s. 566 of the Civil Procedure Code, and refer an issue as to the execution or non-execution of the bond in suit to the lower appellate Court, that issue having practically not been tried at all by the said Court. *Kanhai Lal v. Manorath Ram (W. N. 1894, p. 19); Madho Singh v. Kashi Singh (I. L. R., 16 All., 342) and Durga Dihal Das v. Anoraji (W. N. 1894, p. 190)* referred to. *GANGA PARSAD v. LAL BAHADUR SINGH AND ANOTHER.*

[XV-21]

(66).—*Application of the plaintiff in a Civil suit.* The Court adjourned the case to admit of the appearance of certain witnesses for whom the Court granted summonses. On the day to which the case was so adjourned some of the witnesses summoned were present in Court, and the plaintiff also produced other witnesses who had not been summoned, and tendered them for examination. The Court declined to examine such of the plaintiff's witnesses so produced as had not been summoned by it. Held that the refusal of the Court to examine such witnesses was a substantial irregularity

PRACTICE—CIVIL—Miscellaneous,
(continued.)

which affected the merits of the case and was therefore a good ground of appeal. *Kanhai Lal v. Manorath Ram (W. N. 1894, p. 19)* referred to. *MISRI LAL AND OTHERS v. MA-SHUQ ALI AND OTHERS.*

[XIV-51]

(67).—*In this case the Munsif examined four of the defendant's witnesses and released the others as unnecessary. He dismissed the plaintiffs' claim. In appeal the Subordinate Judge disbelieving these witnesses reversed the judgment of the lower Court and gave the plaintiffs a decree. Held that the Subordinate Judge before reversing the judgment of the lower Court should have caused the other witnesses to be examined. The case must have been regarded as one in which the Court had refused to examine the witnesses tendered by the party.* *KHUDA BAKSH AND OTHERS v. IMAM ALI SHAH.*

[VII-61]

(68).—*Duty of appellate Court to consider evidence independently.* This is the duty of an appellate Court to take its own view of the evidence which is before it and not merely to accept without question the opinion of the Court of first instance. *QUEEN EMPRESS v. BISHAN.*

[X-148]

(69).—*Plea not seriously urged.* The plaintiffs in this suit alleging that they and one KS, were members of a joint Hindu family, that MK, the widow of KS, was entitled only to maintenance, but that she had instituted a suit in the Revenue Court for mesne profits on the basis of her being entitled to the share of her husband, prayed for the following reliefs:—(i). "That it may be declared that the widow, defendant, is only entitled to maintenance. (ii). That the defendant may be declared to have no right of possession or right to an amount of profits in certain villages belonging to KS deceased. (iii). That certain proceedings taken by the Musammat in the Revenue Court may be stayed." Subsequent to the institution of this suit the suit in the Revenue Court was dismissed. One of the defences to the suit was that there was no cause of action. Held that if the matter was *res integra* the Court should perhaps have held that there was no cause of action. But as the case stands now the plaintiff's claim could not be refused on that ground specially because the objection was not seriously urged when this appeal was heard on a former occasion and remanded for re-trial. *MAHTAB KUAR v. DAYA KISHEN AND OTHERS.*

[V-280]

PRACTICE—CIVIL—Miscellaneous,
(continued.)

(70).—*Misdescription of appeal.*] It is not a fatal objection to an appeal that the same is described in the memorandum as "first appeal from order" being in reality a first appeal from a decree, it not being shown that the respondent was in any way prejudiced by such misdescription or that by reason thereof an insufficient stamp was placed on the memorandum. *Kedar Nath v. Lalji Sahai* (I. L. R., 12 All. 61) *quoad* this point, and *F. A. F. O No. 70 of 1890*, (decided on the 9th January, 1891) overruled. (*F. A. F. O. No. 15 of 1890*, decided on the 18th April, 1890), followed. **SANT LAL AND OTHERS v. SRI KISHN AND ANOTHER.**

[XII-66]

(71).—*Remand after appellant's death.*] Held that where an appellant was dead at the time a remand order was made and where on the hearing of the remand there was no proper party on the record to represent the deceased appellant, the proper course for the Court was to further remand the case to the lower Court for determining the issue after bringing in the necessary parties. **MOHAN DAS v. RADHA BALLAB.**

[V-164]

(72).—*Jurisdiction of High Court.*] Where the High Court is the Court of appeal from any particular subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal before it, the High Court has power as an appellate Court to set right the proceedings of such subordinate Court. *Kishna Ram v. Hingu Lal* (I. L. R., 4 All., 237) and *Tota Kam v. Ishur Das*, (W. N. 1887, p. 76) overruled. **JWALA PRASAD v. SALIG RAM.**

[XI-158]

(73).—*Destruction of record.*] Where pending an appeal in the lower appellate Court, the entire record of the first Court was destroyed, and the lower appellate Court, though it re-examined the witnesses, never had before it the pleadings or the evidence as originally given, the High Court in second appeal set aside the proceedings and directed the first Court to re-try the case as a fresh suit. **GHULAMAN AND OTHERS v. KARIMA AND ANOTHER.**

[VIII-117]

(74).—*Ex-parte admission of appeal—Right of respondent to object.*] Held that an order made *ex-parte* admitting an appeal after the period of limitation prescribed therefor, must be considered provisional only, and it is competent for the respondent to raise the question of limitation at the hearing of such appeal. **MITTER SEN AND ANOTHER v. BARAKULLAH AND ANOTHER.**

[I-88]

PRACTICE—CIVIL—Miscellaneous,
(continued.)

(75).—*Equity—Plaintiff must come with clean hands.*] Where a Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider, whether anything in the conduct of the party who comes into Court and seeks relief has debarred him from asserting his right. **THAKURI v. KUNDAN AND ANOTHER.**

[XV-69]

(76).—*Cause of action.*] A plaintiff is not entitled to a decree in his suit unless by proof or admission or default of pleading he shows that when he instituted that suit he was entitled to a decree. One *K C*, a zamindar, sued in a Court of Revenue to recover an occupancy holding from one *B C*, his occupancy-tenant, and that tenant's transferee, *G S*, to whom by a transfer which was inoperative under section 9 of Act XII of 1881, *B C* had purported to make over his occupancy-holding. The occupancy-tenant died after the suit was filed, but before he had received notice of it and the transferee being in sole possession of occupancy-holding defended the suit. Held under the above circumstances that the zamindar's suit must fail inasmuch as at the time when it was filed, he was not entitled to immediate possession of the occupancy holding. **GULZAR SINGH v. KALYAN CHAND.**

[XIII-170]

(77).—*Admission.*] A plaintiff suing two defendants, *N* and *L*, for the possession of certain property by right of inheritance, admitted in his plaint the right of inheritance of the defendant *M* to a moiety of the property, and only made him a defendant because he would not join in bringing the suit. The claim, however, was for the entire property. The defendant *M* filed a written statement setting forth that he had long ago willingly resigned all his rights in favour of the plaintiffs, and that the suit had been instituted with his consent. Held that the statement was only an admission by *M* of the plaintiff's title which could not be used against the other defendant *L* so as to entitle the plaintiff to a decree for the entire estate; that since *L* did not set up *M*'s title to defeat the plaintiff, he could not be affected by *M*'s disclaimer; and that the plaintiff could not be allowed in this suit to obtain *M*'s share as his representative, for that would be to decree him the share on a title he never set up. **LACHMAN SINGH v. TANSUKH.**

[IV-136]

(78).—*Decree awarding more than plaintiff was entitled.*] In a suit for possession of immovable property brought by three Muhammadan brothers their three sisters were impleaded as defendants under s. 32, Civil Procedure Code, and, two of the latter subsequently filed a written statement in which, after

PRACTICE—CIVIL—Miscellaneous,
(continued.)

stating that they were on good terms with their brothers the plaintiffs and that the suit had been instituted with their consent, they prayed that the suit might be decreed subject to the condition that they would, on some future occasion "settle with their own brothers as to their rights and costs." The third sister did not appear to defend the suit. *Held* that the lower Courts were wrong in treating this admission as sufficient to entitle the plaintiffs to a decree for possession not only of their own shares but also of the shares of their three sisters, it being a fundamental proposition connected with the administration of justice that a plaintiff cannot sue for more than his own right and that no defendant can by an admission or consent of this kind convey the right or delegate the authority to one for more than his own share in property. *Lachman v. Tansukh* (I. L. R., 6 All., 395) referred to. *AZIZULLAH KHAN AND OTHERS v. AHMAD ALI KHAN AND OTHERS.*

[V-54]

(79).—*Plea not considered by lower Court.* One of the pleas raised by the defendant in this suit for pre-emption was that the actual price paid for the property sold being Rs. 1,500, the Munsif had no jurisdiction to try the suit. *Held* that none of the Courts below having determined the question of jurisdiction it could not be determined by the High Court in second appeal. *RAMDIAL v. BUDH SEN AND ANOTHER.*

[IV-123]

(80).—*Stay of civil proceedings pending criminal.* One *B* executed a hypothecation bond in favor of one *U*, but when *U* took it for registration before the Sub-Registrar *B* denied having executed the document. *U* then applied to the Registrar to proceed under s. 73, but his application was rejected. During this interval *B* brought a charge against *U* of forgery. Meanwhile *U* instituted a suit in the Munsif's Court praying for the registration of the document. He then applied to the Deputy Magistrate to stay the criminal proceedings until the determination of the suit; but the Deputy Magistrate rejected the application and committed *U* to the Sessions Judge. He made a similar application to the Sessions Judge who not only refused to stay proceedings, but directed the Munsif to postpone the hearing of the civil suit. *Held* that the order of the Sessions Judge was *ultra vires* as the Munsif was not subordinate to the Sessions Judge. *Held* further that the criminal prosecution should be postponed till the decision of the civil suit. *EMPRESS v. UNKAR DAS.*

[VII-102]

(81).—*Person entitled to raise a plea.* One *R R* adopted *N R*, the son of his nephew *R P*, and confirmed the adoption by making a

PRACTICE—CIVIL—Miscellaneous,
(continued.)

gift to *N R* of a 1 anna 4 pie out of a 2 annas 8 pies share, the joint property of himself and *R P*. Sometime after the adoption, *R R* and *R P* made a simple mortgage of the 2 annas and 8 pies share to the plaintiff. The plaintiff brought this suit for the sale of the mortgaged property against *N R* and *R P*. *N R* set up as a defence that *R R* having made a gift of the share to him was not competent to mortgage it to the plaintiff. The lower appellate Court allowed the defence set up by *N R*. In this second appeal by the plaintiff it is contended:—
(i). That the lower appellate Court had failed to notice that mutation of names had not taken place. (ii). That the family being joint a deed of gift executed by one member could not prevail over a deed executed by all the competent members. *Held* that as regards the first plea the Court below finds that *N R* obtained possession of the property through his guardian, a finding of fact which this Court was not prepared to disturb. As regards the second plea *R P*, the only other competent member of the joint family who could object to the gift, not having objected then or now to the gift, there is no force in the contention. The appeal is dismissed. *RAGHUBANSI KUARI v. NARBADA RAM.*

[VI-86]

(82).—*Letters Patent appeal—Point not argued before Single Judge.*

See Letters Patent, s. 10, No. (8).

(83).—*Deficiency of court-fees—In respect of lower Court.* Where it was discovered in second appeal in the High Court that the respondent, when appellant in the lower appellate Court, had not paid a sufficient court-fee on his memorandum of appeal in that Court, and up to the date of the hearing of the appeal in the High Court, though called upon to do so, had not made good the deficiency, it was *held* that the proper procedure was not to dismiss the respondent's appeal to the lower appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondent until such time as the additional court-fee due by him might be paid in. *NARAIN SINGH AND OTHERS v. CHATURBHUI SINGH.*

[XVIII-72]

PRACTICE—CRIMINAL.

(84).—*Murder—Exception—Plea not raised.*

See Penal Code, s. 300, No. (6).

(84).—*Enquiry after close of trial.* *Held* that it is very improper on the part of a Judge to make inquiries after the trial had closed and to act upon statements and matters not made evidence on the record. *EMPRESS v. INDAR SINGH.*

[V-31]

PRACTICE—CRIMINAL, (continued.)

(86).—*Witness—Refusal of Judge to examine.*] In a trial before a Court of Session, the Judge refused to examine 11 out of 17 witnesses produced on behalf of the prosecution. Held on appeal by the Government, that it was such an irregularity as was likely to have produced a failure of justice and made it necessary that further proceedings, more regularly conducted, should be taken. *EMPRESS v. NATHUA.*

[VI-68]

(87).—*_____.*] It is the duty of a Sessions Court to examine all the witnesses sent up by the Committing Magistrate. That Court is not justified in rejecting any of the witnesses so sent up unless it has good reason to believe that such witness came into the Court-house with a predetermined intention of giving false evidence. *QUEEN EMPRESS v. BANKHANDI.*

[XII-114]

(88).—*_____.*—*Observations on the examination.*] Observations on the improper manner in which the evidence in cases is generally taken in the subordinate Courts, and in which it was taken in this case. *PHUL KUAR v. SURJAN PANDEY AND OTHERS.*

[II-40]

(89).—*_____.*—*Duty of prosecution to examine.*] It is the duty of the public prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge. The public prosecutor is not bound to call any witnesses who will not in his opinion speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses. *EMPRESS v. TULLA AND OTHERS.*

[V-284]

(90).—*_____.*—*Retracted confession—Police.*] Held that where a confession once made is afterwards retracted, and the police is charged with misconduct in extracting the confession, some step at least should be taken to test the truth of such charge, and it would be unsafe to convict upon such confession alone. *EMPRESS v. RAMANAND.*

[V-221]

PRACTICE—CRIMINAL, (continued.)

As to the admissibility and value of such confession see:—

EMPRESS v. CHATTAR SINGH AND OTHERS.

[IV-84]

EMPRESS v. TIKA RAM.

[VI-22]

QUEEN EMPRESS v. BINDA.

[X-173]

EMPRESS v. BHAGUA.

[I-89]

EMPRESS v. MADAN AND ANOTHER.

[V-59]

(91).—*_____.*—*Weight of.*] It is unsafe for a Court to rely on and act upon a confession which has been retracted unless upon a consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true; that is to say, usually unless the confession is corroborated by credible independent evidence. *Queen Empress v. Rangi (I. L. R., 10 Mad., 295)* referred to. *QUEEN EMPRESS v. MAHABIR.*

[XV-227]

(92).—*_____.*—*Uncorroborated testimony of complainant.*] Held that the uncorroborated evidence of the complainant if believed, was sufficient for a conviction. Further, if a witness has perjured as to one part of his statement it is unsafe to rely on his statement as to other matters. *EMPRESS v. SARFARAZ ALI AND ANOTHER.*

[V-264]

(93).—*_____.*—*Power of High Court to alter conviction.*] Where, on appeal against a conviction for an offence, it became apparent that, although there was not sufficient evidence to support the conviction, there was evidence which might have led to the conviction of the appellants for a totally distinct offence, with which they had not been charged, the Court declined to consider that evidence with a view to altering the conviction of the appellants. *Queen Empress v. Parbati (W. N., 1897, p. 130)* referred to. *QUEEN EMPRESS v. YUSUF AND OTHERS.*

[XVII-210]

(94).—*_____.*—*Plea of guilty.*] In capital cases where there is any doubt as to whether an accused person fully understood the meaning and effect of a plea of guilty it is advisable for the Court to take evidence and not to convict solely on the plea of the accused. *QUEEN EMPRESS v. BHADU.*

[XVI-192]

Explained in QUEEN EMPRESS v. DHIAN SINGH.

[XVIII-16]

(95).—*_____.*—*Oral confession—Exact words.*] Where witnesses depose to some statement a

PRACTICE—CRIMINAL, (continued.)

having been made to them by the accused, they should be required by the Court to give the precise words alleged to have been used by the accused. *EMPRESS v. BALWANT SINGH.*

[III-12]

(96).—*Judge electing himself into an expert.*] Remarked that a Judge should not elect himself into an expert, nor should he slightly treat proper medical evidence. That it was no part of a Judge's duty to examine a prisoner's witness when his pleader had refused to do so. *EMPRESS v. HARPAT.*

[III-189]

(97).—*Medical evidence.*] Observed that it was the duty of the medical witness to describe the nature of the injuries sustained by the person or persons with regard to whom his evidence was being recorded, and that it was not for such a witness to express any opinion as to whether these injuries did or did not amount to grievous hurt under the provisions of the Penal Code. *EMPRESS v. BALWANT AND OTHERS.*

[V-296]

(98).—*_____.*] A Judge is not entitled to discord the whole of the direct evidence of credible and unimpeached witnesses who depose that with their own eyes they saw certain things done; upon the strength of the opinion of a medical witness to the effect that those things could not have been done. *QUEEN EMPRESS v. WAZIR ALI.*

[IX-74]

(99).—*Court Inspector to act as public prosecutor.*] The Court observed with reference to the allegation, that in this case the Court Inspector had been permitted by the Magistrate to assume the functions and part of a public prosecutor, suggesting questions in the examination of witnesses, and otherwise travelling out of the range of his purely ministerial duties as prescribed and limited in the Government Orders on the subject,—that if the Court Inspector acted in this way he was not within "the commonest rules in authorized procedure." It was also injudicious, and it was to be hoped unusual, that the subordinate police officer who had investigated the case should have had a seat on the Bench or at the table of the Magistrate presiding at the trial. It was obvious that this was not the proper place for such a person under the circumstances but also that his presence in such a position might conceivably exercise an influence over weak and ignorant witnesses prejudicial to their integrity to the interests of justice and to the persons under trial. *EMPRESS v. RAM PRASAD.*

[II-24]

PRACTICE—CRIMINAL, (continued.)

(100).—*Collector moving High Court to revise Sessions Judge's order.*] Held that District Magistrates are not competent to invoke the High Court as a Court of Revision, because they disapprove of the order of the Sessions Judge as a Court of appeal. The Magistrate, if he thinks there has been a miscarriage of justice, should communicate with the public prosecutor and invite his assistance to move the High Court. *EMPRESS v. SHERE SINGH.*

[VII-64]

(101).—*Commitment.*] Held that where an accused is charged before a Magistrate of the first class with two offences, one of which he is competent to try and the other not, the proper course for him is to commit the accused for trial for both the offences, though there is nothing in the law to make it illegal for him to try the one he is competent to try. *EMPRESS v. RAMANAND.*

[III-199]

(102).—*False information—Prosecution before disposal of complaint.*] *F* complained to the police that she had been raped by *R*. The police having reported the charge to be false, criminal proceedings were instituted against her under s. 182 of the Penal Code. In the meantime *F* made a complaint in Court, again charging *R* with rape. This complaint was not disposed of, but the proceedings against her under s. 182 of the Penal Code were continued, and she was eventually convicted under that section. Held, setting aside the conviction and directing that *F*'s complaint should be disposed of, that such complaint should have been disposed of before proceedings were taken against her under s. 182. *EMPRESS v. JAMNI.*

[III-71]

EMPRESS v. RADHA KISHEN.

[II-145]

Per contra

QUEEN EMPRESS v. RAGHU TIWARI.

[XIII-111]

(103).—*Sentence—Discretion.*] Where the law provides a maximum punishment for an offence leaving it to the discretion of the Court to inflict such punishment or any less punishment which it may think will suffice in the particular instance, the Court should exercise such discretion upon judicial grounds, and after consideration of the principles intended by the Legislature to be applied. The maximum penalty should only be inflicted for the maximum offence, and in every gradation from the maximum downwards that principle ought to be kept in sight. *QUEEN EMPRESS v. RAJJU.*

[XIII-184]

PRACTICE—CRIMINAL, (continued.)

(104).—*Two hours' imprisonment.* Where, on a conviction for an offence under s. 193 of the Penal Code, the Court inflicted a fine and also sentenced the accused to undergo two hours' simple imprisonment, *held* that the Court had no power to inflict such a sentence as two hours' simple imprisonment. *EMPRESS v. PARMESHAR.*

[IX-208]

(105).—*Parda ladies—Appearance in Court.* Although there is no provision in the Criminal Procedure Code which protects *pardanasheen* ladies from appearing in a Court of justice, nevertheless it is very undesirable to compel the attendance of such persons. It can not be admitted as a general principle that *pardanasheen* ladies whose evidence is required in criminal trials are to be allowed to compel the Courts to examine them at some other place than the Court-house itself. *In the matter of the petition of Din Tarini Debi (I. L. R., 15 Cal., 775) and in re Farid-un-nissa (I. L. R., 5 All., 92)* referred to. Where a Magistrate considered it necessary to take the evidence of a *pardanasheen* lady, who objected to appear in Court the High Court directed him to make arrangements so as to take her evidence either in an empty Court-room in the presence of himself, the accused, and the pleader for the prosecution, or if no empty Court-room were available, in his own private room or some other room in the Court-building. *IN THE MATTER OF THE PETITION OF BASANT BIBI.*

[IX-202]

(106).—*Evidence taken by one—Judgment by another Magistrate.* The evidence for the prosecution was taken before one Magistrate, and the evidence for the defence before his successor, who convicted the accused. No objection was taken before the convicting Magistrate to his acting on the evidence recorded by his predecessor, nor was any demand made that the witnesses for the prosecution should be re-examined, nor was any objection in this respect taken on appeal before the Sessions Judge; but it was objected for the first time before the High Court in revision that the procedure adopted by the convicting Magistrate was illegal. *Held* that although the practice of one Magistrate hearing part of a case, and a second hearing the rest and acting on the statements of witnesses he had not seen or heard, was one which the Court would not ordinarily be disposed to favour. In the present case the accused had not been materially prejudiced, and the Court would therefore not interfere in revision. *QUEEN EMPRESS v. BANSI SINGH AND OTHERS.*

[IX-161]

(107).—*Submission of record to High Court.* A Sessions Court in forwarding to the

PRACTICE—CRIMINAL, (continued.)

High Court the record of a criminal case in which an appeal has been preferred to that Court, should forward as part of such record all objects connected with the commission of the offence in question, which were placed before the Sessions Court as part of the evidence at the trial. *QUEEN EMPRESS v. RAMADHIN.*

[XIV-205]

(108).—*Loss of record.* In an appeal before the High Court from a conviction and sentence for murder, it appeared that the entire record of the proceedings of the trial had been lost, and that no trace of it could be discovered. The Court directed that the conviction and sentence and all other proceedings in the trial should be set aside, and a new trial of the accused held by the Sessions Judge. *QUEEN EMPRESS v. KHIMAT SINGH.*

[IX-55]

(109).—*Evidence.* The appellants in the case were one of the two parties to a riot, the other party was separately tried, but both the parties were committed to the Sessions Judge at the same time. The trial of the first party lasted from 5th August and lasted till the 8th August and that of the second from 8th August to 11th August when the opinion of the assessors was taken in both the cases and judgment was given on the 12th August in both. *Held* that as the Judge allowed himself to consider in one case evidence given in another the whole proceeding was void and a new trial should be held. *EMPRESS v. ZAUWAR HUSAIN AND OTHERS.*

[V-28]

PRE-EMPTION.

- (1) Conditional decree.
- (2) Loss, waiver or forfeiture of right.
- (3) Persons entitled to the right.
- (4) Preliminaries.
- (5) Purchase-money.
- (6) Transfers giving rise to.
- (7) *Wajib-ul-arz.*
- (8) Miscellaneous cases.

(1) Conditional decree.

(1).—*Construction—"Decree becomes final"—Appeal.* A obtained a decree for pre-emption, dated the 14th September, 1882, which directed that the purchase-money was to be deposited within a month from the time when the decree became final. An appeal was

PRE-EMPTION—Conditional decree,
(continued.)

preferred from the decree, but was dismissed on the 5th April, 1883. The purchase-money was deposited on the 7th May, (6th May being a close holiday). *Held* that the deposit was within time. **BISHESHAR NAIK v. SHAHEBUDDIN.**

[IV-217]

(2). —————.] *Held* that when the decree of the appellate Court had confirmed that of the lower Court, in a pre-emption suit, except that it had increased the purchase-money, the period within which the money must be deposited was to run from the appellate decree. **MAHESH v. BIDDYA.**

[VI-300]

(3). —————.] *Time-requisite for obtaining copy.* A decree for pre-emption dated the 28th September, 1880, and drawn up in the terms of s. 114, Civil Procedure Code, directed that the amount of the purchase-money should be paid into Court "within one month from the date the decree became final." It appeared that in consequence of delays in the preparation of copies of the decree and judgment which had been applied for by the defendants and the intervention of holidays, the period within which the defendants might have appealed expired on the 16th December, 1880. Neither of the parties to the suit appealed from the decree. On the 16th December, 1880, the defendants applied for execution of the decree for costs, on the ground that the plaintiff had failed to comply with the condition of the decree. On the same date plaintiff appeared in Court and expressed himself ready to comply with the condition of the decree. *Held* that the decree in question not having been appealed against became final on the 29th October, 1880, and the plaintiff's appeal, was therefore beyond time. **Hingan Khan v. Ganga Parshad (I. L. R., 1 All., 293)** followed. **DISA SINGH v. JUALA SINGH AND OTHERS.**

[I-165]

(4). —————.] *Held* that a decree for pre-emption conditional on payment, by the plaintiff, of the purchase-money within 15 days from that date on which the decree became final, where no appeal was preferred therefrom, thirty days after it was passed, and the time occupied in furnishing the defendant with a copy of the judgment and decree could not be deducted. A deposit by the plaintiff more than forty-five days after the date of the decree, could not therefore, be regarded as made within time. **Disa Singh v. Juala Singh (W. N., 1881, p. 201)** followed. **KARAM KHAN AND ANOTHER v. NATHAN KHAN.**

[III-4]

(5). —————.] *Computation of time.* The decree in a suit to enforce a right of

PRE-EMPTION—Conditional decree,
(continued.)

pre-emption, dated the 12th December, 1879, declared that the plaintiff should obtain possession of the property on payment of the purchase-money "within thirty days", but that if such money was not so paid the suit should stand dismissed. The period specified in the decree for the payment of the purchase-money, the day on which the decree was made not being computed, expired on the 11th January, following. That day was a Sunday. The plaintiff paid the purchase-money into Court on the next day, the 12th January. *Held* that inasmuch as the day on which the decree was made should not be taken into account in computing the period specified in the decree for the payment of the purchase-money, nor the last day of that period, that day being a Sunday, the plaintiff had complied with the condition imposed on him by the decree. *Sembla* that, if the plaintiff had actually failed to deposit the purchase-money within thirty days as directed by the decree, his suit would have been liable to be dismissed, as he could not have claimed to have such period computed from the date the decree became final. **DEBIDIN RAI v. MUHAMMAD ALI AND OTHERS.**

[I-100]

(6). —————.] *Purchase-money not paid within time—Appeal.* *Held* that plaintiffs in a pre-emption suit who had obtained a decree conditioned on payment by them of the pre-emptive price within a certain fixed period could, after the expiration of such period, appeal against such decree on the ground that a condition of the contract out of which their right to pre-empt arose had not been embodied in the decree. **Kodai Singh v. Faisri Singh (I. L. R., 13 All., 376)** referred to. **WAZIR KHAN AND OTHERS v. KALE KHAN AND ANOTHER.**

[XIV-3]

(7). —————.] *Deposit of purchase-money in Court effect.* Where a decree is given for pre-emption upon payment of a specified sum on or before a certain date, the moment the pre-emptor complies with the terms of the decree in his favor by payment into Court of the amount due from him, he acquires a title to the property and the money becomes that of the person for payment to whom it was deposited. **HAKIM VILAYAT ALI v. ABDUS-SALAM AND OTHERS.**

[XV-13]

(2) Loss, waiver or forfeiture of right.

(8). —————.] *Refused to purchase—Price demanded excessive.* A person having a right of pre-emption does not lose it by refusing to purchase the property at the price stated in the conveyance to the vendee, because he believes that such price is in excess of the real price where such belief is entertained and expressed in good faith, **MAWASH v. NABI BAKHSH AND ANOTHER.**

[I-21]

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued.)

AMIR CHAND v. ISHAR DAS AND OTHERS.

[II-46]

BHOLI BIBI AND ANOTHER v. FAHIMA BIBI AND ANOTHER.

[II-137]

MAHDEO PRASAD AND OTHERS v. SAHIBA BIBI AND ANOTHER.

[VII-260]

BHAIRON SINGH v. LALMAN AND ANOTHER.

[IV-216]

(9).—*Prior to particular transaction.* Held that as the right to use for pre-emption accrues after the sale, plaintiff's refusal to purchase prior to the transaction cannot defeat his right. RAMDIAL v. BUDH SEN AND ANOTHER.

[IV-123]

(10).—*Prior relinquishment.* The relinquishment of the right of pre-emption in respect of any accrual thereof does not involve the relinquishment of the right to enforce pre-emption in respect of any other accrual subsequent to the accrual in respect of which the right has been thus relinquished. *Ashik Ali v. Mathura Kandu* (I. L. R., 5 All., 187); *Rup Narain v. Awadh Prasad* (I. L. R., 7 All., 478) and *Sheoratan Kuar v. Mahipal Kuar* (I. L. R., 7 All., 258) referred to. SHEOBARAN v. MANGO RAI.

[XI-185]

(11).—*Failure to claim after knowledge.* The plaintiff in a suit to enforce the right of pre-emption alleged that the true consideration for the sale was less than the amount stated in the sale-deed. It was found that he made no communication to the vendor after he became aware that a sale was being negotiated, nor did he make it known to him that while he stood upon his pre-emptive right he declined to pay the price stated in the deed, because it was not the consideration agreed on between the vendor and the vendee. Held that the plaintiff was bound, instead of remaining silent to communicate to the vendor that he was prepared to purchase at the price within a reasonable time and that not having done so he must be taken to have countenanced the completion of the bargain with the vendee and to have waived his right of pre-emption. BHAIRON SINGH v. LALMAN AND ANOTHER.

[IV-216]

(12).—*Member of family.* The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co-sharers, and that first a near

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued.)

co-sharer and next a more distant co-sharer should have a right of pre-emption. Where such notice having been given, the co-sharer receiving notice took no action thereon within a reasonable time. Held that as his inactions would lead the vendor to conclude that he would not interfere or become a purchaser it was equivalent to declining to purchase. MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB AND ANOTHER.

[IX-17]

(13).—*General notice.* In order to entitle a co-sharer to assert a right of pre-emption based on the *wajib-ul-arz*, there must, as a condition precedent to such assertion, be a sale of a share already negotiated with a stranger, and a price fixed with the stranger by the co-sharer desiring to sell. The only mode in which a pre-emptive claim can then be defeated is by proof of a distinct intimation to the co-sharer seeking to maintain such claim of the contemplated sale, and of the price agreed to be paid by the stranger, of an offer to him (the co-sharer) at such price and of his refusal to purchase. Where the sale in respect of which the pre-emptive claim was raised was one made by the Collector as Manager of the Court of Wards, and the Collector, before selling the property, issued a proclamation through the Tahsildar notifying to all the share-holders that the property was for sale, and that sharers intending to purchase should make offers. Held that such a notification was not a sufficiently distinct and definite notice of a negotiated and intended sale to a stranger, so as to estop co-sharers failing to make an offer to purchase from subsequently asserting their pre-emptive rights. SUBHAGI AND OTHERS v. MUHAMMAD ISHBAK AND OTHERS.

[IV-174]

(14).—*Joining in the suit of a stranger.* Held applying the doctrine of the Muhammadan law of pre-emption such doctrine being in accordance with justice, equity and good conscience that a co-sharer in a village who had under the *wajib-ul-arz* a right of pre-emption in respect of the sale of a share who joined a "stranger" (that is, a person who had not such right) with himself in suing to enforce such right thereby forfeited such right. *Sheo Dayal Ram v. Bhyro Ram* (N.-W. P., S. D. A., Rep., 1860, p. 53); *Guneshee Lall v. Zarat Ali* (N.-W. P. H. C. Rep., 1870, p. 343); *Fakir Rawat v. Sheikh Emambaksh* (B. L. R., F. B. Rule, 35) referred to. BHAWANI PRASAD v. DAMRU.

[II-217.]

(15).—*Member of family.* A co-sharer of an estate who has a right of pre-emption, does not, merely by joining with himself members of his family who were not co-sharers in such estate, in a suit to enforce

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued).

such right, defeat such right. *Manna Singh v. Ramadhin Singh* (I. L. R. 41 All., 252) distinguished. *BHURAI MAL v. NAVAL SINGH*.

[II-16]

See also

GANDHARP SINGH AND ANOTHER v. SAHIB SINGH AND ANOTHER.

[IV-326]

(16). ———— *Wajib-ul-arz*.] Under the terms of a *Wajib-ul-arz* successive pre-emptive rights were given, first to "own brothers" secondly, to "near cousins" and thirdly to "shareholders." Held, the parties being Muhammadans, that in regard to a sale of land to which this *Wajib-ul-arz* applied a nephew (brother's son) of the vendee was a "stranger" and his joinder as co-vendee would vitiate the sale and let in other persons having a right of pre-emption. *Bhurey Mal v. Nawal Singh* (I. L. R., 4 All., 259) distinguished. *AMJAD ALI AND OTHERS v. MUSH-TAQ AHMAD AND ANOTHER*.

[XV-95]

(17). ———— *Mistake*.] Held that a pre-emptor who joins with a stranger even under a mistake of fact, e.g. that he is a co-sharer, loses his right and the suit must be dismissed. *BHAWANI KUAR AND ANOTHER v. NARAIN SINGH AND OTHERS*.

[VII-247]

(18). ———— *Amendment of plaint*.] Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, i. e. a person who has no such right, he thereby forfeits his right to pre-empt and this disability cannot be overcome by amending the plaint by striking out the name of the stranger. *Bhawani Prasad v. Damru* (I. L. R., 5 All., 197); *Ram Nath v. Badri Narain* (W. N. 1897, p. 20, I. L. R., 19 All., 148) and *Fida Ali v. Muzaaffar Ali* (I. L. R. 5 All. 65), referred to. *BHUPAL SINGH v. MOHAN SINGH*.

[XVII-72]

(19). — *Joining in the suit of unqualified person—Muhammadan law*.] The mere joining by a person having a right of pre-emption of persons who have an equal right of pre-emption but have not qualified themselves according to the Muhammadan law to enforce it, and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone from maintaining a suit brought by him so far as he himself is concerned. *CHOTU AND OTHERS v. HUSAIN BAKIISH AND OTHERS*.

[XIII-25]

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued).

(20). — *Suit not including whole property transferred*.] Every suit for pre-emption must include the whole of the property, subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger; and a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the nature and essence of the pre-emptive right. *Izzutoollah v. Bikharee Mollah* (14 W. R., 469) and *Baisun Thakooranee v. Ram Singh* (N. W. P. S. D. A. Rep., 1863, p. 394) followed. *Oomur Khan v. Moorad Khan* (N. W. P. S. D. A. Rep., 1865, p. 173) and *Salig Ram v. Debi Prasad* (N. W. P. H. C. Rep., 1877, p. 38) distinguished. *Casee Ali v. Sheikh Masseentoolah* (2 W. R., 285), *Abdool Guffoor v. Nodorbanoo* (10 W. R., 111); *Shoodyal Ram v. Bhyroo Ram* (N. W. P. S. D. A. Rep., 1860, p. 53); *Guneshee Lal v. Zaraut Ali* (N. W. P. H. C. Rep., 1870, p. 343) and *Bhawani Prasad v. Damru* (I. L. R., 5 All., 197) referred to. *DURGA PRASAD v. MUNSI AND OTHERS*.

[IV-146]

(21). ———— *Vendor's bad title*.] A person claiming pre-emption can not, except under very special circumstances, exclude a portion of the property sold from his claim. If he does so on the ground, for instance, that the vendor's title is defective, it is incumbent on him to prove conclusively that the vendor has no title to the portion which he seeks to exclude. *BADDRI PRASAD v. KHWAJA MUHAMMAD HUSEIN AND OTHERS*.

[XI-44]

(22). ———— *Sale to stranger along with co-sharer*.] If a co-sharer associated a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale, so far as the co-sharer vendee is concerned. *HARJAS v. KANHYA*.

[IV-271]

(23). ———— *Disqualification as to portion—Dismissal of whole suit*.] The principle of the rule that a pre-emptor must claim the whole of the property included in the sale transaction and for which one price was paid, if he is entitled to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time, disenthralled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale. Where therefore a pre-emptor was disqualified from claiming a portion of the property sold, by not having made a prompt demand in accordance with the Muhammadan law in respect of such portion, held that

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued.)

he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz* of a village, though he was willing to pay the full purchase-money and to leave in the vendee's hands the portion as to which he was disqualified. **MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB AND ANOTHER.**

[IX-17]

(24).—*No right in respect of a portion.* One A by a simple mortgage-deed for a period of 5 years for Rs. 200 mortgaged his shares in *mauzas* X and Y to B. C brought a suit for pre-emption in respect of both villages on the payment of Rs. 200. It was found by the Court that the *wajib-ul-arz* of *mauza* Y allowed no pre-emption in mortgages. Held that the mortgage being joint his claim must fail in respect of the other village also. **ABDUL RAHIM AND ANOTHER v. SUCHIT MISRA.**

[V-243]

(25).—*Claiming portion by inheritance.* The plaintiffs claimed a portion of the property in dispute as their own by right of inheritance and the remainder by right of pre-emption. It was found that he had no right of inheritance in respect of any portion. Held that the whole suit must fail as a suit for pre-emption cannot be brought in respect of a portion of the property sold and that the plaintiffs could not in second appeal alter the ground of their claim so as to claim the whole property by pre-emption. **ARZANI BAKHSI AND ANOTHER v. SHERE ALI AND OTHERS.**

[II-79]

(26).—*Prior institution of rival suit.* The prior institution of a suit by rival pre-emptors in no way entitles a pre-emption to depart from the general rule of pre-emption, by suing for a portion only of the property sold. *Kashi Nath v. Mukhta Prasad* (I. L. R., 6, All., p. 370) referred to. **HULASI AND OTHERS v. SHEO PRASAD AND OTHERS.**

[IV-166]

(27).—*Offer to purchase from vendee.* Where a pre-emptor continues to assert his pre-emptive right and on the strength of that right, and in his character of pre-emptor offers to take the property from the purchaser by paying him the sale price, without resorting to and with a view to avoid litigation, he can not be said to have acquiesced in the sale and waived his right of pre-emption. **MUHAMMAD NASIRUDDIN v. ABUL HASAN.**

[XIV-91]

MUHAMMAD YUNIS KHAN AND ANOTHER v. MUHAMMAD YUSUF.

[XVII-93]

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued.)

MUNNA LAL v. LAL BAHADUR AND OTHERS.

[III-219]

(28).—*Compromise with vendee—Muhammadian law.* According to the Muhammadian law, if a pre-emptor enters into a compromise with the vendee, or allows himself to take any benefit from him in respect of the property which is the subject of pre-emption, he by so doing is taken to have acquiesced in the sale and to have relinquished his pre-emptive right. In a suit to enforce the right of pre-emption founded on the Muhammadian law it appeared that the purchasers, by an agreement made with the plaintiffs on the same date as the sale in respect of which the suit was brought, agreed to sell the property to the plaintiffs any time within a year, and if the latter paid the price and purchased the property for themselves. Held that by the very fact of their taking the agreement, the plaintiffs had relinquished their right of pre-emption, and were precluded from enforcing it. **HABIB-UN-NISSA AND ANOTHER v. ABDUL RAHIM AND ANOTHER.**

[VI-119]

(29).—*Application for partition by vendee—Acquiescence in.* Subsequently to the sale of a one-third share in a village, the vendee applied for partition of the share. A co-sharer, who had a right of pre-emption in respect of the sale, made no objection to this application, and the partition was effected. The co-sharer afterwards set up a claim to pre-emption. Held that there was nothing in the conduct of the pre-emptor which could amount to estoppel or to a waiver of his right of pre-emption. *Motee Sah v. Gohlee* (N. W. P. S. D. A. Rep., 1861, p. 506) distinguished and dissented from, and *Bharon Singh v. Lalman* (W. N. 1884, p. 216) referred to by Mahmood, J. **THAMMAN SINGH v. JAMAL UDDIN.**

[V-70]

(30).—*Acceptance of purchase-money in satisfaction of decree.* A and B were co-sharers in a certain village. B to satisfy a standing decree of A against him sold a part of his share, in the village to C for Rs. 1,500. Thereupon A brought this suit to pre-empt the property sold to C. The suit was founded on the *wajib-ul-arz* of the village. The actual price was said to be Rs. 750 only. The suit was resisted by the vendee on the following grounds. That the plaintiff had no superior right of pre-emption. That the actual price being Rs. 1,500, the Munsif had no jurisdiction. That the plaintiff had refused to purchase when the share was offered to him. That the plaintiff had not made the demands, *Talub-mawasilat*, &c. Held that an immediate demand was not necessary when the claim was founded on *wajib-ul-arz*. That his acceptance of the money in satisfaction of his decree cannot deprive him of his

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued.)

right to pre-empt the property. *RAMDIAL v. BUDH SEN AND ANOTHER.*

[IV-123]

(31).—*Pre-emptor mortgaging his share to stranger.*] Held that a claimant for pre-emption under a *wajib-ul-arz* would not forfeit his right to pre-emption if upon a former occasion he had violated the provisions of the *wajib-ul-arz* by mortgaging his share to a stranger. *Gokul Chand v. Ram Prasad* (W. N., 1889, p. 127) followed. *Bhajjo v. Lalman* (I. L. R., 3 All., 180) referred to. *UJAGAR LAL v. JIA LAL AND OTHERS.*

[XVI-112]

GOKUL CHAND AND ANOTHER v. RAM PRASAD.

[IX-127]

(32).—*Pre-emptor mortgaging share claimed in anticipation.*] Held applying the doctrine of the Muhammadan law of pre-emption, such doctrine being in accordance with justice, equity and good conscience, that co-sharer in a village who had under the *wajib-ul-arz* a right to the mortgage of a share in such village who in anticipation of obtaining the mortgage, mortgaged such share to a "stranger" (that is, a person who had not preferential right to the mortgage), thereby forfeited such right. *RAJO v. LALMUN AND ANOTHER.*

[II-210]

(33).—*Sale subsequent to decree.*] The holder of a decree enforcing a right of pre-emption who subsequently to the date of the decree sells the property to a "stranger" and permits the latter to pay the purchase-money decreed into Court, does not by such conduct debar himself from obtaining possession of the property in execution of the decree. *Rajjo v. Lalman* (I. L. R., 5 All., 780) and *Surju Prasad v. Jamna Prasad* (S. A. from order No. 45 of 1883, decided 21st November, 1883, not reported) distinguished. *RAM SAHAI v. GAYA AND OTHERS.*

[IV-224]

(34).—*Loss of ownership subsequent to suit.*] The suit out of which this appeal has arisen was a suit for pre-emption based on the *wajib-ul-arz* of the village which provided that sales by co-sharers of shares should be governed by the Muhammadan law of pre-emption. It appeared that the plaintiff was not in possession of her share and that after she had filed this second appeal her share was sold in execution of a decree. It was contended on behalf of the rival pre-emptors respondents that as the plaintiff was not in possession of her share she had no right of pre-emption under the Muhammadan law and reliance was made on Tagore Law Lectures for 1873, p. 535. It was also contended that the share out of which plaintiff's right arose having

PRE-EMPTION—Loss, waiver or forfeiture of right, (continued.)

been sold no decree can be passed in her favor. Held that both the contentions were unsound. It is the ownership, and not physical possession which gives to a co-sharer his right of pre-emption; and a Court of appeal has to see whether the decree appealed against is a correct decree and not to matters which have happened since the decree was passed. *Khuda Bakhsh v. Ramlautan Lal* (W. N. 1884, p. 169) referred to. *SAKINA BIBI v. AMIRAN AND OTHERS.*

[VIII-177]

Per contra

KHUDA BAKHSH v. RAMLAUTAN LAL.

[IV-169]

(3).—Persons entitled to the right.

(35).—*Ekjaddi—Wajib-ul-arz—Constructions.*] The pre-emption clause of a *wajib-ul-arz* gave a right of pre-emption, first to "brothers of the same stock" (*ekjaddi*) with the vendor, and next to other co-sharers:—*R* sold, to *S* a share in the village, and certain relatives of *R* sold another share to *F*, after which *S* sold to *F* the share originally held by *R*. *D* who was of the same stock with *R*, sued for pre-emption in respect of this last sale, contending that *S*, though in fact, a stranger in blood, had, by virtue of his purchase from *R*, stepped into *R*'s place, and must be treated for the purposes of pre-emption under the *wajib-ul-arz*, as a brother of the same stock with *D*. Held that this contention could not be allowed, that the plaintiff could not sue as one of the same stock with *S*, nor could he claim as an ordinary co-sharer, *F* having, by a previous sale, also become a co-sharer, and one co-sharer not being entitled under the *wajib-ul-arz* in the case, to maintain a suit for pre-emption against another, unless his rights were higher than that of the other. *Ram Dai Kuar v. Hemraj* (W. N. 1882, p. 72) distinguished. *Man Khan v. Mamu Khan* (W. N. 1886, p. 56) referred to. *DARAB AND ANOTHER v. JAI DYAL SINGH AND OTHERS.*

[IX-16]

(36).—*Wajib-ul-arz of a village gave the persons of the same stock (ekjaddi) as the co-sharer desirous of selling his share a right of pre-emption.* The vendor of land in suit had previously sold to the plaintiffs a part of his land, the plaintiffs thereby becoming co-sharer in the same *thoke* as the vendor. The defendants were co-sharers in another *thoke*. Held that the plaintiffs were, as regards the right of pre-emption, in the same position as their vendor of the portion they had formerly purchased, would have been and had thereupon under the *wajib-ul-arz* a preferential right. *RAMDAI KUAR AND OTHERS v. HEM RAJ AND OTHERS.*

[II-72]

PRE-EMPTION—Persons entitled to the right, (continued.)

(37). — [The plaintiff, pre-emptor in this suit, though a co-sharer, was not "*ekjaddi*" with the vendor. The vendees were mere strangers. According to the *wajib-ul-arz* "brothers" had preferential rights, then would come those who were "*hissadaran ekjaddi thoke*". After providing this the *wajib-ul-arz* ran as follows:—"In case of dispute as to price...and that if the co-sharers do not take at the amount fixed by the arbitrators then he may transfer it to a stranger." The defendants contended that the plaintiffs not being "*ekjaddi*" they had no right of pre-emption. Held that they had, against a stranger, a right of pre-emption. SABIR ALI AND OTHERS *v.* YAD RAM AND OTHERS.

[VII-226]

(38). — [In a *wajib-ul-arz* the following provision was entered with reference to pre-emption:—"Basurat intiqal haqayat kisi hissedar ka us gimat par jo shakhs ghair de tehqag kharidari awal shur ka ekjaddi bad-d-hu shurkai mahal ka shakhs ghair par muqaddam hoga". Held that the term *shakhs ghair* in the above context meant merely a person not of the family of the transferer and not necessarily a person other than a co-sharer. ARI JAN *v.* PHEKU.

[XV-9]

(39). — *Nazdiki—Wajib-ul-arz—Construction.* [The expression "*Nazdiki hissedar*" occurring in the pre-emption clause of the *wajib-ul-arz* of a pure *zamindari* village must be taken to relate to nearness of blood or relationship. GJRSARAN SINGH *v.* AKHANDANAND SINGH AND OTHERS.

[X-227]

(40). — *Karabat-dari-baid—Wajib-ul-arz—Construction.* [Held, in a suit of pre-emption based on a *wajib-ul-arz*, that a person who was the father of the wife of a person alleged to be the brother of the vendor, or a person whose mother's sister had married the son of the vendor did not come within the category of "*karabat-dari baid*". GOPAL SINGH AND OTHERS *v.* GHULAM HUSAIN.

[XIV-58]

(41). — *Bhai-band—Wajib-ul-arz—Construction.* [Held that the word *bhai-band* in the *wajib-ul-arz* in this case meant the brotherhood of the village and not merely those persons who were related by blood. (S. A. 1054 of 1881 decided the 1st April, 1882) referred to. HIRA LAL *v.* RAMJAS.

[III-206]

(42). — *Karibi—Wajib-ul-arz—Construction.* [The word "*karibi*" used by itself in the pre-emptive clause of a *wajib-ul-arz* to indicate

PRE-EMPTION—Persons, entitled to the right, (continued).

share-holders "near" to the vendor, is ambiguous and inadequate to express the intentions of the share-holders. The pre-emptive clause in the *wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale by share-holders, first to "*bhai kakiki*" (own brothers), next to "*karibi*" (near), and next co-sharers in the same "*thoke*" as the vendor. Held that although the word "*karibi*" must be read in connection with the preceding word "*bhai*" the words "*bhai karibi*" could not reasonably be confined to cousins, but must be construed as meaning "*bhai-band*" or "*bhai-log*" so as to include all near relatives both male and female. Held also that a vendor's father's brother's widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees who were only sharers in the same *thoke* as the vendor. KHUMAN SINGH AND OTHERS *v.* HAR DAI.

[IX-1]

(43). — [Held that the words "*hissadar-i-karibi*" in the particular *wajib-ul-arz* before the Court has no reference to consanguinity. It meant co-sharer in the same *thoke*. MAHADEO PRASAD AND OTHERS *v.* SABIHA BIBI AND ANOTHER.

[VII-260]

(44). — [The pre-emption clause of the *wajib-ul-arz* of a village held under the *bigha* dam tenure provided that if a co-sharer wished to sell or mortgage his land he was competent to do so, first to a "*hissadar karibi*" next to a co-sharer in the *mahal*, and in the event of no co-sharer taking it, to stranger. It also provided that if a person selling or mortgaging his share failed to comply with the above conditions, the "*hissadar karibi*" in their order would have a right of pre-emption. Held that the term "*hissadar karibi*" as used in the *wajib-ul-arz* did not refer to nearness in blood but to nearness as regard the holding of shares in the village. BALZAR RAI AND OTHERS *v.* MADHO RAI AND OTHERS.

[XV-78]

(45). — [Held that a Muhammadan co-sharer could not be said to be a "near sharer" ("*hissadar karibi*") of a Hindu vendor in pre-emption to a Hindu co-sharer under the terms of the *wajib-ul-arz*. SARABSUKH LAL *v.* MAJIBULLAH.

[II-167]

(46). — *Balihaz-i-Makaribat—Wajib-ul-arz—Construction.* [The *wajib-ul-arz* of a pure *zamindari* village contained a clause giving a preferential right of purchase to a co-sharer offering the same price as a stranger (*balihaz magaribas*). Held that the words

PRE-EMPTION—Persons entitled to the right, (continued.)

balihaz muqaribat" must under the circumstances having reference to propinquity in respect of relationship, not of locality. *Mahadeo Prasad v. Sahiba Bibi* (W. N. 1887, p. 260) distinguished. **MUHAMMAD SADI AND ANOTHER v. MUHAMMAD ABDUR RAZZAK.**

[XI-137]

(47).—*Pattidar—Chakdar—Wajib-ul-arz.*] Held that the word *pattidar* in the pre-emption clause of the *wajib-ul-arz* did not include *chakdar*, consequently there was no pre-emption either between the *chakdars* *per se* or as against the *pattidars*. **BALWANT SINGH v. SUBHAN ALI AND ANOTHER.**

[VII-290]

(48).—*Sharik-holder of grove land—Wajib-ul-arz.*] The proprietor of two groves in a certain village who did not own a *zemin-dari* share in the village sold them to the appellant, a stranger to the village. The respondent who owned a *zemin-dari* share in the village thereupon brought the present suit to enforce his right of pre-emption. The *wajib-ul-arz* contained the following provision as to the right of pre-emption. "At the time of a transfer of *haqiqat*, a *sharik* in a *patti thoke*, and afterwards in the *mahal* will have a preferential right of purchase to a stranger &c." The suit was resisted on the ground that the sale was not governed by the *wajib-ul-arz* as the vendor was not a "*sharik*". Held that he was a "*sharik*" and the fact that he is entered in the *khewat* in the list which bears the heading "the names of sharers" clearly shows that he was a "*sharik*." **Balwant Singh v. Subhan Ali** (W. N. 1887, p. 290) distinguished. **INAYAT HUSAIN v. AMINUDDIN AHMAD.**

[VIII-182]

(49).—*Co-sharer—Arazidar—Wajib-ul-arz.*] This was a case for pre-emption based on the *wajib-ul-arz* of the village which gave a right of pre-emption on the transfer of a share to any other than the co-sharers, the plaintiff was an *arazidar* while the defendant was a *zemin-dar* of the village. The land claimed was a share of the plot in which the plaintiff was an owner. The defendant contended that the *arazidar* had no right of pre-emption in the village. Held that they had. **RAM SARUP v. DALIP SINGH.**

[V-54]

(50).—*Purchaser of sir land—Wajib-ul-arz.*] Held that where the pre-emptor was the purchaser and owner of a portion of a *sir* holding only and his rights were confined to the land purchased by him and did not affect other rights in the *mahal*, he was not a *share-holder* within the meaning of the *wajib-ul-arz*, so as to entitle him to a right of pre-emption.

PRE-EMPTION—Person entitled to the right, (continued.)

To be a *share-holder* within the meaning of the *wajib-ul-arz* a person must have all rights and be subject to all the obligations and liabilities attaching to the proprietary holding in the *mahal* or *patti*. **RAGHUNATH SINGH v. GOPAL SINGH AND ANOTHER.**

[VI-144]

(51).—*Share-holder.*] The *wajib-ul-arz* of a village gave a right of pre-emption to "co-sharers in the *mahal*". One of the co-sharers brought a suit for pre-emption which the vendee defendant resisted on the ground that he also was a co-sharer in the *mahal*, and the plaintiff had therefore no preferential right. This contention was based on a former purchase by the defendant under a deed of sale executed by a co-sharer, comprising (i) an isolated plot of land in the *mahal*, (ii) *sir* lands in the *mahal*. Held by the Full Bench that the vendee defendant, by reason of his prior purchase, was a co-sharer in the *mahal* within the meaning of the *wajib-ul-arz*, and the plaintiff had therefore no preferential right of pre-emption.

Per MAHMOOD, J.—The decisions of the Full Bench in *Niamat Ali, v. Asmat Bibi* (I. L. R. 7 All., 626) and *Sital Prasad v. Amtul Bibi* (I. L. R., 7 All., 633) have overruled *Hazari Lal v. Ugrah Rai* (W. N. 1884, p. 103) and *Rup Ram v. Mangni* (W. N. 1886, p. 136). **SAFAR ALI v. DOST MUHAMMAD AND ANOTHER.**

[X-117]

See Nos. (118)———(125).

(52).—*Hindu son—Wajib-ul-arz.*] The *wajib-ul-arz* of a village contained the following entry regarding the right of pre-emption: "When any co-sharer &c." Held that a Hindu son living jointly with his father and having no separate property of his own, was not a "co-sharer" within the meaning of the *wajib-ul-arz* and was not entitled to pre-empt the property transferred by his father. **JANAK v. GANGA BISHEN AND ANOTHER.**

[IV-13]

MAHADEO SINGH v. NANDA SINGH.

[IV-100]

(53).—*Member of joint Hindu family—Wajib-ul-arz.*] The members of a joint and undivided Hindu family other than that member who is recorded in the Collector's book as a sharer in the *mahal*, are "co-sharers" for the purposes of pre-emption in the sense of the *wajib-ul-arz*. **GANDHARP SINGH AND ANOTHER v. SAHIB SINGH AND ANOTHER.**

[IV-326]

PRE-EMPTION—Persons entitled to the right, (continued.)

See also

BHURAI MAL v. NAWAL SINGH.**[II-16]**

(54). ————— *Member of a Muhammadan family—Wajib-ul-arz.*] The heirs to a Muhammadan have no legal interest or share in his property so long as he is alive and cannot therefore be regarded as in any sense co-sharers or co-parceners in his property, so as to be entitled to claim the right of pre-emption in case of sale by him of his property. *Held* therefore, where a husband sold his share of an undivided estate to his wife, that, although one of his heirs, she had not on that account a right of pre-emption in respect of such sale. A husband transferred certain property to his wife in consideration of a certain sum which was due by him to her as dower. *Held* that such transfer was a "sale" within the meaning of the Muhammadan law of pre-emption and gave rise to the right of pre-emption. *Pearee Begam v. Sheikh Hasmat Ali*, (N. W. P., S. D. A. Rep., 1864, Vol. 1, p. 475) followed. The meaning of "stranger," and "sale" as used in Muhammadan law of pre-emption, explained. **FIDA ALI AND OTHERS v. MUZAFFAR ALI AND ANOTHER.**

[II-175]

See also

AMJAD ALI AND OTHERS v. MUSHTAQ AHMAD AND ANOTHERS.**[XV-95]****MUSHTAQ AHMAD AND ANOTHER v. AMJAD ALI AND OTHERS.****[XVII-121]**

(55). ————— *Hindu widow in possession—Wajib-ul-arz.*] A Hindu wife or widow who on partition of the property of the joint family of which she was a member has obtained a share in such property, does not become entitled to pre-emptive rights by virtue of her possession of that share. The principle of *Dila Kuari v. Jagarnath Kuari* (I. L. R., 6 All., 17) followed. *Phulman Rai v. Dani Kuari* (I. L. R., 1 All., 452) referred to, **PHOPI RAM AND OTHERS v. RUKMIN KUAR.**

[XV-84]

(56). —————.] A Hindu widow in possession of the immoveable property of her deceased husband but not as his heir, there being a son living, has no right of pre-emption as a co-sharer by virtue of such possession even though she may be recorded as a co-sharer in the village papers. *Phopi Ram v. Rukmin Kuar* (W. N., 1895, p. 84) and *Imam-uddin v. Surjaiti* (W. N., 1895, p. 85) followed. **BHUPAL SINGH v. MOHAN SINGH.**

[XVII-72]

(57). —————.] The plaintiffs in a suit to enforce a right of pre-emption based on the *wajib-ul-arz* of a village which gave the right to "co-sharers," alleged

PRE-EMPTION—Persons entitled to the right, (continued.)

themselves to be jointly interested in the village, and, in their plaint, claimed relief jointly. One of the two plaintiffs was the widow of a co-sharer in the village, who, at the time of his death, was a member of a joint Hindu family. *Held* that inasmuch as the widow had only a right of maintenance out of the estate of her husband she was not a co-sharer in the village and therefore had no right to claim pre-emption. *Held* further with reference to the manner plaint was framed, that the other plaintiff could not claim pre-emption entirely on his own account without amending the plaint, but that it was too late for him to take such a course. *Damodar Das v. Gokal Chand* (I. L. R., 7 All., 79) referred to. **KARAN SINGH AND ANOTHER v. MUHAMMAD ISMAIL KHAN AND OTHERS.**

[V-247]

(58). —————.] Possession for life by a Hindu widow of a share of a village in lieu of maintenance under a decree of Court does not give her such an interest in the share as to entitle her to enforce the right of pre-emption on the sale of another share of the village. **DILA KUARI v. JAGARNATH KUARI AND OTHERS.**

[III-177]

(59). —————.] Two Hindu brothers were in possession of a certain share in a village. On the death of one of them the survivor entered into a compromise with his widow whereby the widow was put into possession of a quarter of the said share for her life with strict provisions against her alienating it in any way. *Held* that the possession of the widow under the above circumstances was not such as would entitle her to claim pre-emption as being a proprietor in the *mahal*, but that her position was analogous to that of a Hindu widow in possession of immoveable property in lieu of maintenance. *Phulman Rai v. Dani Kuari* (I. L. R., 1 All., 452); *Dila Kuari v. Jagarnath Kuari* (I. L. R., 6 All., 17) and *Phopi Ram &c. v. Rukmin Kuar* (Supra, 84, referred to. **IMAM-UD-DIN AND OTHERS v. SURJAITI.**

[XV-85]

(60). ————— *Muhammadan widow in possession in lieu of dower—Wajib-ul-arz.*] *Held* that a person in possession of property in lieu of dower is not a co-sharer within the meaning of the *wajib-ul-arz* for the purpose of pre-emption. Her possession is liable to be determined at any time by the satisfaction of the dower-debt. Such a person can not be in a better position than that of a mortgagee in possession. **KHAIRUNNISSA BIBI v. AMIN BIBI AND ANOTHER.**

[VII-93]

(61). ————— *At the time of sale—Wajib-ul-arz.*] Where there is a right of pre-emption under the *wajib-ul-arz* which a share-

PRE-EMPTION—Persons entitled to the right, (continued.)

holder could claim and enforce in respect of a sale of property, a person purchasing the said share-holder's interest in the village subsequently to the sale cannot claim and enforce pre-emption as his vendor might have done. *SHEO NARAIN PANDE v. HIRA PANDE.*

[V-142]

See also

LACHMI NARAIN AND ANOTHER v. MANOG DAT.

[V-47]

(62).—*Mutation—Wajib-ul-arz.* In a suit for pre-emption under a *wajib-ul-arz* which gave a right of pre-emption to "co-sharers" in the village. *Held* that the word "co-sharer" included a person who had acquired lands in the village, which were not merely *sir* of a co-sharer and were not grove lands held by a licensee from a *zemindar* but lands belonging to a *zemindar* and in his occupation, notwithstanding the fact that he had not yet obtained mutation of names in respect thereof. *Held* also that the mere fact of the owner of land having erected a temple and planted a grove thereon did not of itself without any further evidence indicate a dedication to the God and a cessation of the right of private ownership in respect of such land. *DAKHKHNI DIN v. RAHIM-UN-NISSA AND ANOTHER.*

[XIV-134]

See No. (38).

(63).—*Benami purchaser.* The plaintiffs (recorded co-sharers) brought this suit of pre-emption against the vendees who were admittedly not recorded co-sharers, but they allege that they had bought shares in the village in the name of their *gumashla*, who was recorded as a co-sharer. *Held* that even if their history be true the defendants were equitably estopped from asserting their claim. *BENI SHANKAR SHELHAT AND OTHERS v. MAH PAL BAHADUR SINGH.*

[VII-71]

(64).—*Khalit—Shamilat land—Wajib-ul-arz—Muhammadan law.* The *wajib-ul-arz* of a *mahal* to which certain *Shamilat* land appertained in common with another *mahal* contained a provision that the right of pre-emption should be exercised according to the rules of Muhammadan law. *Held* that such provision did not give a right of pre-emption to the sharers in the second *mahal* in respect of land in the first, as against sharers in the first *mahal*, merely by virtue of their sharing in the common appurtenances. *NAZIR-UD-DIN v. KADIR BAKSH AND ANOTHER.*

[XIV-193]

PRE-EMPTION—Persons entitled to the right, (continued.)

(65).—*Vicinage—Muhammadan law.* Where an estate, originally one, has been divided into two separate *mahals* no right of pre-emption under the Muhammadan law will subsist on behalf of one of such *mahals* in respect of the other merely by reason of vicinage: nor will any right of pre-emption arise from the fact that certain appurtenances to the original *mahal* are still enjoyed in common by the owners of the separate *mahals*. *ABDUL RAHIM KHAN v. KHARAG SINGH AND ANOTHER*

[XII-240]

(66).—*Private road—Muhammadan law.* In order that two persons may become *Shafi-i-khalits*, or persons having a right of pre-emption in virtue of the common enjoyment, e.g. a road, it is necessary that such road should be a private road and not a thoroughfare. Among persons who are *Shafi-i-khalits* by reason of being sharers in a right of way, all those who are sharers in such right of way have equal rights of pre-emption, although one of them may be a contiguous neighbour. *KARIM BAKHSH v. KHUDA BAKHSH.*

[XIV-70]

(67).—*Purchaser of a co-sharer's share.* *Held* that one of three co-sharers in a *mahal* did not by purchase of one moiety of the share of another co-sharer acquire a preferential right of pre-emption over the third co-sharer in respect of the remaining moiety of the said share. *MANIK RAJ KUARI v. AMINA BIBI AND ANOTHER.*

[XV-5]

(68).—*Condition vendee—Decree for foreclosure—Order absolute.* *Held* that where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act, 1882, the right to sue for pre-emption accrues, not from the date fixed in the decree under s. 86 as the date upon which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under s. 87 of the said Act. *Raghubir Singh v. Nandu Singh (W.N. 1891, p. 134); Ali Abbas v. Kalka Prasad (I. L. R., 14 All., 405) and Poresk Nath Majumdar v. Ramjodu Mojumdar (I. L. R., 16 Calc., 246) referred to. ANWARUL HAQ v. JWALA PRASAD.*

[XVIII-67]

(4) Preliminaries of pre-emption.

(69).—*Talab-i-muasibat—Muhammadan law.* A claimant for pre-emption under Muhammadan law does not comply with the requirements of the law as to *talab-i-muasibat* if he allows a right to elapse after hearing of the sale before making his demand for pre-emption. *NAZIR KHAN v. INAYAT ULLAH AND OTHERS.*

[XII-24]

PRE-EMPTION—Preliminaries of Pre-emption,—(continued.)

(70).—*Wajib-ul-arz*] A sale of property, to which the Muhammadan law of pre-emption was applicable, took place in October, 1884. The plaintiff pre-emptor and his agent became aware of the sale shortly after it took place, and many months prior to July, 1885. He did not allege that he had given notice that he claimed to exercise his right of pre-emption before July, 1885. It was found as a fact that no such notice was given. *Held* that even if such notice was given, it was too late, and was not a prompt demand in accordance with the Muhammadan law. **MUHAMMAD WILAYAT ALI KHAN v. ABDUL RAB AND ANOTHER.**

[IX-17

(71).—*]* *Held* that, in the absence of a local custom to the contrary, the burden of proving which (custom) lies upon the person alleging it, pre-emption would be presumed to be governed by the Muhammadan law with all the incidents attached thereto, *e.g.* (*talab-i-muasibat* &c.). so far so that where the *wajib-ul-arz* contained the following words: "The custom of pre-emption prevails according to the usage of the country" it was *held* that unless proof is given to the contrary it must be presumed to be the pre-emption of the Muhammadan law. *Fakir Rawat v. Sheikh Emambakhsh* (B. L. R. Sup. Vol., p. 35); *Choudhry Brij Lal v. Rajah Goor Sahai* (F. B. rulings from July to December, 1867, for N.-W.P., p. 128); *Jai Kuar v. Heera Lal* (N.-W. P. H. C. Rep., 1875, p. 1); *Zamir Husain v. Dawlat Ram* (I. L. R., 5 All., 110); *Govind Dayal v. Inayatullah* (I. L. R., 7 All., 775); *Ram Dial v. Budd Sen* (W.-N. 1884, p. 123) referred to. **RAM PRASAD v. ABDUL KARIM.**

[VII-146

(72).—*]* A brought a pre-emption suit against B. The suit was found on the *wajib-ul-arz* and custom. Every issue was found in favour of the pre-emptor except that he did not notify his desire to purchase when he heard of the sale. *Held* that no such demand was essential to a pre-emption suit founded on *wajib-ul-arz*, the case being different in cases founded on Muhammadan law. The cause of action in pre-emption suit was not the demand but the sale impeached. **MUHAMMAD RUSTAM ALI KHAN v. NIADAR SINGH AND ANOTHER.**

[VI-114

(73).—*Talab-i-Ishad, Muhammadan law.*] In a suit to establish a right to pre-emption under the Muhammadan law the requirement of *talab-i-ishtishhad* is sufficiently complied with if witnesses are brought by the plaintiff, pre-emptor, for the purpose of witnessing the demand and are actually present when the demand is

PRE-EMPTION—Preliminaries of Pre-emption,—(continued.)

made though they are not specifically invoked. **CHOTU AND OTHERS v. HUSSAIN BAKHSH AND OTHERS.**

[XIII-101

(74).—*]* *Held* that in the making of the *talab-i-ishtishhad* the servants of the pre-emptor are competent witnesses. The disability in this respect imposed by the Muhammadan law is limited to minors and persons convicted of slander. *Muhammad Nasir Uddin v. Abdul Hussain* (I. L. R., 16 All., 300) followed. *Habib-un-nissa v. Abdul Rahim* (W. N., 1886, p. 119) referred to. **MUHAMMAD YUNIS KHAN AND ANOTHER v. MUHAMMAD YUSUF.**

[XVII-93

(75).—*]* In making *talab-i-ishtishhad* under the Muhammadan law it is essential to the validity of that proceeding that the person making the demand should in some form or another distinctly state that he had prior thereto, made what is known as the immediate demand (*talab-i-mawasibat*). *Rajjab Ali Chopdar v. Chundi Churn Bhadra* (I. L. R., 17 Calc., 543) referred to. **AKBAR HUSAIN v. ABDUL JALIL AND ANOTHER.**

[XIV-122

(76).—*]* A would-be pre-emptor, who was a *pardanashin* lady upon hearing of the sale of certain property in respect of which she had a right of pre-emption, at once declared her intention to pre-empt. She then sent to the purchaser her agent, who declared to him her intention in the following terms: "*Meri Mumani kahali hai ki main is ahute ki shafi hun.*" At the same time taking the persons present to witness that he had told the purchaser what his aunt had said in the matter of the pre-emption. *Held* that his was a sufficient compliance with the requirements of the *talab-i-ishtishhad* according to the Muhammadan law. *Rajjab Ali Chopdar v. Chandi Charan Bhadra* (I. L. R., 17 Calc., 542) and *Akbar Husain v. Abdul Jalil* (W. N., 1894, p. 122) referred to. **AHMAD SHAH KHAN v. ABADI BEGAM.**

[XVII-23

(77).—*]* *Held* that if the *talab-i-ishtishhad* is made in the presence of the vendee it is not necessary that such vendee should at the time the demand is made be actually in possession of the property in respect of which pre-emption is claimed. *Held* also that the ceremony of *talab-i-ishtishhad* need not necessarily be performed by the claimant for pre-emption in person, but may be performed by a duly constituted agent on his behalf. **ALI MUHAMMAD KHAN v. MUHAMMAD SAID HUSAIN.**

[XVI-76

PRE-EMPTION—Preliminaries, (continued.)

(78). —————.] Where certain person claimed pre-emption in respect of a share in an undivided village and proved that they made an immediate assertion of their intention to pre-empt in the presence of witnesses within the area of the *zamindari* to which the share sold belonged, it was held that in the absence of any indication that the demand was not made *bonâ fide*, the demand of pre-emption was a good demand "made on the premises" within the meaning of Muhammadan law. **KULSUM BIBI v. FAQIR MUHAMMAD KHAN AND OTHERS.**

[XVI-71]

(79). —————.] *Talab-i-Ish-had—Local custom.* A Muhammadan sued to enforce a right of pre-emption in respect of a sale between Hindus, founding such right on local custom. The formality of "*ish-had*" or express invocation of witnesses, required by the Muhammadan law of pre-emption, was not one of the incidents of such custom. Held that the circumstances that the plaintiff was a Muhammadan did not preclude him from claiming to enforce such right against the defendants who were Hindus; and that the formality of "*ish-had*" not being one of the incidents of such custom, it was not necessary that the plaintiff should have observed that formality as a condition precedent to the enforcement of such right. *Fakir Rawot v. Sheikh Emambakhsh* (B. L. R. Sup. Vol. 35); *Bhodo Mahomed v. Radhe Churn Bolia* (13 W. R. 332) referred to. *Sheikh Kudratulla v. Mahini Mohan Shaha* (4 B. L. R., F. B., 134; 13 W. R. F. B., 21) and *Dwarka Das v. Husain Bakhsh* (1 L. R., 1 All., 564) distinguished. *Chowdhree Birj Lal v. Raja Goor Sahai* (F. B. Rule, June—Dec. 1867, p. 128) and *Jai Kuar v. Heera Lal* (N. W. P. H. C. Rep., 1875, p. 1) followed. **ZAMIR HUSAIN v. DAULAT RAM AND OTHERS.**

[II-199]

(5) Purchase-money.

(80). —————.] *Price fixed in wajib-ul-arz.* This was a suit to enforce the right of pre-emption on payment of the price fixed in the *wajib-ul-arz*. The rule in the *wajib-ul-arz* ran thus:—"In the event of any dispute arising between the vendor and pre-emptor, the price shall be fixed in the following way—In sales Rs. 2 *per bigha* and in case of mortgages 3 *bighas* for 1 rupee." Held that the clause of the *wajib-ul-arz* was not applicable to the present case. Here there is a completed sale (without any dispute having arisen) to a stranger for a fair consideration and a claim preferred for the first time six months after the sale. **AKBAR SINGH v. JUALA SINGH AND OTHERS.**

[V-216]

(81). —————.] The *wajib-ul-arz* of a village contained a provision

PRE-EMPTION—Purchase money, (continued.)

that any co-sharer desiring to sell his share should offer it to the other co-sharers before selling it to a stranger, and further, that, in case of sale to a co-sharer, the price to be paid should be calculated in proportion to the price for which a particular share had been sold in 1860. One of the co-sharers, without first offering his share to the other co-sharers, sold it to a stranger, for a price higher than that which would be payable according to the above mentioned provision. A suit for pre-emption was brought by a co-sharer against the vendor and the purchaser, and the plaintiff claimed the benefit of the sale upon payment of a sum calculated according to the condition of the *wajib-ul-arz* relating to sales between co-sharers. Held by the Full Bench that the condition of the *wajib-ul-arz* regarding the price to be paid for the share was still binding on the land, notwithstanding the sale; that a co-sharer was entitled to purchase the share at the price agreed before it could be sold to any one else, and, in case of sale to a stranger, could call on the vendor and the purchaser to hand it over on payment of such price; and that, if the stranger vendee had paid more than was payable according to the *wajib-ul-arz*, he was entitled to recover it from the vendor. *Akbar Singh v. Juala Singh* (W. N., 1895, p. 216) distinguished. **KARIM BAKHSH KHAN AND OTHERS v. PHULA BIBI.**

[VI-24]

HASRAT KHAN v. JEODADH UPADHIA AND OTHERS.

[VII-76]

UPMANI KUAR v. RAM DIN AND OTHERS.

[VIII-243]

(82). —————.] *Foreclosure under Regulation of 1806—Conclusive against pre-emptor.* Held that a proceeding under Regulation XVIII of 1806 foreclosing a mortgage by conditional sale was not conclusive as to the amount of the mortgage-money against persons subsequently claiming to enforce a right of pre-emption and raising the question as to the amount of the purchase-money. *Forbes v. Amceroonnissa Begum* (10 Moo. I. A., 340) referred to. Also that, on general principles, a decree in a suit to foreclose a mortgage by conditional sale cannot bind a person not a party to the suit claiming to enforce a right of pre-emption and raising a similar question. Held also that a person claiming a right of pre-emption in respect of a mortgage by conditional sale was bound to pay as the price of the property the entire amount due on such mortgage at the time it became absolute. Also that on the expiration of the year of grace allowed by Regulation XVII of 1806 the ownership of the mortgaged property vested absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring

PRE-EMPTION—Purchase-money,
(continued.)

his right. *Forbes v. Ameeroonnissa Begam* (10 Moo. I. A. 340) referred to. *Ashik Ali v. Mathura Kandu* (I. L. R. 5 All., 187); *Khub Chand v. Leela Dhuir* (N.W. P. H. C. Rep., 1868, p. 103); *Feorakhan Singh v. Hookum Singh* (N.W. P. H. C. Rep., 1868, p. 358); *Suroop Chunder Roy v. Mohender Chunder Roy* (22 W. R. 539) and *Luft Hossein v. Abdool Ali* (8 W. R., 47) followed. *Bhagwan Singh v. Mahabir Singh* (I. L. R. 5 All., 184) followed. As to the rule of *onus probandi*, where the plaintiff in a suit to enforce a right of pre-emption impugns the correctness of the price stated in the instrument of sale, in determining the amount of the price which a pre-emptor has to pay, the Court is not called upon to assess the amount which would be a fair and reasonable price for the property, but to ascertain what amount actually changed hands as consideration for the sale. **TAWAKHUL RAI AND ANOTHER v. MAHABIR RAI AND OTHERS AND TAWAKHUL RAI AND ANOTHER v. SHEOGHULAM RAI.**

[IV-110]

(83).—*Conditional sale.—Amount.*] The pre-emptor, in the case of a mortgage by conditional sale which has become absolute, is bound to pay as the price of the property the entire amount due on such mortgage at the time it became absolute. **ASHIK ALI V. MATHURA KANDU.**

[II-212]

(84).—*Onus.*] In a suit for pre-emption in which the plaintiff impugns the correctness of the price stated in the instrument of sale although the burden of proof *prima-facie* is on him yet very slight evidence is ordinarily sufficient to shift the burden on the defendant. *Rajah Krishen Dutt Ram Pandey v. Narendar Bahadoor Singh* (L. R. 3 I. A., 85); *Sheikh Mahomed Noorul Hossein v. Sheikh Hyder Buxsh* (W. R., Jan. —July, 1864, 304) and *Sheikh Golam Ayhya v. Foy Mungul Singh* (13 W. R., 435) referred to. **BHAGWAN SINGH AND OTHERS v. MAHABIR SINGH AND OTHERS.**

[I 1-213]

(85).—*—*] Held that in pre-emption cases the rule is that in the first instance the pre-emptor (plaintiff) who alleges the price to be fictitious must give some *prima facie* evidence, which would lead to the presumption that the price mentioned in the sale-deed was not the real price. Having done that it lies upon the vendor and vendee to give such an explanation by evidence as will go to rebut the presumption raised by the plaintiff's evidence. **SHEOPARGASH DUBE v. DHANRAJ DUBE AND OTHERS.**

[VII-39]

SRI RAI AND ANOTHER v. HANWANTA MISRAIN.

[II-16]

PRE-EMPTION—Purchase-money,
(continued.)

RAM PRASAD V. ABDUL KARIM.

[VII-146]

(86).—*Evidence.*] This was a pre-emption suit. The only question was as to the amount of the purchase-money. The vendee defendant alleged that it was Rs. 5,000 and produced the sale-deeds as well as a prior bond for Rs. 2,000 due by the vendor which the vendee alleged to have paid off, the remaining Rs. 3,000 he alleged to have paid in cash. The plaintiff pre-emptor, on the other hand, alleged that the consideration was only Rs. 500, but he failed to establish such allegation. The Court below discredited the evidence produced by the vendor and decided that the plaintiff should pay the market price. Held that the defendant's evidence should not have been rejected without very good reasons and the Court must determine the price paid for the properties. **NUR BHARI v. GHISI.**

[II-9]

(87).—*Market price.*] Held that in pre-emption cases, when the question is as to what is the real amount of the purchase-money and the Court cannot ascertain from the evidence before it, what in fact, was the contract price, it should ascertain, if possible, what was the market price at the time of the sale. **AGAR SINGH v. RAGHURAJ SINGH AND ANOTHER.**

[VII-99]

(88).—*Sulehnama.*] One *R B*, a *baibil-wafa* mortgagee of a 5 *anna* share, took proceedings for foreclosure which ended on a *robkar bai-bat*, dated in 1882, wherein it was declared that the money due on the mortgage was Rs. 333-11 and that in default of the payment thereof within the proper time, the share was to be foreclosed. Subsequently in a suit brought by *R B* for proprietary possession of the whole 5 pies share the parties came to an agreement, dated 4th July, 1882, under the terms whereof half the share (2½ pies) was to remain in possession of the defendant and the other half was to be held and finally foreclosed in favor of *R B* in lieu of Rs. 737-15. In execution of the decree based on this agreement *R B* obtained possession over the 2½ pies share. Thereupon this suit for pre-emption was brought by the plaintiff in respect of the 2½ pies share which under the *sulehnama* came into proprietary possession of *R B*. The lower appellate Court gave the plaintiff a decree conditional on the payment of Rs. 737-15. In this second appeal the amount of the purchase-money ordered to be paid is questioned by the plaintiff-appellant. Held that as the suit was brought on the *sulehnama* the plaintiff was bound to pay the amount mentioned in the *sulehnama* as the purchase-money. **JAGAT SINGH v. RAM BAKHSH AND OTHERS.**

[VII-233.]

PRE-EMPTION—Purchase-money,
(continued.)

(89).—*Bad title of vendor.—Ground for reduction.*] Certain persons sold an eight anna share of a village. *G* sued the vendors of purchasers of the share to enforce his right of pre-emption in respect of the sale and obtained decree. *M* claiming one anna four pies of the share as his property, sued the vendors and purchasers of the share, and *G* for such one anna four pies, and obtained a decree. He then sued the same parties to enforce his right of pre-emption in respect of the remainder of the share, that is, six annas eight pies, claiming to pay only a proportionate amount of the price paid for the whole share. *Held* that *M* was not bound to pay the price paid for the whole share, but only the proportionate amount of such price. *MUHAMMAD LATIF v. GOBIND SINGH AND OTHERS.*

[III-66]

(90).—*Joint sale.—Proportionate amount.*] The owner of a one *biswa* share of a village and the owners of a $1\frac{1}{2}$ *biswas* share joined in selling the $2\frac{1}{2}$ *biswas*. The present suit was brought to enforce a right of pre-emption in respect of the $1\frac{1}{2}$ *biswa* share. The question was as to the amount of the purchase-money he was bound to pay for the $1\frac{1}{2}$ *biswa* share. The purchase-money of the entire $2\frac{1}{2}$ *biswa* was Rs. 4,000, made up of sums due from the two vendors on prior bonds, in different amounts, a sum paid to a prior mortgagee of the land, and a sum paid to the vendees themselves. *Held* that in order to determine what sum the pre-emptor should pay, the price paid by the vendees for both shares should be ascertained and then what was the proportionate amount of that sum chargeable to the $1\frac{1}{2}$ *biswa* share. In order to ascertain that amount reference to the debts originally due on the bonds was outside the case. *SITA RAM AND OTHERS v. NAND RAM.*

[I-80]

(91).—*Covenant in sale deed.—Pre-emptor entitled to benefit.*] A pre-emptor is entitled to all the benefits which the vendee takes under the contract of sale. *Held* therefore, where a certain sum was fixed as the price of the property and such sum was paid by the vendee, but it was subsequently agreed between him and the vendor, as part of the sale contract, that the vendee should recover for his own benefit certain moneys due to the vendor at the time of the sale, and the vendee recovered such moneys, that the pre-emptor was entitled to a deduction of the amount of such moneys from the sum originally fixed as the price of the property. *TAJAMMAL HUSAIN v. UDA AND ANOTHER.*

[I-44]

(6). Transfers giving rise to.

(92).—*Mortgage by conditional sale.*] The *wajib-ul-arz* of a certain village provided

PRE-EMPTION—Transfers giving rise to, (continued.)

that "when any co-sharer wished to alienate his share, he must offer it first to the nearest co-sharer, then to the co-sharer in the *"thoke,"* &c..." and that in case of mortgage or other kind of transfer which did not extinguish the proprietary right, the pre-emptor, &c." *Held* that these expressions in the *wajib-ul-arz* must be taken to contemplate, all alienations, not only by sale and ordinary mortgage, but by conditional sale, and that the term "co-sharer" must be taken to mean the transferee for the time being of a co-sharer's interest. *SALIK SAHU v. JAFAR ALI AND OTHERS.*

[I-84]

(93).—*—*] A clause in the *wajib-ul-arz* of a village gave right of pre-emption in respect of "transfer" by the sharers of their rights and interests by sale and mortgage. *Held* that a deed of conditional sale of a share in the village, which did not transfer possession, was a transfer of an interest in the village, and was sufficient to let in the right of pre-emption. *Sheoratan Kuar v. Mahipal Kuar (I. L. R., 7 All., 258)* followed. *AZIMAN BIBI AND ANOTHER v. AMIR ALI AND OTHERS.*

[V-46]

(94).—*Foreclosure—Wajib-ul-arz prepared after mortgage.*] In the case of a mortgage by conditional sale there is no room for the exercise of the right of pre-emption until the conditional sale becomes absolute. Where therefore a mortgage by conditional sale has been executed before, but the sale has not become absolute until after the preparation of the *wajib-ul-arz* of the village in which the mortgaged property is situated, on the sale becoming absolute, the rights of the parties will be subject to the provisions of the pre-emptive clause of such *wajib-ul-arz*. *RAGHUBIR SINGH v. NANDU SINGH AND OTHERS.*

[XI-134]

(95).—*—*] The conditional vendees of a share in a village obtained a decree for foreclosure against the conditional vendors *ex-parte*. In October, 1883, the conditional vendors applied to have this decree set aside. In January 1884, while this application was pending one *G R* brought the present suit against the conditional vendors, and vendees to enforce the right of pre-emption, his cause of action being the *ex-parte* decree for foreclosure. In February 1884, this foreclosure decree was set aside and the suit for foreclosure ordered to be proceeded with. On the first of April, 1884, the conditional vendee obtained a decree in the foreclosure suit. In July, 1884, the conditional vendors satisfied the decree for foreclosure. *Held* that the sale upon the basis of which the plaintiff had brought his suit having come to an end the suit must be dismissed.

PRE-EMPTION—Transfers giving rise to, (continued.)

The defendants will pay the plaintiff's cost in the first Court and the parties will pay their own costs in this and the lower appellate Court. **KARAN SINGH AND OTHERS v. GANESH RAM.**

[VI-67]

(96). — [On the 12th May, 1871, *B* mortgaged, by way of conditional sale, a share of a village to *A*, a stranger. Such mortgage having been foreclosed, *A* sued *B* for possession of such share, and obtained a decree on the 16th April, 1878, in execution of which he obtained possession of such share on the 9th September, 1878. On the 1st September, 1879, *S*, a co-sharer, sued *A* and *B* to enforce his right of pre-emption in respect of such share founding his suit upon the following clause in the administration paper of the village:—"When a share-holder desires to transfer his share, a near relative shall have the first right; the share-holders of the other pattis if all these refuse to take, the vendor shall have power to sell and mortgage, etc. to whomsoever he likes." Held (Pearson, J., dissenting) having regard to the terms of the administration paper that a cause of action accrued to *S*, when such mortgage was foreclosed.

Per SPANKIE, J., OLDFIELD, J., and STRAIGHT, J. (STUART C. J., dissenting) that a cause of action also accrued to *S* when such share was mortgaged by way of conditional sale to *A*. *B* stipulated in the instrument of mortgage to pay the interest annually, and in case of default to pay compound interest. Held *per* Stuart, C.J., Spankie, J., and Straight, J., that, inasmuch as *B* would have been obliged to pay compound interest had he desired to redeem the mortgage property, *A* was entitled to receive from *S* compound interest up to the date of foreclosure. **ALU PRASAD v. SAKHAN**

[I-31]

(97). — [The *wajib-ul-arz* of a village provided that the right of pre-emption should accrue "not only in respect of absolute sale, but also in regard to conditional sales and "*thika*" leases." Held that under its terms the right of pre-emption accrued on a mortgage by conditional sale becoming absolute. The *ratio decidendi* in *Alu Prasad v. Sakhan*, (I. L. R., 3 All., 610) relied on. **ASHIK ALI v. MATHURA KANDU.**

[II-212]

(98). — [The mortgagee under a deed of conditional sale executed in 1878, took foreclosure proceedings under Regulation XVII of 1806, and, the year of grace having expired, a foreclosure proceeding was recorded on the 18th September, 1882, declaring the mortgage to have been foreclosed. In

PRE-EMPTION, Transfers giving rise to, (continued.)

August, 1885, the mortgagee instituted a suit for possession of the mortgaged property. On the 19th September, 1885, the suit was compromised the mortgagee accepting a part of the mortgaged property, and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently, a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September, 1885. Held that although upon the expiration of the year of grace, the ownership of the mortgaged property vested in a conditional vendee even though he might not have obtained a decree establishing or declaring his right, and the right of pre-emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation, being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected; that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that, in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September, 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. *Bhadu Mahomed v. Radha Churn Bolia* (4 B.L.R.A.C., 219); *Sheodeen v. Sookit* (S. D. A. N.-W. P., 1864, vol. I, p. 624) and *Tawakkul Rai v. Lachman Rai* (I. L. R., 6 All., 344) distinguished. *Norender Navain Singh v. Dwarka Lal Mundur* (L. R., 5 I.A., 18); *Madho Prashad v. Gazadhar* (L. R., 11 I.A., 186); *Silla Bakhsh v. Latta Prasad* (I. L. R., 8 All., 388) and *Fagat Singh v. Ram Bakhsh* (Weekly Notes 1887, p. 233) referred to. Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute. **AJAIB NATH AND OTHERS v. MATHURA PRASAD.**

[IX-48]

(99). — [The two joint owners of a two annas eight pies share in a village jointly executed two deeds of mortgage by conditional sale, each for a share of one anna four pies in favour respectively of *R* and *A*, co-sharers in the village, and related to the vendors. In 1875, the conditional sale in favour of

PRE-EMPTION—Transfers giving rise to, (continued.)

R became absolute and he was recorded as proprietor of half the share of the vendors, and obtained possession thereof. In 1882, *A* foreclosed his mortgage, and obtained possession of the other half share. *R* thereupon claimed the right to purchase the half share so acquired by *A*, on the allegation that he had a right of pre-emption in respect thereof having become the vendee in 1875 of the other half-share, and therefore being the "nearer co-sharer" of the vendors within the meaning of the *wajib-ul-arz* and also being nearer in relationship to the vendors than *A*. The *wajib-ul-arz* provided that each co-sharer was competent to transfer his own share, but that, when making a transfer it was incumbent on him to notify the same to his near co-sharer, and on his refusal, to other sharers in the village. The lower appellate Court held that the plaintiff was estopped from preferring a claim to pre-emption on the ground that he had acquiesced in the conditional sale in favour of the defendant, and also that he had no right to pre-emption under the *wajib-ul-arz*. Held that inasmuch as from 1875 to 1882 the only owners of the two annas eight pies share were the plaintiff and the mortgagors, they were only the co-sharers in respect of this particular share, although, there were other co-sharers in the village; that the plaintiff must therefore be regarded as "nearer co-sharer" of the vendors than the defendant within the meaning of the *wajib-ul-arz* and that, as such, he was entitled to claim pre-emption. Held also that the right of pre-emption which arose upon the sale was a new right, and not the same as that which arose at the time of the mortgage inasmuch as the *wajib-ul-arz* distinctly contemplated the right of pre-emption as arising upon the two different events of mortgage and sale; that the alleged acquiescence of the plaintiff pre-emptor therefore occurred at a time when the right claimed by him was not yet in existence; and that consequently the claim was not barred. RUP NARAIN v. AWADH PRASAD.

[V-85

(100). —————.] "When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so, first, in favour of a near co-sharer, next, in favour of a co-sharer of his *thok*, and, lastly, in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per *bigha* of cultivated land and Rs. 5 per *bigha* of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (i. e. any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the

PRE-EMPTION—Transfers giving rise to, (continued.)

share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share." Held that, in the case of a conditional sale of property to which this *wajib-ul-arz* applied, there were only two stages contemplated by the *wajib-ul-arz*, and not three. The first stage was at or about the time of the execution of the deed of conditional sale, and at that time pre-emption might be had by a co-sharer at the rate indicated in the *wajib-ul-arz*. The second stage was when the conditional vendee had brought his suit for foreclosure, and at that time the pre-emptor would have to pay the amount found to be due under the deed of conditional sale. When once, however, the order for foreclosure, had been made absolute, the co-sharer's right of pre-emption was gone and extinguished. GAYA BHARTI v. LAKHNATH RAI.

[XVII-208

(101). ————Sale out and out—Agreement to retransfer.] In July, 1870, *R*, the owner of a share of a village, executed in favour of *M*, an instrument whereby he transferred by sale his share to *M* absolutely. In November, 1870, *M* agreed to retransfer the share to *R*, if at any time within 13 years, *R* desired to repurchase it, on payment of the sum which *M* had paid for it during the term mentioned in the agreement of November, 1870. *R* not having taken advantage of the agreement, *M* sued as owner of the share, to enforce the right of pre-emption in respect of a sale of another share of the village. Held that, *M* having become under the transfer of July, 1870, the out and out proprietor of the share until *R* availed himself of the option given by the agreement of November, 1870, the full state of an owner, carrying with it the right of pre-emption, vested in *M*, and it was competent for him to enforce such right by suit. *Ram Saran Lal v. Amrita Kuar* (I. L. R., 3 All., 369) distinguished. BHAJAN AND ANOTHER v. MUSHTAK AHMAD.

[III-51

(102). ————.] On the 6th of June, 1887, one *R K* sold a certain *zamindari* share to *S*. On the 18th of May, 1888, *B* brought a suit for pre-emption of that share. Pending the suit, on the 6th of July, 1888, the vendor, the vendee and the pre-emptor entered into an agreement by which the vendee, recognising the pre-emptive right of plaintiff, agreed to re-transfer the property to the vendor or the pre-emptor on payment by either of them on the full moon of *Feth* in any year of the price paid by him. On the 20th of June, 1891, the vendor, affecting to treat the transaction of the 6th of June, 1887, as a mortgage, made an application purporting to be under s. 83 of the Transfer of Property Act accompanied by payment of the price of the property into

PRE-EMPTION—Transfers giving rise to, (continued.)

Court and prayed for redemption. The vendee refused to take out the money deposited by the vendor; and subsequently, on the 13th of November, 1891, R K applied for repayment to him of the said money stating that he wished the vendee to remain in possession and asking that the agreement of 6th of July, 1888, might be considered null and void. On the 1st of September, 1892, one R S filed a suit for pre-emption of the said property. Held that the original transaction of the 6th of June, 1887, was an out and out sale and was not and could not be, by the subsequent agreement between the parties turned into a mortgage by conditional sale, and in consequence that the suit brought by R S was barred by limitation. **RAM DIN AND OTHERS v. RANG LAL SINGH.**

[XV-103]

(103).—[*Bai-bil-wafa.*] The transaction known to Muhammadan law as a *bai-bil-wafa* is a mortgage within the meaning of s. 58 of Act IV of 1882 and not a sale. The plaintiff in a suit for pre-emption had, prior to the sale of the property claimed, executed a deed in respect of his share in the village in virtue of which he claimed the right to pre-empt, the material portion of which deed was as follows:—“Thirdly, if I, the vendor, or the heirs of me, the vendor, Ali Jan alias Ali Ahmed, should pay off the entire consideration money mentioned above on the Puranmashi of Jeth Sudi, 1299 Fasli, to the said purchaser, she should without any objection or hesitation receive the money, and, returning the property sold described above in the document to me the vendor, revoke the sale.” Held that this deed was a *bai-bil-wafa* or mortgage by conditional sale and that as the conditional sale had not become absolute at the time when the right of pre-emption accrued the conditional vendor or mortgagor had still a subsisting right of pre-emption. *Bhagwan Sahai v. Bhagwan Din* (L. R. 17, I. A. 98, S. C., I. L. R., 12 All., 387) distinguished. **ALI AHMAD v. RAHMAT-ULLAH.**

[XII-42]

(104).—[*Simple mortgage.*] The *wajib-ul-arz* of a village gave a right of pre-emption to co-sharers on a transfer *intikal* by sale or mortgage (*rahn*) by a co-sharer of “rights and interests” (*hakkiyat*).

Per PETHERAM, C.J., that as a simple mortgage as defined in s. 58 of the Transfer of Property Act, 1882, by giving a right to sell, transfers an interest in the property mortgaged, a simple mortgage of his share by a co-sharer created a right of pre-emption under the terms of the *wajib-ul-arz*.

Per MAHMUD, J. The circumstance that possession had not been transferred to the

PRE-EMPTION—Transfers giving rise to, (continued.)

mortgagee was one which had no bearing on the question whether a right of pre-emption arose under the terms of the *wajib-ul-arz* in the case of a simple mortgage. The word “*intikal*,” as used in Hindustani has the broadest meaning in connection with “alienation,” “conveyance” “assignment” or transfer of rights in immoveable property. The words “*hakkiyat*” means rights and interest, in the legal sense of the phrase. The word “*rahn*” is a generic word indicating all that is included in the English word “mortgage” and is not limited to usufructuary mortgages, but includes simple mortgages also. When general words are used in a document they must be understood in a general sense, unless they are accompanied by any expression limiting or restricting their ordinary meaning or unless such limitation or restriction arises from necessary implication. The words “*intikal*,” “*hakkiyat*” and “*rahn*” in the *wajib-ul-arz* could be understood only in the most general use. “Mortgage” as understood in Indian Law, includes simple mortgage as well as usufructuary and one is as much as a transfer of an interest in specific “immoveable property,” as the other. A simple mortgage is a “transfer,” being the transfer of the right of sale. Held therefore by Mahmood, J., that a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage by a co-sharer of his share to a “stranger.”

Per BRODHURST, J. That one of the entries in a statement showing the transfer which had taken place in the village at or about the time the *wajib-ul-arz* was framed, which statement was connected with the *wajib-ul-arz*, related to a simple mortgage from which it appeared that it was the intention that the co-sharers should have the right of pre-emption in all cases of mortgage whether usufructuary or otherwise and therefore a right of pre-emption accrued under the terms of the *wajib-ul-arz* in the case of a simple mortgage.

Per DUTHOIT, J., that a pre-emptive right was raised by the terms of the *wajib-ul-arz* only upon the occurrence of a transfer of a share in the property of the *mahal*, and a simple mortgage was not a transfer of property.

Oldfield, J., The words “transfer” used in the *wajib-ul-arz* was not intended to refer to a simple mortgage but to mortgages where possession of the property passes to the mortgagee. The obligors of a bond for the payment of money covenanted as follows:—“To secure this money we have mortgaged a five *gandas* share out of a ten *gandas* share in each of the villages, etc. So long as the principal amount with interest is not paid, the hypothecated share will not be sold or mortgaged to any one.” Held (Petheram, C. J., dissenting) that the bond created a simple mortgage.

PRE-EMPTION—Transfers giving rise to, (continued.)

Per PETHERAM, C. J.—That the bond gave the obligee a charge only on the property. **SHEORATAN KUAR AND OTHERS v. MAHPAL KUAR.**

[V-8

(105).—*Lease.* One *G M* executed a lease of a three pies share in *manza B* and *B M* in favor of *M S* and *M M*. On the same day he made a simple mortgage of a three pies share in *manza B* and a ten and three-quarters pies share in *manza B M* for Rs. 200 in favor of *A R* and *S M*. The plaintiffs in this suit, alleging that the deed of lease and the deed of mortgage were intended by the parties to constitute one mortgage transaction, claimed possession of the properties by right of pre-emption on payment of Rs. 200. *Held* that the plaintiff had obviously no right of pre-emption in respect of the lease without premium effected. As to the claim based on the deed of mortgage the *wajib-ul-arz* of *manza B* restricts the right of pre-emption to transfers of absolute sale only, and as the mortgage was joint and indivisible and the plaintiffs claimed the whole of the property mortgaged, he could not get a decree even in respect of the share of *manza B M*. **ABDUL RAHIM AND ANOTHER v. SUCHIT MISRA.**

[V-243

(106).—*Tamliknama—Sale.* On the 12th August, 1873, one *N* executed a deed of sale transferring certain land to *L*. On the 6th November, 1878, *L* executed an instrument in favour of *B*, called a *tamliknama*, in which he declared himself to be the purchaser of an eighth ($\frac{1}{8}$) only, for the remaining $\frac{7}{8}$ th he being only *benami* for *B*. They obtained possession of the property on 17th July, 1879. *A* thereupon brought this suit for pre-emption against *B* and *L*, in respect of the $\frac{7}{8}$ th share, founding his claim on the *tamliknama* which he discharged as a deed of sale. *Held* that the *tamliknama* was not a deed of sale and the suit could not be founded on it. **ZAUKI v. KUNDAN LAL.**

[I-6

(107).—*Exchange.* The *wajib-ul-arz* of a village gave a right of pre-emption by a clause providing that in case of transfer by any co-sharer of his rights and interests (*haqiqat*) his partners should have a right to purchase at the same price (*qimat*) as the vendee had given. One of the co-sharers transferred to a stranger, one *biswa* and six *dhurs* of a grove or garden in exchange for another piece of land. *Held* by the Full Bench that this transaction was a transfer of *haqiqat* within the terms of the *wajib-ul-arz*. *Held* also that the plot of land

PRE-EMPTION—Transfers giving rise to, (continued.)

which was given in exchange for the one *biswa* and six *dhurs* must be considered as a price (*qimat*) within the terms of the *wajib-ul-arz*.

Per MAHMOOD, J., that the word "*qimat*" must be interpreted in the sense given to it by the Muhammadan law, including not only money but other kinds of property capable of being valued at a definite sum of money, and covering the consideration of "sale" as well of exchange as defined in ss. 54 and 118 of the Transfer of Property Act (IV of 1882) respectively. *Sahib Ram v. Kishen Singh* (W. N., 1882, p. 192) referred to. *Hazari Lal v. Ugrah Rai* (W. N. 1884, p. 103) dissented from. **NIAMAT ALI v. ASMAT BIBI AND ANOTHER.**

[V-183

(108).—*Compromise—Sale.* An appeal having been preferred from a decree in a suit for pre-emption, based on the *wajib-ul-arz* of a village, the parties to the suit entered into a compromise whereby the plaintiff pre-emptor relinquished his claim to a part of the property in dispute in favour of the defendants vendees, and the latter admitted his claim with respect of the remainder of the property. Upon this compromise a decree was passed. Subsequently a co-sharer in the village where the property was situate brought a suit for pre-emption upon the contention that the compromise and the decree passed thereon amounted to a transfer to the plaintiff in the former suit, within the *wajib-ul-arz*. *Held* that the suit was not maintainable. **HANUMAN RAI v. UDIT NARAIN RAI AND OTHERS.**

[V-295

(109).—*Agreement—Transfer.* On the 17th March, 1883, the owners of a moiety of a shop executed an instrument in favor of one *Z A*, the material portions of which were to this effect:—"As we have made a contract with *ZA* for the sale of the share of a shop and the price is settled and have received the earnest money, we promise to execute the sale-deed within a week &c." On the 28th May, 1883, the owner of the other moiety sold it to the plaintiffs. After this on the 23rd December, the owners of the other moiety sold the other half in pursuance of the agreement. The plaintiff thereupon brought the suit to pre-empt the other half sold to the defendant. *Held* that the suit did lie, as the agreement of the 17th March did not amount to sale. **ZAHUR MUHAMMAD AND OTHERS v. ZAHUR AHMAD AND OTHERS.**

[VI-278

(110).—*Compromise.* On the 1st September, 1881, *L* and *R* entered into an agreement (which was duly registered) with *B*,

PRE-EMPTION—Transfers giving rise to, (continued.)

that in consideration of their bringing a suit for recovery of a twelve annas share in a village which *B* claimed by right of inheritance against *G*, they should receive a moiety of the share. *L* and *R* found funds for the prosecution of two suits in respect of the share, which on the 5th April, 1882, were compromised, *B* getting one anna and three pies out of the twelve annas originally claimed by her. In that compromise *B* stated as follows:—"I make over one anna to *L* and *R* my partners, in lieu of the prosecution of the two cases. I, the plaintiff, shall remain in possession of the remaining three pies." Meanwhile on the 3rd September, 1881, *G* had sold three annas out of the twelve annas share to *M*. On the 3rd April, 1883, *M* brought a suit against *L* and *R*, claiming the right of pre-emption in respect of the one anna which they had acquired from *B*, on the allegation that the transfer of the share had taken place on the 5th April, 1862. The claim was based on the *wajib-ul-arz* of the village, which gave a right of pre-emption to the co-sharers of any snares wishing to "transfer" his share. Held that the compromise of the 5th April, 1882, was only a re-adjustment of the amount of the interest in the share between *B* and *L* and *R*; that the real transfer to *L* and *R* was given effect to on the 1st September, 1881; and that, this having been prior to the acquisition by *M* of any right in the village he was not a co-sharer at the time of the transfer; and that he had consequently no right as against *L* and *R* by way of claim for pre-emption. **LACHMI NARAIN AND ANOTHER v. MANOG DAT.**

[V-47]

(111).—*Shankalap.*] No right of pre-emption arises where land is assigned without consideration as *shankalap*. **HAR NARAIN PANDE v. RAM PRASAD MISR AND ANOTHER.**

[XII-39]

(112).—*Gift.*] This was a suit for pre-emption in respect of a transfer dated the 27th February, 1885. The suit was based both upon the *wajib-ul-arz* of the village and upon the general rule of the Muhammadan Law. The deed by which the transfer was made purports to be a *hiba-bil-iwaz* and but for the following passage would undoubtedly be a gift without consideration. The passage in question was as follows:—"There exist debts due by me, the executant, to *Mahajans* which debts are secured by registered deeds. The payment of such debts will devolve upon the donee aforesaid." It was contended on the strength of this passage that the transaction was a *hiba-bil-iwaz* and is therefore liable to a claim for pre-emption. Held that the passage intimated only a wish or expectation that the donee should pay the donor's debts. The payment of the debts was not however a condition of the gift

PRE-EMPTION—Transfers giving rise to, (continued.)

and the transaction was therefore not of the nature of a sale or *hiba-bil-iwaz* and was not liable to a claim of pre-emption. **AMIRAN AND ANOTHER v. SADAR ALI AND ANOTHER.**

[VIII-228]

(113).—*Sale of property over Rs. 100 without sale deed.*] The *wajib-ul-arz* of a village gave the co-sharers a right of pre-emption in cases where any of them should wish to "transfer his share wholly or partly by sale or mortgage." One of the co-sharers entered into a transaction by which he transferred the possession of his share to a stranger for Rs. 300 and had mutation of names effected, but in order to avoid the right of pre-emption the parties omitted to execute or register a deed of sale in respect of the property. Held that the transaction gave rise to the right of pre-emption within the meaning of the *wajib-ul-arz*. **JANKI MISR v. GIRJADAT MISR AND ANOTHER.**

[V-97]

(114).—*Where a Sunni Muhammadan transferred certain immoveable property exceeding in value Rs. 100 under such circumstances that the price was paid and possession of the property delivered to the transferee but no sale deed was executed; on a suit for pre-emption based upon such transfer being brought it was held that the Muhammadan law was to be applied in considering whether or not a right of pre-emption arose and that inasmuch as the transaction in question was a complete transfer under that law a right of pre-emption did arise.* **BEGAM AND OTHERS v. MUHAMMAD YAKUB AND ANOTHER.**

[XIV-101]

(115).—*Invalid sale—Sale to minor.*] This suit for pre-emption against two minors was instituted on the first of June, 1880, and on the 14th June, 1880, an application for the appointment of certain persons as guardians for the suit for the minors was made and granted by the Court on the 15th. The sale deed in favor of the minors was executed and registered on the 9th June, 1879. The suit was decreed by the first Court. In appeal it was contended that the sale to the minors who were incompetent to contract was invalid and therefore no claim for pre-emption could arise. Held that the point was not taken in the lower Court and it certainly did not lie in the mouths of the minors to urge it now. They had paid their money to the vendors, the conveyance of the property had been perfected and they were admittedly in possession of it. **GANESH RAI AND ANOTHER v. HARDIAL.**

[I-129]

(116).—*Sale of expropriary right.* Held that the transfer of expropriary

PRE-EMPTION—Transfers giving rise to, (continued.)

rights being illegal no pre-emption can be brought in respect of such transfer, nor could the *wajib-ul-arz* contemplate such a case. **PARSHAD SINGH v. SADHARI LAL AND ANOTHER.**

[V-220]

(117).—*Fictitious sale*. One GA sold his house to one HH his son. Thereupon MA brought this suit for pre-emption. The defence was that "in order to secure his property, he has executed a nominal sale deed to his son, without receiving the sale consideration." The lower Court though of opinion that the sale was really a fictitious one, decreed the claim on the ground that the defendants cannot be allowed to set up their own fraud as a defence. It relied upon the following rulings. *Ram Pershad v. Shiva Pershad*, (N. W. P. H. C. Rep., 1866, p. 71) and *Sookhmanee v. Chundee Seekur Byas* (N. W. P. S. D. A. Rep., 1860, p. 599.) Held that the rulings were modified by *Param Singh v. Lalji Mal* (I. L. R., 1 All., 403) that whatever estoppel there was between vendor and vendee, there was none as between the defendants and the plaintiff. The suit must therefore be dismissed. **MANSUR ALI v. HAIDAR HUSAIN AND ANOTHER.**

[IV-128]

(118).—*Sale of resumed muafi land*. The plaintiff, a co-sharer in a certain village, sued to pre-empt certain land being 'resumed revenue free land' in the village, which had been sold to a stranger. The clause of the *wajib-ul-arz* under which pre-emption was claimed was as follows:—"When any co-sharer (*hissadar*) is bent upon selling or mortgaging his right (*hagqiyat*) then first that co-sharer who is nearest to the sharer bent on transfer can take it. After that any other person who is interested (*Sharig*) in the village rank by rank can take it. If no person interested in the village takes it then a stranger may take it." Held that under the circumstances of the case the plaintiff had no right of pre-emption in respect of the land claimed by him. *Inayat Husain v. Amin-ud-din Ahmed* (W. N., 1888, p. 182); *Sajdar Ali v. Dost Muhammad* (W. N., 1890, p. 117) and *Niamat Ali v. Asmat Bibi* (I. L. R., 7 All., 626) referred to. **KALLIAN MAL v. MADAN MOHAN.**

[XV-93]

(119).—*_____*. The co-sharers in a *mahal* and the owners of separate plots of *muafi* land included in the area of the *mahal* have as a rule no connection with one another, and it by no means follows that the custom adopted by or existing among the members of the *khalisa* coparcenary body would be applicable to the owners of the *muafi* plots. Strict evidence is always necessary to prove that the same custom is applicable to each. **NARAIN DAS AND ANOTHER v. RAM SARAN DAS.**

[XVIII-94]

PRE-EMPTION—Transfers giving rise to, (continued.)

(120).—*Sale of isolated plot*. A certain *zemindari* village contained a plot of land which had at one time been held on a *muafi* tenure, but had been resumed and become *zemindari*. The plot was separately assessed with revenue, but had no separate *wajib-ul-arz*. A co-sharer in this plot sold his share to a stranger upon which the plaintiff, a co-sharer in the village, but not in the particular plot, brought the present suit for pre-emption. He based his suit on the *wajib-ul-arz* of the village, which provided:—(i) That an uterine brother if he, be a co-sharer "in the *zemindari*," (ii) co-sharers from a common stock and (iii) co-sharers in the village should be entitled to pre-empt. Held that the right of pre-emption was not limited to the old *zemindari* lands but also extended to the plot mentioned above. The phrase "in the *zemindari*" was used only to limit the qualification of a brother by blood and not to circumscribe the area of the village to be governed by the pre-emption clause in the *wajib-ul-arz*. **LALTA PRASAD v. LALTA PRASAD AND OTHERS.**

[I-165]

(121).—*Sale of parcel of land*. The term "*hissa*" as it is generally used includes all and every class of interest possessed by the *hissadar* in the *mahal* in which the "*hissa*" is situate. It will therefore include separate parcels of land and is not confined to the whole or a fractional part of the share of the *hissadar*. **INDAR RAI v. DAULAT RAI AND ANOTHER.**

[XV-8]

(122).—*Sale of sir-land*. This was a suit for pre-emption founded on the *wajib-ul-arz* of the village which ran as follows:—"...should any sharer wish to transfer his own share he must first offer it to sharers in the village." Held that the sale of specific *sir* land was not transfer of a share within the meaning of the *wajib-ul-arz* and no right of pre-emption accrued in respect of such transfer. **HAZARI LAL v. UGRAH RAI.**

[IV-103]

(123).—*Sale of nankar land*. The appellant sued under the *wajib-ul-arz* of a certain *mahal*, to enforce her right of pre-emption, as a co-sharer of such *mahal*, in respect of certain shares of such *mahal*, and in respect of certain *nankar* land situate in such *mahal* belonging to M. H. M. H. and the owner of such sharers had joined in selling their respective properties to the vendee. The condition in the *wajib-ul-arz* relating to the right of pre-emption was to the following effect:—"At the time of sale of a *zemindari* property, first, a sharer of the same kin and after such, sharers of the *mahal* have a prior right to its purchase for a price which a stranger would

PRE-EMPTION—Transfers giving rise to, (continued.)

give." The *nankar* land was once held revenue free by *M H*, but at the last settlement had been assessed. It was quite distinct from the *mahal* and its *zemindari*. The holder of it was not mentioned in the list of the co-sharers. He was mentioned in a separate paragraph of the *wajib-ul-arz* as a *nankar* holder and had a *khewat* to himself to that effect. Under these circumstances the lower appellate Court held that the appellant had no title to claim pre-emption in respect of the *nankar* land, not being of the same kin as *M H* and not being a co-sharer of such *mahal* with him. The appellant appealed to the High Court. Held that the *nankar* land was not affected by the pre-emptive clause in the *wajib-ul-arz*, such land being, though assessed no part of the *zemindari mahal*. **BADRUN-NISSA v. MURAD HASAN AND OTHERS.**

[I-9]

(124).—[*Sale of abadi-land.*] This was a suit brought by a co-parcener to obtain by right of pre-emption proprietary possession of "6 *biswas* of land comprised in the village site, with a partly ruinous dwelling house built thereon, and also the houses of certain tenants" in the village. The claim was based on the contract embodied in the *wajib-ul-arz*, viz., every co-parcener has power to sell and part with his own share (*hakkiyat*) but so long as one entitled to pre-emption comes forward as purchaser, the transfer shall not be made to a stranger. Held by the Full Bench (Mahmood J. dissenting) that the share (*hakkiyat*) connotes exclusively the co-parcener's state in the cultivated area of the *mahal* and that the village site with its houses and other tenements cannot be governed by the contract embodied in the *wajib-ul-arz*; consequently no suit for pre-emption lay in the case. **SAHIB RAM v. KISHEN SINGH AND OTHERS.**

[II-192]

RUP RAM v. MANGNI AND ANOTHER.

[VI-136]

(125).—Statement contained in a *wajib-ul-arz* or *Khewat* with reference to rights of pre-emption possessed by the co-sharers do not under ordinary circumstances have any reference to land situated within the area of the village site. *Ishri v. Thakurdin* (W. N. 1882, p. 192) referred to. **JADUNATH RAI v. MAHADEO PRASAD SINGH AND OTHERS.**

[XVI-99]

See Nos. (47) — (51).

(126).—The principle of denying the right of pre-emption except as to the whole of the property sold, is

PRE-EMPTION—Transfers giving rise to, (continued.)

that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee. The rule applies only to those transactions which, while contained in one deed can not be broken up or separated. It should be limited to such transactions, and the reason of it does not exist where the shares sold are separately specified, and the sale to the stranger is distinct and divisible, though contained in the same deed as the sale to the co-sharers. *The ratio decidendi of Bhawani Prasad v. Damru* (I. L. R., 5 All., 197) explained. *Sheodyal Ram v. Bhyro Ram* (N.-W. P. S. D. A. Rep., 1860, p. 53) distinguished. *Guneshee Lal v. Zaraut Ali* (N.-W. P. H. C. Rep. 1870, p. 343) and *Manna Singh v. Ramadhin Singh* (I. L. R., 4 All., 252) dissented from. A co-sharer in a village conveyed by deed of sale certain land to four persons three of whom were co-sharers in the same *patti* as the vendor. The deed contained a specification of the interests purchased and the consideration paid by the co-sharers and the stranger vendees respectively. In a suit for pre-emption by certain co-sharers of the same *patti* as the vendor, the lower appellate Court held that although the co-sharers vendees had a pre-emptive right of the same degree as the plaintiff, nevertheless they, having joined a stranger with them in purchasing the property had forfeited their right, and could not resist the claim even in respect of such portions as they had purchased under the sale-deed. Held that this view was erroneous, and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower Court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers. **SHEO-BHAROS RAI AND OTHERS v. JIACH RAI AND OTHERS.**

[VI-214]

(127).—[*Sale to stranger along with co-sharer.*] A co-sharer of an estate sold his share to *R* who was also a co-sharer in such estate and to two other persons who were not co-sharers but "strangers" selling it to all of them jointly and collectively, for one integral sum as the consideration for the whole. The deed of sale specified that each of the purchasers took a one-third share of the property sold. The co-sharers of the estate were entitled, on the sale by a co-sharer of his share to the right of pre-emption. Held that such specification could not alter the joint nature of the sale transaction or permit of its being broken up and treated as involving three separate contracts so as to entitle *R* as a co-sharer having an equal right of pre-emption, resist so far as one-third of the property was concerned a claim by another

PRE-EMPTION—Transfers giving rise to, —(continued.)

co-sharer to enforce a right of pre-emption in respect of such sale, but *R* must be regarded as a "stranger" in respect of the whole of the property sold by reason of his having associated himself with "stranger." *Ganeshee Lal v. Zaraut Ali* (N.-W. P. H. C. Rep., 1879, p. 343) observed on. *MANNA SINGH v. RAMADIN SINGH*.

[I-151

(128). —————. Where in the purchase of immoveable property in respect of which a right of pre-emption exists a vendee, being a person entitled to purchase, joins with himself in the purchase a stranger, then in the event of a suit for pre-emption being brought, if the interest of the co-sharer vendee can be separated from the interest of the stranger vendee, the plaintiff pre-emptor can succeed only as against the stranger. If however, the interest of the co-sharer vendee cannot be separated from the interest of the stranger vendee, then the plaintiff pre-emptor can succeed as against both. *Sheobharos Rai v. Jiach Rai* (I. L. R., 8 All., 462) approved. *Sheo Dyal Ram v. Bhyroo Ram* (S. D. A., N.-W. P., 1860, p. 53); *Guneshee Lal v. Zaraut Ali* (N.-W. P. H. C. Rep., 1873, p. 343); *Manna Singh v. Ramadhin Singh* (I. L. R., 4 All., 452) referred to. *RAM NATH AND OTHERS v. BADRI NARAIN AND OTHERS*.

[XVII-20

MUSHTAQ AHMAD AND ANOTHER v. AMJAD ALI AND OTHERS.

[XVII-121

See also

HARJAS v. KANHYA.

[IV-271

(129). —————. *Sale to person having equal rights with pre-emptor.* Held that where the vendee and the pre-emptor were equally entitled and the pre-emption was founded on *wajib-ul-arz*, no suit would lie nor could the pre-emptor recover half the property. *MAN KHAN v. MAMUR KHAN*.

[VI-53

(130). —————. *Muhammadian law.* Under the Muhammadan law, even when the buyer is himself a pre-emptor, that is, a person who would have the right of pre-emption against an outsider, other persons having a similar right of pre-emption are entitled to claim pre-emption against the buyer; and, in such a case the rights of the claimants to pre-emption should be determined in the same way in which they would have been determined had the buyer acquired the property by enforcing his right of pre-emption against a stranger, in the absence of

PRE-EMPTION—Transfers giving rise to, —(continued.)

the other pre-emptors, and the absentee pre-emptors had appeared subsequently and claimed pre-emption. *Baboo Moheshee Lal v. Mr. G. Christian* (6 W. R., 250); *Teeka Dhari Singh v. Mohur Singh* (7 W. R. 260); *Lalla Nowbut Lal v. Lalla Jewan Lal* (I. L. R., 4 Calc., 831) dissented from. In cases of pre-emption to which the Muhammadan law applies the rules of that law are to be administered in their entirety where they are not inconsistent with the principles of justice, equity and good conscience. *Chundo v. Hakeem Alim-ood-deen* (N.-W. P. H. C. Rep., 1874, p. 28) and *Gobind Dayal v. Inayat Ullah* (I. L. R., 7 All., 775) referred to. *AMIR HASAN v. RAHIM BAKHS AND OTHERS*.

[XVII-118

(131). —————. In cases of pre-emption based upon a *wajib-ul-arz* the right of pre-emption does not survive if the land which is subject to pre-emption having been sold to a stranger, is subsequently re-sold by the stranger vendee, before suit, to a co-sharer having equal rights with those seeking pre-emption. *SERH MAL AND OTHERS v. HUKUM SINGH*.

[XVII-206

(132). —————. *Sale where there are many co-sharers—Shia law.* The prevalent doctrine of the Muhammadan law governing the *Shia* sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. *Sheikh Daim v. Asooha Beebee* (N.-W. P. H. C. Rep., 1870, p. 360) and *Tafazzul Husain v. Hadi Hasan* (W. N., 1886, p. 139) dissented from. *ABBAS ALI v. MAYA RAM AND OTHERS*.

[X-93

Per contra

TAFAZZUL HUSAIN AND OTHERS v. HADI HASAN.

[VI-139

(133). —————. *Sale by mortgagee to stranger.* Where the other co-sharers in a *mahal* were given by the *wajib-ul-arz* a right of pre-emption or pre-mortgage in the case of a sale or mortgage by a co-sharer to a stranger, it was held, that no such right of pre-mortgage could be claimed where, the original mortgage having been by a co-sharer to a stranger, the mortgagee assigned or sub-mortgaged his mortgagee interest to another stranger. The principle laid down in *Khair-un-nisa Bibi v. Amin Bibi* (W. N., 1887, p. 93) and in *Ali Ahmad v. Rahmat-Ul-lah* (S. C. W. N., 1892, p. 42) followed. *NAND LAL v. BANAI*.

[XVII-160

(134). —————. *Sale in execution.* A sale in execution of a decree does not give rise to a

PRE-EMPTION.—Transfers giving rise to, (continued.)

right of pre-emption under the Mahafimadan law. **RAJ BIBI v. SUKHI AND ANOTHER.**

[IX-175]

(135). ————. [A sale of immoveable property by order of Court in execution of a decree does not give rise to any right of pre-emption. **MAHABAL SINGH AND ANOTHER v. ABDUL MAJID KHAN AND OTHERS.**

[XVIII-115]

(7) Wajib-ul-arz.

(136). ———— [Attestation.] This was a pre-emption suit founded on *wajib-ul-arz* or on contract and custom as evidenced by the *wajib-ul-arz*. Both the lower Courts dismissed the suit on the ground that as the *wajib-ul-arz* did not bear the signature of the vendor it was not binding on him and so far as it was relied upon as a proof of the custom it deserved no weight as it was drawn up when Regulation VII of 1822 was in force and at that time there was no legal presumption of its accuracy. *Held* that the public character of the document raised a strong presumption that the custom existed and shifted the burden of proof on the other party. The suit must consequently be decreed. **MUHAMMAD HASAN v. MUNNA LAL AND ANOTHER.**

[VI-166]

(137). ————. [This suit for pre-emption was brought by two brothers, co-sharers in a village in respect of a sale to a stranger. The claim was based on the terms of the *wajib-ul-arz*. Subsequently one of the brothers withdrew from the case. It was contended on behalf of the defendants (i) That the *wajib-ul-arz* not having been signed by the vendor he was not bound by its terms. (ii). One of the plaintiffs having withdrawn from the suit, the part which he claimed must be deemed to have been abandoned and a suit to pre-empt a portion of the property sold would not lie. *Held* that the first question was set at rest by the ruling in (*Isri Singh v. Ganga*, 1. L. R., 2 All., 876). As to the second it must be observed that the scope of every pre-emptive suit must necessarily be co-extensive with the whole property which has been sold and is subject to the plaintiff's pre-emption, and when a suit like the present is brought by more than one pre-emptor, the claim is necessarily a joint one and each pre-emptor must be taken to claim the whole jointly with the other. **Bhawani Prasad v. Damru**, (1. L. R., 5 All., p. 197.) and (**Rajjo v. Lalman**, (1. L. R., 5 All., 180) distinguished. **Kashinath v. Mukhta Prasad** (1. L. R., 6 All., 370); **Ganga Prasad v. Munshi** (1. L. R., 6 All., 423), and **Hulasi v. Sheo Prasad** (1. L. R., 6 All., 455.) referred to. **UDEY RAM v. MAULA AND ANOTHER.**

[V-189]

PRE-EMPTION—Wajib-ul-arz, (continued.)

(138). ————. [Held that the simple fact that the vendor had not signed the *wajib-ul-arz* was not a sufficient answer to a suit for pre-emption founded on the *wajib-ul-arz*. The defendant must show that the vendor was no party to it, or had no knowledge of its contents or had repudiated it as not binding on her. **BHAWANI SINGH v. SHIB SINGH AND OTHERS.**

[II-87]

(139). ————. [This was a suit for pre-emption based upon the *wajib-ul-arz* of the village. The first Court dismissed the suit on the ground that it was not signed by the vendor. In first appeal the pre-emptor contended that the suit was based upon custom as recorded in the *wajib-ul-arz*, and not upon a special agreement recorded in that document. The lower appellate Court held that as the appellant had allowed the suit to be treated in the first Court as based upon a special agreement he could not now in appeal treat it as based upon custom. *Held* following **Isri v. Ganga** (1. L. R., 2 All., 876) that the plea of the respondent that he was not a party to the signing of the document was immaterial and irrelevant. The appellant was entitled to a decree. **LACHMAN DAS v. NIRBHEY RAM AND ANOTHER.**

[I-114]

(140). ————. [In a suit to enforce a right of pre-emption based upon an agreement recorded in the *wajib-ul-arz* of the village in which the property was situated, it appeared that the *wajib-ul-arz* was not signed by the vendor, or attested by any authorized agent on his behalf. The vendor, however, was present when that document was attested, and for ten years after the attestation of that document he never raised any objection to its contents. *Held* that the vendor must be taken to have accepted the *wajib-ul-arz* as binding on him. **BADAL v. RAM DIAL AND ANOTHER.**

[I-26]

(141). ————. [The appellants claimed to enforce their right of pre-emption in respect of certain land, basing their suit on an agreement recorded in the *wajib-ul-arz* of the village in which such land was situate. That document was framed in the year 1863, and at the time it was framed the vendor was absent from the village, and it was not attested by him. He only returned to the village a short time before he sold the property. The lower appellate Court held that the vendee was not bound by the agreement, refusing to infer from his silence on his return his assent thereto, as he had been so short a time in the village. The Court concurred in the lower appellate Court's ruling. **JAI RAM AND OTHERS v. BAHADUR AND OTHERS**

[I-20]

PRE-EMPTION—Wajib-ul-arz, (continued.)

(142). —————.] The circumstance that a co-sharer of a village was minor at the time of the preparation of the *wajib-ul-arz* and that the document was not attested on his behalf by a guardian or duly authorized representative, is not a reason for excluding from the benefit of the provisions of that document relating to pre-emption. The guardian of a minor is competent to assert a right of pre-emption and to refuse or accept an offer of a share in pursuance of such a right, and the minor is bound by his guardian's act if done in good faith and in his interest. **LAL BHADUR SINGH v. DURGA SINGH.**

[I-4

(143). —————.] Where a *wajib-ul-arz* was not signed by the *lambardar* or by any of the co-sharers of the village for which it was framed, but was found to have been in existence without having been questioned by any of the parties who might have been affected thereby for a period of some thirteen years: *Held* that the *wajib-ul-arz* might be taken as *prima facie* evidence of the custom of the village for which it was framed. The said *wajib-ul-arz* contained a clause relative to pre-emption rights to the following effect:—"When any *muafidar* in the *patti* desires to transfer his share, then first a share-holder in the *patti* takes it, and if he does not take it then another man who desires to take it takes it." *Held* that this clause was declaratory of the village custom and that it was not intended thereby to adopt the Muhammadan law of pre-emption. **RUSTAM ALI KHAN v. ABBASI BEGAM.**

[XI-146

(144). —————.] The plaintiff sued for pre-emption, basing his suit upon the *wajib-ul-arz*, but not stating whether he relied on a custom or on a contract. The defendant objected that the plaintiff had refused to sign the *wajib-ul-arz* and therefore could not sue upon it. The chapter of the *wajib-ul-arz* upon which the plaintiff relied was headed:—"The private rights of the sharers and the particular customs and agreement,"—and detailed the practice in the village as to pre-emption first, in the case of sales, and, secondly, in the case of mortgages. The defendant gave no evidence as to the non-existence of any custom of pre-emption in the village. *Held* that the recital contained in the *wajib-ul-arz* was good evidence of a custom of pre-emption prevailing in the village, and that the mere fact of the plaintiff not having signed the *wajib-ul-arz* would not disentitle him from suing upon it. **MAJIDAN BIBI v. SHEIKH HAYATAN AND ANOTHER.**

[XVII-3

PRE-EMPTION—Wajib-ul-arz, (continued.)

(145). —————.] *Partition.*
The *wajib-ul-arz* of a village contained a covenant among the co-sharers that, in the event of any one of them selling his share, a right of pre-emption should be enforceable, first by a "near share-holder", next, by a partner in the *thoke* and thirdly by a partner in the village. The village was subsequently divided into three separate *mahals* by means of a perfect partition, under the North-Western Provinces Land Revenue Act (XIX of 1873). *Held* that the agreement regarding pre-emption remained in force after the partition. The term "village" as used in the *wajib-ul-arz* means a definite area of land with houses upon it, and does not necessarily imply a joint ownership of such land, inasmuch as after partition there may remain some community of interest, and things held and used in common by all the inhabitants. Every one who lives in that area has a share in it, and may therefore be regarded as a "share-holder" within the meaning of the *wajib-ul-arz*. **GOKAL SINGH AND ANOTHER v. MANNU LAL AND ANOTHER.**

[V-263

(146). —————.] The *wajib-ul-arz* of a village contained a covenant between the co-sharers giving rights of pre-emption. The village was, for revenue purposes, divided into two separate *mahals* but no fresh *wajib-ul-arz* was prepared. Subsequent to the division, a suit for pre-emption was brought by the owner of the property situate in one of the *mahals* in respect of a sale of property situate in the other. *Held* that the covenant in the *wajib-ul-arz* giving the right of pre-emption attached to and ran with the land, and was not put an end to by the division of the village for revenue purposes into two areas and that the suit was maintainable upon the *wajib-ul-arz*. In suits for pre-emption, where the plaintiff alleges that the consideration stated in the deed of sale has been fraudulently overstated he is bound to give *prima facie* proof at least of such overstatement. **RAMJIWAN SAMU v. RATURAJ SINGH AND ANOTHER.**

[IX-81

(147). —————.] The *wajib-ul-arz* of a village which consisted of a single *mahal* contained the following provision:—"Every co-sharer may transfer his property.....either wholly or in part having regard to the right of pre-emption ("*balehaz hagg shafa*)."
The village was subsequently partitioned into two *mahals*. *Held* that the partition of the village did not render the previously framed *wajib-ul-arz* inapplicable. *Gokal Singh v. Mannu Lal* (L. L. R., 7, All., 772) and *Muhammad Wilayat Ali Khan v. Abdul Rab* (W. N., 1889, p. 17) referred to. **ABBAS ALI AND OTHERS v. GHULAM NABI.**

[XI-137

PRE-EMPTION—Wajib-ul-arz, — (continued.)

(148).—[Partition of *mahals*]. When a *mahal* is divided by perfect partition into two or more separate *mahals* a separate record of rights should be framed for each of the new *mahals*. Where under such circumstances no fresh records of rights are framed for the new *mahals* the co-sharers in any one of the new *mahals* cannot, unless under very exceptional circumstances, claim, under the terms of the old record of rights applicable to the original undivided *mahal*, pre-emption in respect of land situated in any of the other new *mahals*. *Ghure v. Man Singh* (I. L. R., 17 All., 226) referred to. **ABDUL HAI AND OTHERS. v. NAIN SINGH AND ANOTHER.**

[XVII-202]

(149).—[Cases where, after the division of a village area into separate *mahals* for which no new *wajib-ul-arz* is drawn up, the old *wajib-ul-arz* for the whole area has been held to apply generally to the new *mahals*, and such division has been held not to affect covenants existing between the co-sharers under such *wajib-ul-arz*, distinguished from cases where a new *wajib-ul-arz* has after the division, been drawn up for each *mahal*. *Gokal Singh v. Mannu Lal* (I. L. R., 7 All., 772) and *Jai Ram v. Mahabir Rai* (I. L. R., 7 All., 720) referred to. **KUAR DAT PRASAD SINGH v. NAHAR SINGH AND OTHERS.**

[IX-79]

(150).—[The *wajib-ul-arz* framed in 1856 of a village consisting of several *pattis* or *thokes* gave a right of pre-emption to the owners of each *thoke* in respect of property situate in every other *thoke*, when such property was sold to any one having no share in the village co-parcenary. The *mahal* subsequently became the subject of perfect partition under the N.-W. P. Land Revenue Act (XIX of 1873), and one of the *pattis* was constituted a separate *mahal* and a new *wajib-ul-arz* was framed for it. Prior to the partition, a proprietor of land both in the *pattis* which remained in the original *mahal* and in the *pattis* which formed the new *mahal*, sold property in both to a stranger. Thereupon a co-sharer in the original *mahal* brought a suit for pre-emption in respect of the property situate therein which had been sold, excluding the property situate in the new *mahal*. Held that the effect of the partition was to include property situate in the new *mahal* from the operation of the *wajib-ul-arz* framed in 1856, and to place it under new conditions as to the right of pre-emption; that the plaintiff could, after the separation, exercise no such right against and in respect of share-holders and property so separated, nor could the separate share-holders exercise any right of pre-emption against plaintiff and his property remaining in the

PRE-EMPTION—Wajib-ul-arz, — (continued.)

mahal from which they had separated; and that the suit to pre-empt that portion only of the property sold which was situate in the original *mahal* was maintainable. *Durga Prasad v. Munsu* (I. L. R., 6 All., 423); *Hulasi v. Sheo Prasad* (I. L. R., 6 All., 455); *Kashinath v. Mukhta Prasad* (I. L. R., 6 All., 370); *Motee Sah v. Musammatt Goklee* (N.-W. P. S. D. A. Rep., 1861, p. 506); *Ram Prasad v. Buljeet Singh*, (N.-W. P. H. C. Rep., 1867, p. 252); *Comur Khan v. Moorad Khan* (N.-W. P. S. D. A. Rep., 1865, p. 173) and *Salig Ram v. Debi Prasad* (N.-W. P. H. C. Rep., 1875, p. 38) referred to.

Per MAHMOOD, J.—The rule of the Muhammadan law that where more persons than one owning the property in virtue of which the pre-emptive right exists appear for the purpose of suing, their rights are to be taken as equal *per capita* with reference to the number of pre-emptors, and not with reference to the number of the shares of each pre-emptor in such property, is so consistent with justice, equity and good conscience, that it must be followed in cases of rival suits for pre-emption under the *wajib-ul-arz* where there is nothing to show that the rival pre-emptors are not equally entitled. **JAIRAM v. MAHABIR RAI AND OTHERS.**

[V-206]

(151).—[Where a *mauza* originally consisting of one *mahal* was divided by perfect partition into three *mahals* and a separate *wajib-ul-arz* was prepared for each of them in which was inserted the following clause relating to pre-emption:—"The co-sharers of the *mauza*, provided they pay the proper price, can become pre-emptors when a transfer of property is made." Held that the right of pre-emption was not limited to co-sharers in the *mahal* in which the property sold was situated. **MATA DIN AND OTHERS v. MAHESH PRASAD.**

[XII-100]

(152).—[Where at the settlement of a village constituting a single *mahal* a record of rights was framed giving certain pre-emptive rights to the co-sharers in the village, but subsequently the village was divided by perfect partition into three separate *mahals*, and in accordance with the rules of the Board of Revenue of the 13th November, 1875, issued under s. 257 of Act No. XIX of 1878 new record of village customs was framed which did not give to the sharers in the different *mahals* any right of pre-emption *inter se*, it was held that the latter record of village customs was a valid and binding document and no right of pre-emption existed in favour of the co-sharers in any one *mahal* in respect of land situated in another *mahal*.

PRE-EMPTION—Wajib-ul-arz, (continued.)

Per AIKMAN, J.—Unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other *mahals*, such right of pre-emption is not to be presumed from the mere fact that when the village formed but one *mahal* the co-sharers had pre-emptive rights against each other. *GHURE AND ANOTHER v. MAN SINGH AND ANOTHER.*

[XV-70]

(153).—[Where a village originally forming one *mahal* is divided by perfect partition into two or more separate *mahals* unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of land lying in other *mahal*, such right of pre-emption is not to be presumed from the fact that when the village formed but one *mahal* the co-sharers had pre-emptive rights against each other. *Ghure v. Man Singh (I. L. R., 17 All., 226)* followed. *ABDUL AZIZ KHAN AND OTHERS v. HUSEN ALI KHAN AND ANOTHER.*

[XV-233]

(154).—*Superseded—Wajib-ul-arz.* The plaintiffs brought their suits in 1890 to pre-empt certain property situated in the Gorakhpur district. Their claim was based upon two grounds one an alleged contract said to be recorded in and approved by a *wajib-ul-arz* of 1860, relating to the village in question, and the other a custom of pre-emption alleged to be existing in the village. The period during which the *wajib-ul-arz* of 1860 was in force expired prior to the sale which gave rise to the right of pre-emption sought to be enforced. Subsequently to the expiration of the *wajib-ul-arz* certain rules had been framed with reference to the settlement of the Gorakhpore and Basti districts the material portions of which for the purposes of the present case were as follows:—“A memorandum of the village customs will be appended to each *kherwat* by the Assistant Settlement Officer when he verifies the *jamabandi* and it will take the place of the document hitherto known as the *wajib-ul-arz.*” *** “In regard to any custom or constitution peculiar to the *mahal* the following matters should be noticed [clause (d), s. 25].—(a) pre-emption (as regards *mahals* which belong to other than Muhammadan proprietors) when the proprietors expressly demand that it may be noted and prove conclusively that the custom exists.” At the new settlement made in accordance with these rules no mention of the right of pre-emption as obtaining in the *mahal* in question was recorded. Upon these facts it was held by Edge, C.J., and Burdett, J., that having regard to the rules abovementioned framed by the Board of Revenue for the settlement of the Gorakhpore and Basti districts the mere absence of any mention of the right of pre-emption in

PRE-EMPTION—Wajib-ul-arz, (continued.)

the new memorandum of village customs was in itself no evidence that the custom of pre-emption had ceased to exist and that the *wajib-ul-arz* of 1860 might be used as evidence of the existence of such custom.

Per AIKMAN, J.—The absence from the new memorandum of village customs of any mention of the existence of a right of pre-emption was a circumstance which the Court would be entitled to take into consideration in any conflict of evidence as to whether or no the custom of pre-emption did exist. *SADHU SAHU v. RAJA RAM AND OTHERS.*

[XIII-200]

(155).—*Retrospective effect.* The pre-emption of rights of the parties to a deed of conditional sale can not be affected by a *wajib-ul-arz* prepared subsequently to the execution of the deed of conditional sale, but prior to the sale becoming absolute they not being parties to the *wajib-ul-arz*, and the *wajib-ul-arz* not apparently indicating any pre-existing custom of pre-emption in the village. *BECHAN RAI AND OTHERS v. NAND KISHORE RAI.*

[XII-18]

(156).—*Framed when there was only one proprietor.* Held that a document purporting to be a *wajib-ul-arz* which was drawn up at a time when the *mahal* to which it related was owned by one single proprietor could not be regarded as any evidence of a custom of pre-emption prevailing in that *mahal.* *Man Prasad v. Gaudhar Singh (L. R., 14 I. A., 129).* *JAIMAN BIBI v. MIR ALI HUSEN AND ANOTHER.*

[XVIII-89]

(8). Miscellaneous cases.

(157).—*Muhammadan law — Sunni—Shia.* A Shia Muhammadan cannot avail himself of the Sunni law so as to maintain a successful suit for pre-emption against a Sunni vendee. *PIR BAKSH v. SUGRA BIBI.*

[XII-34]

(158).—*Hindu vendor.* Held that a suit for pre-emption founded on the Muhammadan law would not lie where the vendor was a Hindu (though the vendee and the pre-emptor are Muhammadans) but one founded on custom would lie. That where the plaintiff had founded his claim on both, both must be looked into. *MUHAMMAD HABIB ULLAH v. ABDULLAH.*

[VI-143]

PRE-EMPTION—Miscellaneous, (continued.)

(159).———*When to be applied.*] Held by the Full Bench that, in a case of pre-emption, where the pre-emptor and vendor are Muhammadans and the vendee a non-Muhammadan, the Muhammadan law is to be applied to the matters, in advancement to the terms of s. 24 of the Bengal Civil Courts Act (VI of 1871). *Sheikh Kudratulla v. Mohini Mohun Shaha* (4 B. L. R., 134) dissented from.

Per PETHERAM, C. J., and OLDFIELD J., that by provisions of s. 24 of the Bengal Civil Courts Act, the Court was not bound to administer the Muhammadan law in claims for pre-emption; but that on grounds of equity that law had always been administered in respect of such claims as between Muhammadans and it would not be equitable that persons who were not Muhammadans but who had dealt with Muhammadans in respect of property knowing the conditions and obligations under which the property was held, should, merely by reason that they were not themselves subject to the Muhammadan law, be permitted to evade those conditions and obligations.

Per MAHMOOD J., that by a liberal construction, the rule of the Muhammadan Law as to pre-emption is a "religious usage or institution" within the meaning of s. 24 of the Bengal Civil Courts Act, and, as such, is binding on the Courts. Also *per* Mahmood, J., that the word "parties" as used in s. 24 of the Bengal Civil Courts Act, does not mean the parties to an action, but must be interpreted with the reference to the inception of the right to be adjudicated upon. Also *per* Mahmood, J., the right of pre-emption is not a right of "repurchase" either from the vendor or from the vendee, involving any new contract of sale, but it is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. The history and nature of the right of pre-emption discussed by Mahmood, J. *Shumsh-ool-nissa v. Zohra Bibi* (N. W. P. H. C. Rep., 1874, p. 2); *Chundo v. Hakeem Alim-ood-deen* (N. W. P. H. C. Rep., 1874, p. 28); *Ibrahim Saib v. Muni Mir Uddin* (Mad., H. C. Rep., p. 26); *Moti Chand v. Mahomed Hossein Khan* (N. W. P. H. C. Rep., 1875, p. 147) and *Dwarkan Das v. Husain Bakhsh* (I. L. R., 1 All., 564) referred to. *GOBIND DAYAL v. INAYATULLAH AND BRIJ MOHAN LAL v. ABUL HASAN KHAN.*

[V-228]

(160).———.] In cases of pre-emption to which the Muhammadan law applies, the rules of that law are to be administered in their entirety where they are not inconsistent with the principles of justice, equity and good conscience. *Chundo v. Hakeem Alim-*

PRE-EMPTION—Miscellaneous, (continued.)

ood-din (N. W. P. H. C. Rep., 1874, 28) and *Gobind Dayal v. Inyat-ullah* (I. L. R., 7 All., 775) referred to. *AMIR HASAN v. RAHIM BAKHSH AND OTHERS.*

[XVII-118]

(161).———*Wajib-ul-arz.*] Held that where a pre-emption suit is founded on the Muhammadan law as well as the *wajib-ul-arz* the latter would govern the suit. *TAFAZZUL HUSAIN AND OTHERS v. HADI HASAN.*

[VI-139]

(162).———.] In a suit for pre-emption based on a *wajib-ul-arz* the material words of the *wajib-ul-arz* under the heading of "custom for pre-emption" were as follows:—"At the time a proprietary share is transferred a right of purchase will vest, first, in a co-sharer of the same family, and then in the other co-sharers of the village in preference to a stranger, provided that the same prices paid by the co-sharer as is offered by the stranger." Held that these words were intended to define a special custom of pre-emption, and did not merely mean that the custom of pre-emption according to the Muhammadan law was to be followed. *Ram Prasad v. Abdul Karim* (I. L. R., 9 All., 513) distinguished. *JASODA NAND AND ANOTHER v. KANDHAIRYA LAL.*

[XI-136]

(163).———*Wajib-ul-arz—Evidence of custom.*] Although a *wajib-ul-arz* as a general rule, is some evidence of a custom in the village to which it relates, a *wajib-ul-arz* of 1874 is not satisfactory evidence of what was the custom in 1816. *Quere* whether a custom that Muhammadan daughters did not inherit from their fathers would not be bad, as overriding the Muhammadan law. *Musammat Sarupi v. Mukh Ram* (N. W. P. H. C. Rep., 1870, p. 227) referred to. *RAMZAN ALI v. BECHAI AND ANOTHER.*

[VIII-118]

(164).———*Contract—Custom.*] The right of pre-emption, when it exists among Hindus, is a matter of contract or custom agreed to by the members of a village or community. Such a custom is not properly described as attached to the land, and as soon as any members of a Hindu community, who have agreed to be governed by it, sell to any one who is a stranger to the agreement, the land is no longer subject to pre-emption. *HIRA AND ANOTHER v. KALLU AND OTHERS.*

[V-295]

(165).———*Offer to purchase at fixed sum—Decree on payment of price found by Court.*] The Court of first instance dismissed a suit to enforce a right of pre-emption, although it found

PRE-EMPTION—Miscellaneous,
(continued.)

that the plaintiff had such right, on the ground that the actual price of the property was a larger amount than the amount which the plaintiff alleged it in his plaint to be, and the plaintiff had not in his plaint expressed his readiness and willingness to pay any amount which the Court might find to be the actual price. On appeal by the plaintiff the lower appellate Court gave him a decree conditional on the payment of such larger amount within a fixed time. *Held* that it was not necessary to interfere within the exercise of the lower appellate Court's discretion in the matter, particularly as the defendant had not objected to such exercise in his memorandum of second appeal. *Durga Prasad v. Nawazish Ali* (I. L. R., 1 All., 591) distinguished. **NAUBAT SINGH v. KISHEN SINGH.**

[I-54]

(166).———[*Held* that, where a plaintiff in a pre-emption suit, claiming the property on payment of a certain fixed sum which he alleged to be the real price did not allege his readiness to pay whatever sum the Court might find to be the actual price, and the Court found the actual price to be higher than that offered, the plaintiff could not get a decree on the payment of the higher price. **LACHMAN SINGH v. RAM PRASAD.**

[II-244]

(167).———[*Necessary parties—Vendor.*] In a suit for pre-emption it was objected by the vendee in second appeal that the vendor had not been made a party. *Held* that, whether the omission to make the vendor a party in a suit to enforce the right of pre-emption renders the suit unmaintainable or not as the vendee had not been prejudiced by such omission in this case, the objection taken, at such a late stage of the case could not be allowed. **HIRA LAL v. RAMJAS.**

[III-208]

(168).———[*Costs.*] In this suit for pre-emption the plaintiff's allegation, that the price entered in the sale-deed was fictitious, was decided adversely to plaintiff. Accordingly the Court decreed the claim but ordered the parties to bear their own costs. Against this order for costs the defendant (vendee) appealed. *Held* that, as in answer to the pre-emptive demand (through a notice) the vendees gave clear and precise notice that they (the plaintiffs) might take the property on payment of the full price entered in the sale-deed and as that was found to be the correct price, and the defendants were entitled to get their costs from the plaintiff. **MAXWELL AND OTHERS v. HIMANCHAL SINGH AND OTHERS.**

[IV-34]

(169).———[*Agent.*] It is a general rule of pre-emption that any act or omission on the

PRE-EMPTION—Miscellaneous,
(continued.)

part of a duly authorized agent or manager of the pre-emptor has the same effect upon pre-emption as if such act or omission had been made by the pre-emptor himself. **HARIHAR DATT v. SHEO PRASAD AND OTHERS.**

[IV-256]

(170).———[*Right of pre-emptor to recover mesne profits.*] Although a successful pre-emptor becomes substituted for the original transferee and thus becomes entitled to the benefits of the transfer those benefits cannot be claimed by him for any period antecedent to such substitution itself and a pre-emptor, before his pre-emption, is actually enforced, possesses no such right in the subject of pre-emption as would entitle him to any benefits arising out of the property which he is entitled to take but has not yet taken. The original vendee cannot, whilst he is in possession, be regarded as trespasser who would have no right to enjoy the usufruct of the property which he has purchased. *Udhan Singh v. Maneri Khan* (2 Calc. S. D. A. Rep., 85) dissented from. *Manik Chand v. Ramashur Rae* (N. W. P. S. D. A. Rep., 1865, Vol. II., 171); *Buldeo Pershad v. Mohun* (N. W. P. S. C. Rep., 1866, Rev. App. 30) and *Ajudhia v. Baldeo Singh* (I. L. R. 7 All., 674) followed. In February, 1883, a decree for pre-emption was obtained in respect of a mortgage by conditional sale executed in August, 1882. On the 23rd August, 1883, the decree-holder executed his decree by depositing the principal amount of the mortgage-money and obtained possession of the property in substitution for the original mortgagee. In June, 1884, the mortgagor, proceeding under s. 83 of the Transfer of Property Act, deposited in Court the sum of Rs. 699, claiming the same to be adequate for redemption. The case was, however, struck off in consequence of the pre-emptor's objection to receiving the deposit on the ground that it did not include the interest due on the mortgage. The deposit remained in Court, and on the 21st August, 1884, the mortgagor deposited a further sum on account of interest, but this also the pre-emptor refused to receive, for the same reason as before. In a suit by the mortgagor for redemption of the mortgage, it was found that the amount deposited was all that was due on the mortgage on the 21st August, 1884. *Held* that until the 23rd August, 1883, when the defendant enforced his pre-emptive decree by depositing the consideration for the conditional sale of August, 1882, he had no such interest in the subject of pre-emption as would entitle him to any benefits arising therefrom, and that the defendant was not entitled to claim any interest on the mortgage-money for the period antecedent to the 23rd August, 1883. *Seemle* that the proper person entitled to receive the interest for that period was the original conditional vendee and the Court which passed the decree for pre-emption should have allowed

PRE-EMPTION—Miscellaneous,
(continued.)

him the amount of such interest in addition to the principal mortgage-money. *Ashik Ali v. Mathura Kandu* (I. L. R., 5 All., 187) referred to. *Held*, with reference to s. 84 of the Transfer of Property Act (IV of 1882) that the Courts below were right in not allowing interest to the defendant after the 21st August, 1884, when the plaintiff, to his knowledge deposited the whole money due on the mortgage. *Held*, with reference to the last paragraph of s. 51 of the same Act that the Courts below were wrong in subjecting their decrees in favor of the plaintiff to the condition that the defendant should not be evicted till the crops he had sown were cut. **DEODAT v. RAM AUTAR.**

[VI-149]

(171). —————.] *Held* that a pre-emptor who had obtained a decree for pre-emption in respect of a share in a pure *samindari* village could not successfully maintain a suit against the judgment-debtor co-sharer for the profits of the pre-empted share accruing between the date of the original decree and the date of his obtaining mutation of names, such profits having been collected by the *lambardar* but not paid over to the judgment-debtor; inasmuch as neither could the *lambardar* be considered as an agent of the co-sharer, whose possession of the profits was the possession of his principal, nor was there any obligation on the co-sharer to collect the profits and hold them to the use of the plaintiff. **SRI KISHEN LAL v. ATMA RAM.**

[XVII-45]

(172). —————.] *B* purchased a share in a *mahal* on the 3rd January, 1880, (*Pus*, 1287 *Fasli*). *A* sued *B* and the vendor to enforce his right of pre-emption, and, on the 24th March, 1882, (*Chait*, 1289 *Fasli*) obtained a final decree enforcing the right. Subsequently *B*, as a co-sharer in the *mahal*, during 1288 *Fasli*, claimed from *A*, as *lambardar* of the *mahal*, the profits of the share for 1288 *Fasli*. *Held* that the pre-emptive right which was declared in the suit instituted by *A*, when it was once established, existed, and must be presumed to have taken effect on the date when the subsequently awarded sale to *B* took place; and therefore there was no period of time during which *B* was properly in possession of the share and entitled to profits from *A* in his character of *lambardar*, but *A* must be presumed to have been in possession and entitled to the profits from the date of the sale to *B*. **AJUDHIA v. BALDEO SINGH.**

[V-177]

(173). —————] *Pre-emptor entitled to benefits of covenant.* In this suit for pre-emption the plaintiff claimed the benefit of an agreement, entered into between the vendors and vendees, that a portion of the purchase-money should

PRE-EMPTION—Miscellaneous,
(continued.)

remain on credit. *Held* that the plaintiff was not entitled to it, as the *wajib-ul-ars* gave only a right of pre-emption and not to stand in the position of the purchaser so as to take advantage of every particular arrangement which may have been made between the parties. **NIHAL SINGH AND OTHERS v. KOKALE SINGH AND OTHERS.**

[V-314]

See also—No. (93).

(174). —————] *Rights and liabilities of pre-emptor.* Under a registered deed of mortgage, dated in May, 1869, the mortgagee had a right to immediate possession; but by arrangement between the parties, the mortgagors remained in possession, the right of the mortgagee to obtain possession as against them being, however, kept alive. In October, 1869, the mortgagors sold the property and thereupon one *R* brought a suit to enforce the right of pre-emption in respect of the sale and obtained a decree and got the property and sold it in 1871 to *D*. In 1883, the mortgagee brought a suit against *D* to obtain possession under his mortgage. *Held*, with reference to a plea of adverse possession for more than twelve years set up by the defendant, that the position of a person who purchased property by asserting a right of pre-emption was not analogous to that of an auction-purchaser in execution of a decree, but that such person merely took the place of the original purchaser and entered into the same contract of sale with the vendor, that the purchaser was making. There was privity between him and the vendor, and he came in under the vendor and his holding must be taken to be in acknowledgment of all obligations created by his vendor. *Anundoo Moyee Dossee v. Dhondro Chunder Mookerjee* (14 Moo. I. A., 101; 3 B. L. R., 122) distinguished. *Held*, also, that although it would be material to show that the defendant had in any way by fraud been kept out of knowledge of the mortgage, his not having notice of it would not otherwise affect his liability inasmuch as the principle on which Courts of Equity in England refuse to interfere against *bond fide* purchasers for a valuable consideration, without notice, when clothed with the legal title, had no applicability in the Courts of British India. *Held*, under these circumstances, that there was no equitable ground why the plaintiff's right under the mortgage, which had priority, should be defeated by the defendant's purchase. **DURGA PRASAD v. SHAMBHU NATH AND OTHERS.**

[VI-11]

(175). —————] *Rival suits for pre-emption.* Where two rival pre-emptors, each having an equal right to claim pre-emption under a *wajib-ul-ars*, bring suits to enforce their rights, in the absence of anything in the *wajib-ul-ars* to the contrary, the rule of Muhammadan law must be observed, and however, the property may be

PRE-EMPTION—Miscellaneous,
(continued.)

divided by the decree of the Court between the successful pre-emptors, the Court must take care that the whole share must be purchased by both pre-emptors, or on the default of one, by the other, or that neither of them should obtain any interest in the property in respect of which the suits were brought. In two rival suits for pre-emption, the Court gave one claimant a decree in respect of a three *annas* share, and the other a decree in respect of a two *annas* six *pies* share of certain property, each decree being conditional on payment of the price within thirty days. The Court further directed that in case of either pre-emptor making default of payment within the thirty days, the other should be entitled to pre-empt his share on payment of the price thereof within fifteen days of such default. Both pre-emptors made default of payment within the thirty days. One of them, within the further period of fifteen days, paid into Court the price of the share decreed in favor of the other, and claimed to pre-empt such share. *Held* (affirming the judgment of Mahmood, J.) that the claim was inadmissible, since to allow it would have the effect of defeating the rule of law that a pre-emptor must buy the whole and not part only of the property which he is entitled to pre-empt. *ARJUN SINGH v. SARFRAZ SINGH.*

[VIII-55]

(176). —————. *A* and *B* were two rival pre-emptors. *A's* suit was dismissed on the sole ground that it was barred by s. 13, Civil Procedure Code. He preferred an appeal to the lower appellate Court. In the meantime *B's* suit was decreed and it was declared that he had a preferential right than *A*. The lower appellate Court therefore dismissed the appeal on the ground that *B* having a preferential right nothing remained of the appeal to be decided. *Held* that the lower appellate Court was wrong. It should have given an alternative decree. *Kashi Nath v. Mukta Prasad* (*W. N.* 1884, p. 119) referred to. *LEKHRAJ SINGH AND OTHERS v. SRIPAT DIAL AND OTHERS.*

[V-329]

(177). —————. *Appeal.* *A* and *B*, two rival pre-emptors, brought two suits to enforce their rights of pre-emption and made the vendors, the vendees and the rival pre-emptor parties to the suit. Both the suits were tried together but resulted in two decrees. In the first it was held that *A* had a preferential right than *B*. In the other *B* obtained a decree subject to the right of *A*. No appeal was preferred from the first. From the second *B* preferred an appeal upon the ground that the consideration was excessive and that *A* had lost his right of pre-emption. *Held* that no appeal having been preferred from the first decree it became final between the parties and any issue decided therein could not be re-opened. *CHAJJU v. SHEO SAHAI.*

[VII-301]

PRE-EMPTION—Miscellaneous,
(continued.)

(178). —————. *Custom—Evidence—Previous judgment.* In a suit for pre-emption based on custom, evidence of decrees passed in favour of such a custom, in suits in which it was alleged and denied is admissible evidence to prove its existence. The most satisfactory evidence of an enforcement of a custom is a final decree based on the custom. *Gajju Lal v. Fateh Lal* (*I. L. R.* 6 *Calc.*, 171) distinguished. *Koodootoolah, v. Mohinee Mohun Shaha* (5 *Rev. Civ. and Cr. Rep.*, 290); *Sheo Churn v. Goodur* (*N.-W. P. H. C. Rep.*, 1868, p. 138) and *Lachman Rai v. Akbar Khan* (*I. L. R.*, 1 *All.*, 440) referred to. *GURDAYAL MAL v. JHANDU MAL.*

[VIII-242]

(179). —————. *Personal right.* According to the Muhammadan law applicable to the *Sunni* sect if a pre-emptor has not obtained his decree for pre-emption in his life-time the right to sue does not survive to his heirs. *MUHAMMAD HUSAIN v. NIAMAT-UN-NISBA AND OTHERS.*

[XVII-193]

(180). —————. *Wajib-ul-arz—Construction.* The clause relating to pre-emption in a village *wajib-ul-arz* ran as follows:—"At the time of the transfer of a *zamindari* right a right of pre-emption will accrue against a stranger, on payment of the price paid by him, firstly, to a co-sharer, who is descended from an ancestor from whom the vendor is descended; secondly, to joint sharers, and, thirdly, to sharers in the *mahal*." *Held* by Blair, J., that under this *wajib-ul-arz* the right of pre-emption would only arise where the sale was to a "stranger" in the sense of a person not included in any of the three classes of pre-emptors specified. *Held* by Aikman, J., that under this *wajib-ul-arz* the right of pre-emption might arise also in favour of a higher class of the three classes of pre-emptors upon a sale by a member of a higher class to a member of a lower class. *Ali Jan v. Phetu* (*W. N.* 1895, p. 9) referred to. *ILAH BAKHS V. GHULAM ABBAS.*

[XVIII-15]

(181). —————. *Right pleaded in defence.* A co-sharer of a village, who is in possession, can not plead the existence of a right of pre-emption in defence to a suit for possession by the purchaser of the rights and interests of another co-sharee. *AJUDHIA BAKHS SINGH v. ARAB ALI KHAN AND OTHERS.*

[V-291]

Queen's proclamation of 1st November, 1858.

Retrospective effect. *Held* that the effect of the Queen's proclamation of the 1st of Novem-

QUEEN'S PROCLAMATION, 1st Nov, 1858, (continued.)

ber, 1858, was prospective merely and did not operate to restore property which had been confiscated. *Ganga Bai v. Swinton* (2 Ind. Jur., N. S., 124) referred to. JANKI PRASAD v. RAI PARTAP CHAUD BAHADUR.

[XVII-129]

Regulation No. XV of 1793.

(1).—*Usufructuary mortgage—Wajib-ul-arz—Account.*] F, the usufructuary mortgagee for Rs. 1,250 of certain land, of one-ninth of which he had purchased the equity of redemption, in 1854, gave a usufructuary mortgage of the land to N for Rs. 2,700 of which Rs. 1,950 represented the mortgage-money of the land he held as mortgagee, and Rs. 750 of the land he held as proprietor. By the instrument of the mortgage it was provided that the mortgagee should take all the profits in lieu of interest and the mortgage should be redeemable on payment by the mortgagor of the principal money. In 1880 F, the representative of the original mortgagor in respect of eight-ninths of the land, sued, with reference to Regulation XV of 1793, for possession of the land, on the ground that the mortgage had been redeemed, as the principal money and interest at twelve per cent had been received out of the profits, and claimed an account N set up as a defence that the provisions of that Regulation were not applicable, as after its repeal, by Act XXVIII of 1855 the mortgagor had agreed not to claim an account. This agreement, he alleged, was contained in the *wajib-ul-arz* of 1871. Held that the *wajib-ul-arz* did not contain a new contract, or ratification of the old contract of 1854, between the parties but merely a recital of the mortgage and therefore F was entitled to an account. Held also that the account should be calculated on eight-ninths only of the land. Observation by Stuart, C. J., on Regulation XV of 1793 and Statute 13, Geo. III C., 63. *Shah Makhan Lal v. Sri Krishna Singh* (2 B. L. R., P. C., 44); *Badri Prasad v. Murtidhar* (I. L. R., 2 All., 593) referred to. MAHTAB KUAR v. THE COLLECTOR OF SHAHJAHANPUR.

[III-43]

(2).—*Satisfaction of mortgage-money from usufruct—Onus.*] The question in the suit was, whether the mortgage-money had been satisfied or not, out of the profits of the property mortgaged. The usufructuary mortgage was made on the 17th December, 1844, and was governed by Regulation XV of 1793, s. 11. Held that the burden of proving that it had not been satisfied lay on the mortgagee defendant in the suit. ABDUL GHANI v. DURGA PRASAD AND OTHERS.

[III-90]

Regulation XVII of 1806.

(1).—s. 8—*Preliminary demand.*] S. 8 of Regulation XVII of 1806 contemplates a

REGULATIONS—No. XVII of 1806, (continued.)

previous demand of payment of the mortgage-money and non-compliance therewith as a kind of cause of action for commencing foreclosure proceedings, and such demand must therefore necessarily be made before the mortgagee has the right of applying for foreclosure and the omission to make such demand vitiates the foreclosure proceedings altogether. *Behari Lal v. Beni Lal* (I. L. R., 3 All., 408) followed. KARAN SINGH v. MOHAN LAL AND ANOTHER.

[II-149]

See also

SITLA BAKSHI AND ANOTHER v. LALTA PRASAD.

[VI-140]

KUBRA BIBI v. WAJID KHAN.

[XIII-209]

(2).—*Notice—Signature—Seal.*] A notice issued under Regulation XVII of 1806, which does not bear the signature of the District Judge, but bears the seal of his Court only is informal and bad and the foreclosure proceedings in which such a notice has issued are invalid *ab initio*. BASDEO SINGH AND ANOTHER v. MATADIN SINGH AND ANOTHER.

[II-25]

(3).—*Signed by Munsarim.*] The provisions as to the procedure to be followed in taking foreclosure proceedings under Regulations XVII of 1806 are not merely directory, but strict satisfaction of the prescribed conditions therein laid down precedes the right of the conditional vendee to claim, the forfeiture of the conditional vendor's right and the various requirements of that section have to be strictly observed in order to entitle a mortgagee to come into Court and, upon the basis of the observance of those requirements, to assert an absolute title to the property of the mortgagor. *Norender Narain Singh v. Dwarka Lal Mundur* (I. L. R. 3 Cal., 397) and *Madho Pershad v. Gajadhar* (I. L. R., 11 Cal., 111) followed. In a suit for possession of immoveable property by a conditional vendee under a deed of a conditional sale, alleged to have been foreclosed under Regulation XVII of 1806, it appeared that except a recital in the application for foreclosure itself, there was nothing to show that any preliminary demand was ever made upon the mortgagors for payment of mortgage debt; that there was no proof of the "notice" itself having been served upon the mortgagors, which it lay upon the plaintiff to establish; that there was nothing to show that the notice which was issued was signed by the Judge to whom the application was made; and that it was not proved that a copy of the application was forwarded along with the notice to the mortgagors or that its terms

REGULATIONS—No. XVII of 1806,
(continued.)

were ever brought to their knowledge. *Held* applying to the case the principles stated above that the provisions of Regulation XVII of 1806 had not been satisfied and that the plaintiff had not fulfilled his obligation, namely to prove affirmatively that those provisions were strictly followed. *Held* also that to treat the suit as one instituted under the Transfer of Property Act, and to allow the plaintiff to obtain such relief as he would be entitled to by that Act would be to countenance an entire change in the nature and character of the suit as it was originally instituted, and that this was a course not sanctioned by the law. **SITLA BAXSH V. LALTA PRASAD.**

[VI-140]

(4).—[Held] that where the notice of foreclosure under s. 8 of Regulation XVII of 1806 was signed not by the Judge but only by the Munsarim, the foreclosure proceedings were void *ab initio*. *Held* also that the notice which was upon the record of the foreclosure proceedings and bore the mortgagor's signature must be regarded as the original notice in the matter; and that the acknowledgment of receipt of notice by the mortgagor did not cure the inherent defect of its non-signature by the Judge. **HANUMAN SARAN SINGH AND ANOTHER V. BHAIROO SINGH.**

[IX-199]

(5).—[Signed by Subordinate Judge.] *Held* that a "parwana" purporting to be issued under the provisions of s. 8 of Regulation XVII of 1806, but signed, not by the District Judge, but by the Subordinate Judge in charge of the current duties of the office of the District Judge was not a good notice in law. **PIRBHU LAL V. GANPAT.**

[XIV-53]

(6).—[Signature—Initials.] In proceedings for foreclosure of a mortgage under Bengal Regulation, No. XVII of 1806, it is not necessary that the fact that a demand for payment was made before the petition for foreclosure was presented should appear on the face of the proceedings; it is sufficient if the plaintiff in his suit for possession shows that the demand was so made. A *parwana* issued under the provisions of s. 8 of the abovementioned Regulation is not signed as required by that section with the "official signature" of the Judge when it bears merely the initials of that officer. **Madho Persad v. Gajudhar (I. L. R., 11 Calc., 111)** referred to. The term "stipulated period" as used in s. 8 of Regulation No. XVII of 1806, means the full term on the expiry of which the mortgage-money is payable, notwithstanding that under the strict terms of the mortgage the mortgagee might be entitled to foreclose at an earlier period. **Srimati Sarasibala Devi v. Nand Lal Sen (5, B. L. R., 389)** and, **Imdad**

REGULATIONS—No. XVII of 1806,
(continued.)

Husain v. Mannu Lal (I. L. R., 3 All., 509) referred to. **KUBRA BIBI V. WAJID KHAN.**

[XIII-209]

(7).—[Foreclosure before term fixed.] An instrument of conditional sale provided that the conditional vendor should retain possession of the property to which it related paying interest on the principal sum but annually at twelve per cent, and should repay the principal sum but within seven years; that by the fourth clause thereof, in the event of default of payment of interest in any year, the term of seven years should be cancelled and the conditional sale should at once become absolute; and that (by the fifth clause thereof) in the event of the principal sum lent not being repaid at the end of seven years, the conditional sale should become absolute. Default having been made in the payment of interest annually as stipulated, the conditional vendee, the term of seven years not having expired, took proceedings to foreclose, in pursuance of the condition contained in the fourth clause of the deed, and the conditional sale was declared absolute. The conditional vendee then sued for possession of the property. *Held* that the fifth clause of the deed did not dispense with the necessity of complying with the provisions of s. 8 of Regulation XVII of 1806 and was compatible with them, and on or after the expiry of the stipulated period application for the foreclosure of the mortgage and rendering the conditional sale absolute in the manner prescribed by that Regulation might and must be made; that the condition contained in the fourth clause of the deed in effect defeated and violated the provisions of that Regulation, and summarily converted a conditional into an absolute sale in disregard and defiance thereof, and the foreclosure proceedings taken by the conditional vendee before the expiry of the period stipulated for the repayment of the principal sum lent were irregular, and the sale could only be rendered conclusive in the manner prescribed by that Regulation in pursuance of the fifth clause of the deed; and that accordingly such suit was not maintainable. **IMDAD HUSAIN V. LALMAN AND ANOTHER.**

[I-15]

(8).—[Payment in Court—Conditional payment.] *Held* that, in a suit for foreclosure, payment in Court of the mortgage-money, by the mortgagor within the year of grace, but accompanied with a protest that the debt had been paid and that legal proceedings would be taken to recover the money back, was not a valid payment (which must be unconditional) so as to prevent foreclosure. **MANKHAN KUAR AND ANOTHER V. JASODA KUAR AND OTHERS.**

[IV-138]

(9).—[Principal—Mesne profits.] A deed of conditional sale, after reciting that the

REGULATIONS—No. XVII of 1806,
(continued.)

vendor had received the sale-consideration (Rs. 199) and had put the vendee in such possession of the property as the vendor himself had, proceed as follows:—"I (vendor) shall not claim mesne profits, nor shall the vendee claim interest: in case the vendee does not obtain possession, he shall recover mesne profits for the period he is out of possession: and when, after the expiry of the term fixed, I repay the entire sale-consideration in a lump sum, I shall get my share redeemed: in case of default in payment of the sale-consideration, the sale shall be deemed to become absolute." The vendee did not get possession of the property for some years, and on the expiry of the term took proceedings under Regulation XVII of 1806 to foreclose. The legal representative of the vendor deposited the sale-consideration mentioned in the deed of conditional sale (Rs. 199) within the year of grace. In a suit by the vendee for possession of the property, the sale having been declared absolute, the question arose whether or not the legal representative of the vendor should have deposited, by way of interest, in order to prevent the sale from becoming absolute, in addition to the sale-consideration, the amount of mesne profits for the period the vendee was out of possession of the property. *Held* (Spankie, J., dissenting) on the construction of the deed of conditional sale, that the deposit of the sale-consideration (Rs. 199) was sufficient for the redemption of the property. **RAMESHAR SINGH v. KANHAIYA SAHU.**

[I-42]

s. 6—Rejection of plaint. The plaintiff-appellant, claiming to recover certain money on certain Indigo contracts with interest, presented a plaint, under Regulation VI of 1823, stamped with an eight-annas stamp. The District Judge rejected the plaint on the ground that the whole of the Regulation had been repealed or become obsolete. *Held* that it had not been repealed and the Court below was bound to receive the plaint. **MARTIN v. KAULESHAR RAI.**

[VIII-155]

REGULATION NO. XI OF 1825.

ss. 2 & 4—Dhardhura. The question whether the custom of *Dhardhura* applies to lands gained by gradual accretion only, or also to lands which have been separated from a *mauza*, by a sudden change of stream, must be determined in each case on the evidence; for although the Court would be disposed to scrutinize with care evidence in regard to a custom which would have the effect of passing from one owner to another lands long held and enjoyed; and of which the character is in no way altered by river action, yet it can not be said that such a custom can in no case be established and given effect to. *Ranee Katiyanae v. Mahomed Shurfoodeen*, (N.-W. P. H. C. Rep., 1838, p. 189); *Ishri Singh v. Mirza*

REGULATIONS—No. XI of 1825,
(continued.)

Shurfoodeen (N.-W. P. H. C. Rep., 1869, p. 142) and *Rajendur Pertab Sahoe v. Laljee Sahoo* (20 W. R., 427) referred to. **SIBT ALI AND OTHERS v. MUNIRUDDIN.**

[IV-185]

(1). **s. 4.—Dhardhura.** *Held* that the law in Regulation XI of 1825, s. 4 (i), as to gradual accession of land does not apply where the land is claimed according to the custom of *Dhardhura*. **ISHRI PRASAD AND OTHERS v. JAGMOHAN RAM.**

[I-2]

(2). —————. The appellants owned a two-annas share in a village called *A* and the respondent owned a village called *D*. The river *Rapti* flows between the two villages. The appellants sued the respondents to be maintained in proprietary possession of certain lands alleging that such land had appertained to their village *A*, that it had been submerged by the *Rapti*, and that it had reappeared and accreted to their village. The respondents on the contrary alleged that such land had appertained to their village *D*; that it had been cut off by the action of the river; and that it had gradually been recovered by them. The lower appellate Court held that the land in suit had been the subject of fluvial action for ten years and in the course of that time had gradually accreted to *D*, and that therefore under cl. 1 of s. 4 of Regulation XI of 1825, the defendants-respondents were entitled to it. *Held* that the judgment of the lower appellate Court proceeded on a misunderstanding and misapplication of the law of gradual accession in cl. 1, s. 4 of Regulation XI of 1825. That the Regulation referred only to cases of gain, of acquisition by means of gradual accession, which an individual proprietor might make from that which was part of the public territory, the public domain, and not to the confiscation or destruction of any private person's property. Diluviated lands re-forming on their old sites remain the property of their original owner and it was immaterial whether the lands have re-formed gradually or otherwise. The case was remanded for a finding as to whether the site on which the alluvial has appeared is part of village *A* or *D*. *Lopez v. Muddeen Mohun Thakoor* (13 Moo., I. A. 467); *Radha Proshad Singh v. Ram Comar Singh* (I. L. R., 3 Calc., 796); *Fogindro Kishore v. Sukh Bhawan Singh* (S. A., No. 618, decided on the 3rd December, 1879) followed. **RAMCHARAN TIWARI AND OTHERS v. JASAI PANDEY AND OTHERS.**

[II-8]

(3). —————. Clause 1 of s. 4 of Regulation XI of 1825 does not depend for its operation on the capability of identification of the accreted lands. Whether the accreted lands are capable of identification or not, the clause applies where the lands have been

REGULATIONS—No. XI of 1825,
(continued.)

gained by gradual accession by the recession of the river. In the case of gradual accretions the ordinary rule of acquisition by prescription does not apply, but each accretion as it occurs comes under the same title as that upon the land to which it is made is held. **DEBI BAKSH SINGH AND ANOTHER v. TIR-BHAWAN SINGH AND OTHERS.**

[XVII-39

(4). —————.] Held that the ownership of land acquired by alluvial rests upon the title upon which the original village is held, so that if the riparian village is ancestral the other property must be ancestral too. **RAM PRASAD RAI AND OTHERS v. RADHA PRASAD SINGH.**

[V-65

REGULATION VII OF 1828.

s. 20.—*Family Domains of Maharaja of Benares.*] **MB** and others, the lessees of a village lying within the Family Domains of the Maharaja of Benares, constructed a dam across a stream running between that village and a village called **K**, lying down the stream, and within the jurisdiction of the Civil Court of Mirzapore. **JD** and others, the proprietors of village **K**, objected to this and one of the Mirzapore Magistrates made an order directing that an opening should be kept open in the dam. Thereupon **MB** and others sued **JD** and others, in a Court established by Regulation VII of 1828 for the Family Domains, for a declaration of their right to construct the dam and the cancelment of the Magistrate's order. **JD** and others on the other hand, subsequently brought the present suit against **MB** and others in the Court of the Munsif of Mirzapore, claiming to restrain them from closing the opening which was to be left in the dam and from obstructing the flow of water. Held that the present suit was not barred by the provisions of s. 12 of Act No. X of 1877, as the injunction sought by the plaintiffs did not fall within the category of claims mentioned in s. 20 of Regulation VII of 1828. **MAHARAJA OF BENARES AND OTHERS v. JAGGANNATH DAS AND ANOTHER.**

[I-116

REGULATION XXVIII OF 1855.

See Regulation XV of 1793, No. (1).

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THE BENGAL ARMY

published in 1853

corresponding to Regulations
and orders

for the Army of the Bengal Presidency,
1880, s. 17, Para. (42).

S. 11, para (12)—*Cantonment.*] Certain ground situate within the limits of a cantonment

REGULATIONS—Of the Bengal Army
1858, (continued.)

was granted for building purposes by the military authorities in 1802. In 1873 such cantonment was abandoned and the ground comprised therein was made over to the Collector of the district in which it was situate. The Government subsequently sued **P** who had succeeded to such grant, claiming (i) a declaration of its proprietary right to the ground comprised in such grant and to the alluvial accretions to such ground, (ii) that **P** should be directed to pay rent for such ground and such alluvial accretions, and (iii) that should **P** refuse to pay the rents fixed, she might be ejected and the Government put in possession. Held that, inasmuch as under the military regulations relating to such grants such a grant can not be resumed by the Government without a month's notice and without payment of the value of such buildings which may have been authorised to be erected, and as the Civil Courts had no jurisdiction in the matter of assessing rent on such alluvial accretions, which were outside the original grant the Government was not entitled to the second and third reliefs it claimed but was entitled only to a declaration of its proprietary title to such ground and to such alluvial accretions. **PATERSON v. THE SECRETARY OF STATE FOR INDIA.**

[I-45

REGULATION I OF 1877.

Ajmere Court.] This was a reference by the Commissioner and District Judge of Ajmere and Merwara under s. 21 of the Ajmere Courts Regulation, No. I of 1877. The question referred to was,—“Whether an attachment (in execution of a decree) ceases when nothing can be realized by a sale, or whether the attachment remains in force till the property is formally released by the Court which caused the attachment to take effect.” Held that the question referred to was not properly coming within the scope of s. 17 of the Regulation, not being a question of law or usage having the force of law, but a question of fact to be decided by a consideration of the circumstances of the cases of *Puddomonee Dossee v. Roy Muthoora Nath Chowdhry* (12 B. L. R., P. C., 411) and *Zaibunissa v. Jafaragir* (I. L. R., 1 All., 616). **SHAM LAL v. HAMID.**

[V-57

RULES AND CIRCULAR ORDERS
OF THE HIGH COURT, N.-W. P.

(1). ———— *Joint trial—Commitment.*] Held that the circular order, dated 30th June, 1862, No. XIV (the object of which is that where several persons are jointly charged in respect of one transaction, but it appears from the facts implicating the whole of them, that one has committed an offence of a more aggravated character, than the rest, which either must or

RULES AND CIRCULARS of the High Court, N.-W. P., (continued.)

should be tried, by a Court of Session, the Magistrate investigating the case should, for purposes of convenience, send up the whole of the accused for trial to the Court of Session), does not apply to the case of an accused person who has been arrested after the others have been committed and does not invalidate his trial and conviction by the Magistrate himself. **EMPRESS v. KHALI.**

[I-64]

(2).—*Brief holding.*] Held that the rule of the Court allowing one legal practitioner to hold the brief of another was not *ultra vires* or illegal. **SEATADIN AND OTHERS v. GANGA BAI.**

[VII-152]

(3).—*Judgment of High Court.*] Rule 9 of the Rules made under s. 633 in March, 1885, is not *ultra vires* of the Court. With reference to the terms of Rule 9, it is not necessary, in a case where the High Court substantially adopts the whole judgment of the Court below, or to go through the formality of re-stating the points at issue, the decision upon each point and the reason for the decision. **SUNDAR BIBI v. BISHESHAR NATH AND OTHERS.**

[VI-302]

(4).—*Power of Single Judge—To entertain ex parte application for criminal revision.*] Held that a judge sitting as a Single Bench had power to entertain *ex parte* application for criminal revision. **EMPRESS v. RAGHUBAR DIAL.**

[VII-800]

(5).—*To make order under s. 549.*] Under the Rules of Court of the 11th June, 1887, a Single Judge of the High Court has no power to make an order under s. 549 of the Civil Procedure Code requiring an appellant to give security for the costs of the appeal. **FARKHANDATUNNISSA v. THE COLLECTOR OF MEERUT.**

[IX-147]

(6).—*Costs.*] Held that though orders passed under s. 244, Civil Procedure Code, fell within the definition of decrees, the scale of costs applicable to such orders is that given in article 57 of the Circular Order No. 19 of 1880 of the Court. **BULAND KHAN v. IBRAHIM HUSAIN.**

[II-2]

(7).—*Board of Examiners—Raising pass marks.*] The Board of Examiners having without giving any notice to the candidates at the annual examination for pleaderships of the Upper Subordinate Grade, raised the minimum

RULES AND CIRCULARS of the High Court, N.-W. P., (continued.)

number of marks qualifying for a pass certificate, some of the unsuccessful candidates petitioned the High Court that the result of the examination might be reconsidered and the former standard reverted to. Held that the Court having delegated its powers in connection with the examination to the Board of Examiners, and the Board having exercised its powers legally, properly and for the benefit of the public, there was no cause for interference. **PETITION OF DWARKA PRASAD AND OTHERS.**

[VII-148]

(8).—*Process fee.*] It is competent to the Court upon sufficient cause shown to extend the time limited by Rule 45 of the Rules of Court of the 30th of November, 1889, for payment of process fee. **RAM LAL v. JAMNA DAS.**

[XVII-157]

(9).—*Limitation for appeals under Letters Patent.*

See Letters Patent, s. 10, No. (9)

(10).—*Bench hearing Letters Patent appeals—Constitution.*] Held that Rule VI of 21st May, 1893, for the hearing of Letters Patent appeals, was a valid rule. **MUHAMMAD ALLAH-DAD KHAN AND ANOTHER v. ISMAIL KHAN AND OTHERS.**

[VII-199]

RYOT AND ZAMINDAR.

(1).—*Hag-i-chaharum—Custom—Execution sale.*] A in execution of his decree against B, attached and sold his house which was bought by C. Thereupon D (the zamindar of the mahal in which the house of B was situate) brought this suit against A, B and C for 1/4th of the sale proceeds according to the custom alleged by them to prevail in the mahal. The suit was decreed by the lower Court against A. The evidence adduced to prove the custom was that of some witnesses, and two decrees obtained by plaintiffs against other parties in which the right (for *haqq-i-chaharum*) had been allowed in the case of execution sale. Held that the evidence was insufficient to establish the custom. A custom, before it can have the force of law, must be proved to be immemorial continued and undisputed and in the particular case it must go to show that it is applicable to sales in execution of decrees. The suit must therefore be dismissed. **LACHMAN AND ANOTHER v. SHEOBALAK SINGH AND OTHERS.**

[IV-151]

(2).—*Proof of a custom whereby the zamindar of a village is entitled to one fourth of the purchase-money when a house in the village is sold privately is not proof of a similar custom*

RYOTS AND ZAMINDARS—(continued.)

in respect of sales in execution of decrees.
KALIAN DAS *v.* BHAGIRATI AND OTHERS.

[III-198]

(3). ————. [This was a suit for *haqq-i-chaharam* based on custom as evidenced by the *wajib-ul-arz* of the *mohalla*. The terms of the *wajib-ul-arz* were as follows:—"In this *mohalla* the custom of *mohalladari* dues is that the *zamindars* receive from all low caste people a house cess as settled by verbal contract; and at the time of the sale of a house a cess called *haqq-i-chaharam*, the amount of which is settled by mutual agreement." Held that the terms of the *wajib-ul-arz* did not contemplate and could not be applied to sales of a compulsory character such as a sale in execution of a decree.
GOPAL MISR *v.* FAZAL ALI KHAN.

[I-165]

(4). ————. [The *zamindars* of a certain *mohalla* claimed from the purchaser of a house situated in such *mohalla* which had been sold in execution of a decree one-fourth of the sale proceeds of such house, such purchaser being the holder of such decree. Such suit was based upon the terms of the *wajib-ul-arz*. The document stated, *inter alia* that, when a house in such *mohalla* was sold a cess called *chaharam* was received by such *zamindars* "according to the understanding arrived at between the seller and the *zamindars*". Held that such *zamindars* were not entitled under the terms of the *wajib-ul-arz* to one-fourth of the sale proceeds; that the decree-holder because he happened to have become the auction-purchaser, could not be regarded as the "seller", and it was only the seller who was liable; that the terms of the *wajib-ul-arz* were applicable only to private and voluntary sales and not to execution-sales; and that under these circumstances the suit must be dismissed. BENI MADHO AND ANOTHER *v.* ASGHAR ALI AND OTHERS.

[I-72]

(5). ————. [This suit, for *Haqq-i-chaharam* brought by the *zamindars* of a village against the seller and purchaser respectively of a house in their *zamindari*, based on prevailing and operative local custom, was resisted by the vendor on the ground that the vendee had undertaken to meet the charge; and by the vendee on the grounds that no such custom prevailed in the *mohalla*, that the *wajib-ul-arz* of the village denied the existence of any such custom and that he had undertaken no such liability as alleged by the vendor. The Munsif finding that the right was sanctioned by the *wajib-ul-arz* and established by sufficient and independent testimony, decreed the claim as against the vendee. On appeal by the vendor the District Judge found erroneously

RYOTS AND ZAMINDARS—(continued.)

that the suit was based on the *wajib-ul-arz* and that there had been no sale and on these findings dismissed the suit and decreed the appeal. Held that the District Judge was wrong in believing that the claim was based on the *wajib-ul-arz* and that there had been no sale. The following issues must be tried and determined by the Court below. (i) Whether there was valid evidence, that by custom, a vendee is liable in the *mohalla* to pay the *chaharam*? (ii) Whether the claim of the vendee operates to make any difference in respect of such liability? (iii) What the *quota* payable should be? ASGHAR ALI AND ANOTHER *v.* RAM GHOLAM AND ANOTHER.

[I-137]

(6). ————. [House built by tenant on *zamindar's* land—Right to make improvements]. A tenant of a building site in the *abadi* of a village may make what improvements he likes in his house so long as he can do so without injury or interference with the rights of the *zamindar*. BALKISHEN AND OTHERS *v.* MUHAMMAD ISMAIL KHAN AND OTHERS.

[XVIII-44]

(7). ————. [Right to convert it into temple.] Held that a tenant cannot convert his house, (which is given him by the *zamindar* for residential purposes) into a *mandir* or for other non-residential purposes. GOBARDHAN AND OTHERS *v.* ABDUL GHAFUR AND OTHERS.

[VII-108]

(8). ————. [Auction-sale—Right of purchaser to repair]. The purchaser of a house at a sale in execution of a money-decree against a tenant, on attempting to put the same in repair, and to re-build a part of it which had fallen down, was resisted by the land-holder, who alleged that the occupier was entitled only to the materials existing at the time of sale, and to occupy the house as it then stood, and not to repair or renew it. Held that the occupier as owner of the house was entitled to keep it in good repair and to possess it as long as it maintained the character of a habitation, and that although when it had fallen into ruins the landholders would be entitled to enter into possession of the land, he could not take any action to accelerate the house falling into ruins. NARIAN PRASAD *v.* DAMMAR AND OTHERS.

[VIII-125]

(9). ————. [Private sale—Right of purchaser.] This was a suit for the possession of a house and some trees standing in the enclosure of such house, purchased by the plaintiff from an agricultural tenant. The suit was brought against the tenant and the *zamindars* of the village. It appeared that by the custom of the village an agricultural tenant could sell materials of his house and the trees which stood

RYOTS AND ZAMINDARS—(continued.)

in its enclosure. If he vacated his house or left the village, he could carry away the materials, but the site, which belonged to the *zamindar*, reverted to the *zamindar*. Held that the purchaser took nothing by his purchase, but the materials of the house and the wood of the trees. He could not retain possession of the house and occupy the site. **GANGA PRASAD AND ANOTHER v. KANJI.**

[I-82]

(10).—*Right to sell—Auction-sale.* According to the general custom prevalent in the North-Western Provinces, a person, agriculturist or agricultural tenant, who is allowed by a *zamindar* to build a house for his occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents, its falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the *zamindar*, he has, unless he has obtained by special grant from the *zamindar* an interest which he can sell, no interest which he can sell by private sale, or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood work of the house. **Narain Prasad v. Dammar** (W. N., 1888, p. 125) and **Chajju Singh v. Kanhia** (W. N., 1881, p. 114) referred to. **SRI GIRDHARIJI MAHARAJ v. CHOTE LAL AND OTHERS.**

[XVII-27]

(11).—*Presumption.* The plaintiffs in this suit came in Court on the allegation that they were the *zamindars* of a certain village, that a tenement in the village fell vacant seven years ago, that they then allowed the defendants, who had no right or title to the house, to lodge in it rent-free, and that they now wished to eject them. The defendants answered that the tenure had come to them seven years ago by inheritance from the previous occupant, who had occupied it for generations. Through him they set up a title to hold the house, and an occupation of more than 12 years. This allegation of inheritance and of adverse occupation was found on the evidence against the defendant. But the plaintiffs also did not prove their allegation that the house had been built by them. Held that as a natural consequence of the finding that the house did not come to the defendants by inheritance and that their occupation of it had not been adverse, it followed that their occupancy was permissive. As a house left unoccupied by a tenant lapses to the landlord in the absence of heirs or other lawful assignees of the last occupant, plaintiffs' claim must be decreed. **CHAJJU SINGH AND OTHERS v. KANHIA AND OTHERS.**

[I-114]

RYOTS AND ZAMINDARS—(continued.)

(12).—*Right to recover possession.* Held that where a tenant was entitled to the possession of his house so long as it stood, and the *zamindar* had wrongfully taken possession of it and demolished, the tenant was entitled to recover possession of the site (though the house no longer existed) and the damages. **TARA SINGH AND OTHERS v. UMED SINGH AND ANOTHER.**

[II-35]

(13).—*Land in possession of tenant—Right of tenant over such land.* On evidence that a tenant has for a great number of years used a particular piece of the *zamindar's* land along with other tenants as a threshing floor it is competent to the Court to find, there being no evidence to the contrary, that the right to use the plot of land for that purpose was part of the contract of tenancy. **Udit Singh v. Kashi Ram** (I. L. R., 14 All., 185) distinguished. **DALEL v. BHAJJU AND ANOTHER.**

[XIV-15]

(14).—*Sanction by zamindar.* Held that a sanction by *zamindar* to the use of a portion of his waste land by a community of persons for the purpose of saying their prayers, does not entitle them to the construction upon it of an erection such as a *chabutra* &c., and the *zamindar* may successfully sue to have the waste lands restored to their normal condition. **REHMAT ULLAH v. BADAM SINGH AND OTHERS.**

[V-325]

(15).—*Universal rule of law.* There is no universal rule of law that a *ryot* can not build upon land purchased by him, without the consent of the *zamindar* of the village. **GANGA BISHAN v. BINDESHRI PRASAD SINGH.**

[IX-172]

(16).—*This was a suit by the zamindars of a certain village against the tenants for possession of land on the allegation that the defendants were entitled to hold such land only so long as certain clumps of bamboos existed thereon that such clumps having been removed they were entitled to the land.* The defence was that the defendants were entitled by custom to plant new bamboos as the old died out and that there were many clumps of young bamboos self-planted and many fruit trees on such land. Held that the contentions raised by the defendants shall be framed into issues and decided. **RAM SAMAI AND OTHERS v. AGAR SINGH AND OTHERS.**

[II-10]

(17).—*Orchard in possession of tenant—Presumption.* It may ordinarily be presumed that, when an orchard of guava or similar fruit trees that continue to bear fruit for a long period is found to be held by a tenant, the

RYOTS AND ZAMINDARS—(continued.)

orchard was planted with the consent of the land-holder on the understanding that the tenant should remain in possession of the land on payment of the stipulated rent as long as the trees stand upon it. But the facts in evidence in particular cases may show that the presumption in the tenant's favor may not reasonably be made. *Badri Prasad v. Bhim Sen and others* (S. D. No 2 of 1892; W. N., 1893, p. 1) referred to. *MAKUND PRASAD AND OTHERS. v. DEBI.*

[XIII-117

(18).—*Self-sown trees on occupancy holding.*] A zamindar claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied, and, (*sed quare*). There is no general rule in India to decide that there is a right in the land-lord or a right in the tenant by general custom to the fallen woods of self-sown trees. *NATHAN AND ANOTHER v. KAMLA KUAR AND ANOTHER.*

[XI-167

(19).—*Lambardar—Power to grant perpetual lease.*] A lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or the particular season may require. *JAGAN NATH AND ANOTHER v. HARDYAL AND OTHERS.*

[XVII-207

(20).—*Lease of land in Gwalior—Suit for rent—Jurisdiction.*] Held that a suit by a lessor against his lessee to recover rent which had accrued due in respect of agricultural land situated in Gwalior, the plaintiff being a subject of the Gwalior State, but the defendant a British subject resident in the District of Jhansi, was properly brought in Civil Court in the district of Jhansi. *Gurdayal Singh v. The Raja of Faridkot* (1. L. R., 22 Calc., 222) referred to. *BHUIBAL AND ANOTHER v. NANHEJU.*

[XVII-98

STATUTE 11 AND 12 VIC.

Ch. 21, s. 7—*Insolvency proceedings.*] A decree-holder having attached the property of his judgment debtor in execution of the decree, obtained an order for sale of the attached property. Prior to sale, the judgment-debtors made an application to be declared insolvents, and obtained an order under Statute 11 and 12, Vic., C. 21, s. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the

STATUTE 11 AND 12 VIC—(continued.)

Court in which the execution of the decree was pending for the release of the property from attachment, and that the property might be made over to him. The Court dismissed the application. On appeal the District Judge reversed the first Court's order. Held that the matter did not come before the Court of first instance under s. 49 of Statute 11 and 12, Vic., C. 21, inasmuch as that section refers to cases where the insolvent's schedule has been filed, and to debts or demands admitted therein, and in the present case no schedule had been filed at the time of the Official Assignee's application; and the Court could therefore only entertain the application under the provisions of Civil Procedure Code relating to the execution of decrees. Held that the Official Assignee could not be held to be a representative of the judgment debtors within the meaning of s. 244 of the Civil Procedure Code, and his application was not one relating to the execution, discharge, or satisfaction of the decree. Held that the Court of first instance had only jurisdiction in the matter under s. 278 of the Code, and disposed of it under that section, and that the District Judge had no jurisdiction to entertain the appeal. *KASHI PRASAD AND ANOTHER v. MILLER.*

[V-166.

(1). Ch. 21, s. 24—*Insolvency proceedings.*] On the 12th March, 1881, a firm, the partners of which were subsequently within two months, from that date, adjudicated insolvents under 11 and 12, Vic., C. 21, suspended payment. On the night of the previous day, the 11th March, one of the creditors of the firm, the impending bankruptcy of the firm having become known, urged the latter to make over a part of their stock-in-trade as security for the debt, and to this the insolvents consented. The only pressure which appeared to have been exercised was that, on the 11th March, security was demanded from the insolvent. Held that there having been no pressure which could not be resisted, and no legal proceedings having existed against the insolvents or which they could have feared, the transaction was a voluntary transfer, and therefore void under s. 24 of 11 and 12, Vic., C. 21. *PHULCHAND AND OTHERS v. MILLER.*

[V-33

(2).—*Insolvency proceedings.*] A firm which failed in business on the 16th March, and was adjudicated insolvent on the 11th April, conveyed, on the 6th and 7th April, to a creditor, property almost sufficient to discharge his claim, amounting to Rs. 1,100 in full. The Official Assignee brought a suit to recover the property, on the ground that the transfer was a voluntary one, and void under s. 24 of the Insolvent Act, 11 and 12, Vic., C. 21. Held that, looking to the nature of a proceeding in insolvency under the statute, and to the position

STATUTE 11 AND 12 VIC—(continued.)

occupied by the Official Assignee in regard to the estate of the insolvent, the Official Assignee is entitled to the whole of such estate, wherever it may be; and that any person in possession of a portion of the estate or claiming to hold it under a conveyance or transfer made within the period prohibited by s. 24 and under such circumstances as were disclosed in this case, must defend that conveyance or transfer, and establish that it was not within the mischief contemplated by the section. Such a conveyance or transfer should primarily be presumed to have been voluntarily made; and it rests upon those who seek to uphold it and who must necessarily be best able to prove the facts, to establish that it was made under such pressure as would remove it from the operation of the section. *Held* also, apart from the question of burden of proof, and looking to the judgments of the Courts below, in conjunction with the facts and dates proved, that there were materials which justified the finding that the transfer in the present case was a voluntary transaction of the kind contemplated by s. 24, and as such unsustainable. *Phulchand v. Miller* (1. L. R., 7 All., 340); *ex-parte Hall* (51 L. J. Ch. D., 556); *Bajinath v. Ellis* (W. N., 1883, p. 187) and *Mata Mal v. Radhe Lal* (W. N., 1887, p. 93) referred to. *BHOLA NATH AND ANOTHER v. MACGREGOR*.

[IX-24]

Ch. 21, s. 49—*Insolvency proceedings*.
See Ch. 21, c. 7.

STATUTE 24 AND 25 VIC.

Ch. 67.—*Power of Governor-General to pass Act XVII of 1886.* Act XVII of 1886 (the Jhansi and Morar Act) is not *ultra vires* of the Governor-General in Council; and the town and fort of Jhansi are subject to the jurisdiction of the High Court for the North-Western Provinces in the same manner as the rest of the Jhansi district. The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those Indian territories which were, at the date when the Indian Councils Act, 1861, 24 and 25 Vic. C. 67, received the royal assent (the 1st August, 1861), under the dominion of Her Majesty. In the preamble to the 28 and 29 Vic. C. 17, and in s. 1 of the 32 and 33 Vic. C. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act. Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *The Postmaster General of the United States v. Early* (Curtis, 86), referred to. It must be presumed that the laws and regula-

STATUTE 24 AND 25 VIC—(continued.)

tions of the Governor-General in Council are known to Parliament. *Empress v. Burah* (1. L. R., 3 Calc., at p. 143) and (1. L. R., 4 Calc., at p. 183) referred to. *ABDULLA v. MOHAN GIR AND OTHERS*.

[IX-194]

(1.) Ch. 104, s. 7—*Judge of High Court—Power of Local Government to appoint.* The words "Upon the happening of a vacancy in the office of any other Judge" in s. 7 of the 24 and 25 Vic. Chap. 104 mean upon the happening of a vacancy in the office of a Judge appointed to his office by Her Majesty. They are not applicable to the case of a vacancy caused by a person appointed to act as a Judge under the provisions of the second part of the above-mentioned section ceasing to perform the duties of such office. The words above quoted further mean that the power conferred by s. 7 must be exercised within a reasonable time, that is to say, a practicable time, after the happening of a vacancy. It cannot be held that the power conferred by the above-mentioned section can be held in suspense for several years and then be legally exercised. Where a person had, in fact for a period of more than a year, been exercising all the functions of a Judge of the High Court in virtue of an appointment purporting to be made by the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh under sanction of Her Majesty's Secretary of State for India: it was held that, though, so far as the validity of the appointment depended upon the provisions of ss. 7 and 16 of the 24 and 25 Vic. Chap. 104, the appointment was apparently *ultra vires*, it must nevertheless be presumed that the appointment was legally made in the exercise of some power unknown to the Court vested in the Secretary of State for India. *QUEEN EMPRESS v. GANGA RAM*.

[XIV-39]

(2.) ———— *Constitution of High Court.* Held that the N.-W. P High Court was not illegally constituted because it consisted of a Chief Justice and four Judges only. *LAL SINGH AND OTHERS v. GHANSHAM SINGH*.

[VII-179]

(1)—Ch. 104, s. 15.—*High Court's power of superintendence.* Held by Edge, C. J., and Oldfield and Brodhurst, J. J., that under s. 15 of 24 and 25 Vic. C. 104 it is competent to the High Court in the exercise of its power of superintendence to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority to interfere with and set right the orders of a subordinate Court on the ground that order of the subordinate Court has proceeded on an error of law or an error of fact. The

STATUTE 24 AND 25 VIC—(continued).

High Court's power to direct a Subordinate Judge to do his duty is not limited to cases in which such Judge declines to hear or determine a suit or application, within his jurisdiction. *Held* by Straight and Tyrrell, J.J., that the word "superintendence" used in s. 15 of the Charter Act contemplated and now includes powers of a judicial or quasi-judicial character, apart from those conferred on the Court by s. 622 of the Civil Procedure Code; but that the last mentioned provisions may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance and in which their decisions are declared by law to be final. *Tej Ram v. Harsukh* (I. L. R., 1 All., 101, at pp. 104 and 105); *Girdhari Singh v. Hurdeo Narain Singh* (I. L. R., 3 I. A., 230) and *In the matter of the petition of Mathura Parshad* (I. L. R., 1 All., 296) referred to. *The judgment of Petheram, C. J., in Badami Kuar v. Dina Rai* (I. L. R., 8 All., 111) explained. **MUHAMMAD SULEMAN KHAN AND OTHERS v. FATIMA.**

[VI-309]

(2).—*Dissolution of partnership.* One Abdullah was plaintiff in a suit for dissolution of partnership. He framed his plaint upon the lines laid down in form No. 113 of schedule IV of the Code of Civil Procedure. On the 25th of September, 1889, the Subordinate Judge of Cawnpore passed an order to the effect that the partnership should be considered dissolved from that day and that Manohar Das and Sheo Prasad be appointed Commissioners to examine the accounts and find out the balance of each sharer. After this had been accomplished the case was to be brought up on the 3rd of December, 1889. An appeal was filed from this order to the Court of the District Judge of Cawnpore with the result that the order dissolving the partnership was confirmed and a receiver was appointed. Upon the 6th of May, 1890, the District Judge directed that the decree should be prepared in the Court of the Subordinate Judge after the Commissioners appointed by the Subordinate Judge had adjusted the accounts. The case went back to the Court of the Subordinate Judge for adjustment of the accounts with a receiver appointed for realization of the assets found to be due upon those accounts. There was further a distinct order directing the Subordinate Judge to prepare a decree according to forms Nos. 132 and 133 of schedule IV of the Code of Civil Procedure. The record appears to have reached the Subordinate Judge on the 7th of May, 1890, and, apparently, the terms of the District Judge's order were lost sight of altogether. What did happen thereafter was that the Commissioners examined the accounts, objections were taken to their report, these objections were considered by the Subordinate Judge, and then an order was passed

STATUTE 24 AND 25 VIC—(continued.)

which ran, as follows:—"It is ordered and decreed that out of the assets of the joint firm the parties to this suit shall recover (*hasb zabita*) in due course, Rs. 30,107-7-3, the outstanding debt, and should divide the whole of the assets amounting to Rs. 3,7974 as follows." The mode of division was then made out, and a further order was passed that until the plaintiff paid a certain sum due as court-fees the decree should not be executed. After a vain attempt to execute this inoperative decree Abdullah went back to the Court of the Subordinate Judge of Cawnpore and asked that Court to grant him, either by way of amendment or review or in some shape, a decree which he could put into execution. The Subordinate Judge held that a final decree had been passed in the case that he could not do anything further and rejected the application. *Held*, under the above circumstances, that the Court was competent to exercise the powers conferred by s. 15 of 24 and 25 Vict. Chap. 104 and to send back the case to the Subordinate Judge to be completed according to law. *Muhammad Suleman Khan v. Fatima* (I. L. R., 9 All., 104) referred to. **ABDULLAH v. SALARU AND OTHERS.**

[XV-124]

Ch. 104, s. 16.—Judge of High Court—Power of Local Government to appoint.]

See Ch. 104, s. 7, No. (1).

S. 17.—Constitution of High Court.] See ch. 104, s. 7, No. (2).

STATUTE 28 AND 29 VIC.

Ch. 17.—Power of Governor-General to pass Act XVII of 1886.]

See 24 and 25 Vic. Ch. 67.

STATUTE 32 AND 33 VIC.

Ch. 98, s. 1.—Power of Governor-General to pass Act XVII of 1886.]

See 24 and 25 Vic. Ch. 67.

STATUTE 42 AND 43 VIC.

Ch. 33, ss. 141 and 144.—Cantonment Court of Small Causes—Jurisdiction.] *Held* that the Cantonment Court of Small Causes at Cawnpore had, according to ss. 141 and 144 of the Army Discipline Act, 1879, no jurisdiction to entertain a suit for money brought against a military officer, residing at Umbala, and subject to the Act mentioned above. **ROY v. MACRUK.**

[I-79]**STATUTE 44 AND 45 VIC.**

Ch. 53, s. 144.—Cantonment Court of Small Causes—Jurisdiction.] *Held* that a Barrack

STATUTE 44 AND 45 VIC—(continued.)

Sergeant could be sued in the Court of Small Causes for a sum of less than £ 30 and s. 144 (1) of the Army Act of 1881 was no bar to the suit. *NAGAR MAL v. BERRY.*

[III-170]

STATUTE 51 AND 52 VIC.

Ch. IV, s. 6.—Officers holding Queen's commission.—Liability to be sued in Civil Courts.] There is now no limitation on the general jurisdiction conferred by the Code of Civil Procedure upon Courts in India in respect of suits for debt against officers holding the Queen's commission. *T. G. PIKE v. LIEUT. R. C. L. CARY.*

[XVII-203]

STATUTE 58 AND 59 VIC.

Ch. VII, s. 5.—Officers holding Queen's commission.—Liability to be sued in Civil Courts.] See 51 and 52 Vic. C. IV, s. 6.

SUITS.

(1).—*Suit for removal of building—Erected on plaintiff's land—Acquiescence.]* This was a suit to demolish certain buildings erected by the defendants on open land situate within the limits of a village belonging to the plaintiffs. It appears that the principal plaintiff *M A*, in the performance of his office as Municipal Commissioner, had to report on the petition of the defendants for permission to build and he reported to the Municipality that he had visited the spot and could find no objection to the defendant's application to erect the buildings in question. *Held* that it was clear from this that the plaintiffs were well aware of what the defendant was doing and they never interfered. Under these circumstances the plaintiffs were not entitled to the relief they claimed. *Uda Begam v. Imam-ud-din, (1. L. R., 1 All., p. 82)* followed. *MUNNA v. MADAT ALI AND OTHERS.*

[VI-123]

(2).—*_____.* *B*, the resident of a certain village, about 12 years before the date of this suit built a temple on *A*'s land in the village, with the permission of his agent, as *A* himself was in service in a foreign territory and seldom visited the village. Again about 5 years before the suit *B* built another temple and a tank on a piece of waste land situate in the village of the larger part of which *A* was the proprietor. The present suit was brought by *A* for the demolition of the second temple and the tank. *Held* that as the terms of the power of attorney under which the agent of *A* had given his consent to the building of the temple and the tank were very general in their nature, as a temple had previously been built and not objected to, as part only of the tank belonged to *A* and as the

SUITS—(continued.)

appellant *A* had not acted in good faith his claim should be dismissed. *IMDAD ALI KHAN v. SOBHA RAM AND ANOTHER.*

[I-87]

(3).—*_____.* *Erected on common land—Acquiescence.]* The plaintiffs in this suit sued for the removal of a building erected by the defendant upon certain land over which all the residents of the *inohalla* exercised a right of way, besides using it for social gatherings, &c. *Held* that the court-yard was not such a *public place* as to prevent an action being brought in the Civil Court. *Held* further that the principle of acquiescence also did not apply. The principle applies when a stranger builds on the land of another supposing it to be his own, and the owner does not interfere otherwise. *FATEHYAB KHAN AND OTHERS v. MUHAMMAD YUSUF AND ANOTHER. MUHAMMAD YUSUF AND ANOTHER v. FATEHYAB KHAN AND OTHERS.*

[VII-82]

(4).—*_____.* This was a suit for the demolition of indigo vats and other buildings and constructed upon land jointly owned by the plaintiff and the defendant. *Held* that as the plaintiffs did not immediately apply for an injunction and allowed the construction of the buildings costing thousands of rupees and as the plaintiffs had not shown that they had sustained any injury (for they were competent to have their share partitioned and the deficiency made up), they were not entitled to any relief. *GIRDHARI LAL AND OTHERS v. VELAYAT ALI AND OTHERS.*

[V-277]

(5).—*_____.* *Held* that where a joint owner of land, as distinguished from a mere trespasser without obtaining the permission of his co-owners, builds upon such land such buildings should not be demolished at the instance of such co-owners unless they prove that the action of their joint-owners in building upon the joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. *Held* further that some injury which materially affects his position must be shown by the plaintiff even in cases where the building has been erected in spite of the protests of the co-owners (plaintiffs). *PARAS RAM AND OTHERS v. SHERJIT AND OTHERS.*

[VII-253]

(6).—*_____.* One of several joint-owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners. *Shadi v. Asup Singh (1. L. R*

SUITS.—(continued.)

12 *All.*, 436) referred to. *NAJJU KHAN v. IMTIAZ UD-DIN*.

[XV-243

(7).—*Suit for removal of trees—Planted on common land.*] In this case the plaintiffs and the defendants were co-sharers in certain lands and entitled to joint possession. The present suit was brought by the plaintiff for the removal of trees said to have been planted by the defendants, without the plaintiff's consent on the land in question, for a share of crops said to have been jointly sown on the land and for a partition thereof. The first claim was decreed by the lower Court on the ground that there was no evidence as to the plaintiff's consent and under the circumstances such consent could not be implied. The remaining two claims were dismissed. *Held* on appeal by the defendants that the Subordinate Judge ought to have found whether the defendants in planting the trees, had ousted the plaintiffs from joint possession or whether the planting of the trees had caused any material injury to the plaintiffs. The case must therefore be remanded for a finding on those issues. *Lala Biswambhar Lal v. Raja Ram*, (3 *B. L. R.*, *append.* 67) followed. *WAHID ALI KHAN AND OTHERS v. GHANSHAM NARAIN AND OTHERS*.

[VII-116

(8).—*Suit for joint possession of building erected by trespassers on common land.*] Where a stranger to the property built upon certain land jointly held by several co-parceners and some of the co-parceners purchased from the stranger, the building so erected it was held that the purchasers were *quoad* the building in suit, trespassers, and that a suit might be maintained by the remaining co-parcener to be put into joint possession of the land covered by the building; and this though it was not shown that any special damage had been suffered by the plaintiff by reason of the building. *Paras Ram v. Sherjit* (*I. L. R.*, 9 *All.*, 661) and *Najju Khan v. Imtiaz-ud-din* (*I. L. R.*, 18 *All.*, 115) referred to. *MUHAMMAD ALI JAN v. FAIZ BAKHSI AND OTHERS*.

[XVI-97

(9).—*Suit to have door opened on plaintiff's land closed.*] A whose land ran up to and bordered on the wall of the defendant's house, brought a suit to have a door which the defendant had recently made in the wall closed. *Held* that they were entitled to get the door closed. But as they did not object to the door remaining open they can get it declared that the door may remain open but not so as to create any easement in favor of the defendant. *AMRIT LAL AND OTHERS v. GOPI*.

[VII-216

SUITS.—(continued.)

(10).—*Suit for injunction to restrain the defendants from passing and repassing over a piece of land and also for closing a newly constructed door opened by the defendants in a wall of their house for egress and ingress across the land.* The defendants denied the plaintiff's title to the land. Both the lower Courts finding that the plaintiff was the owner of the land decreed the suit by ordering the defendants to shut up the newly constructed door. *Held* that no right of privacy or other easement being alleged or proved by the plaintiff the decree of the Court below directing the door to be closed was bad in law. The plaintiff was entitled to obtain a perpetual injunction restraining the defendants from using their newly constructed door in such a manner as by egress and ingress to pass and repass over the plaintiff's land. *Komathi v. Gurunnada Pillai*, (3 *Mad. H. C. Rep.* 141) and *Joogul Lal v. Jasoda Behee*, (*N.-W. P. H. C. Rep.*, 1871, p. 311) followed. *Judgments in S. A. 402 of 1887 and S. A. No. 567, 1887, decided on 15th June, 1888, and Gokul Prasad v. Radho*, (*I. L. R.*, 10 *All.* 358) referred to. *DURGA PRASAD AND ANOTHER v. SHEO PRASAD*.

[VIII-270

(11).—*Suit to prevent encroachment on land—Plaintiff's title imperfect.*] The plaintiff, with the permission of the Municipality, opened a new door to allow egress from his house to the public street in front. Between the plaintiff's house, where the new door was opened and the public street, it appeared that a small portion of *nazul* land intervened. Upon this *nazul* land, the defendant had for considerable time, but without license from the owner or any other person, been in the habit of tethering some cattle. He had also built a *chabutra* thereupon and planted a *nim* tree. On the strength of these encroachments upon this *nazul* land the defendant claimed the right to debar the plaintiff from exit or ingress through his new door, over the portion of the *nazul* land opposite that door. *Held* that the defendant had not acquired any such possession as would justify him in restraining the plaintiff or other members of the public from a legitimate use of the land in question. *Kalidas v. The Municipality of Dhandhuka* (*I. L. R.*, 6 *Bom.*, 686) and *Asher v. Whillock* (*L. R. Q. B.*, Vol. 1, p. 1) distinguished. *SAADULLAH v. KADIR BAKHSI*.

[VIII-255

(12).—*Suit for refund of purchase-money—Failure of consideration.*] Where a decree-holder sold his rights under the decree pending the decision of an application made by him for execution, with a warranty that he would not interfere with the power of the vendee to realize the decretal amount, and subsequently to the sale withdrew that appli-

SUITS—(continued.)

cation, by reason of which with a law the decree became time-barred. *Held*, that, so far as the decree itself was concerned, that was dead and the vendee had no remedy; but that the vendee could recover the purchase-money of the decree by an action on his contract. *RUP RAM v. MAKHAN LAL.*

[X-169]

(13.) —————.] *K* conveyed certain land to certain persons who conveyed the same with all their rights to *K L* and others. In the former conveyance *K* covenanted that if the land conveyed by him proved deficient in quantity the purchasers should be entitled to a proportionate refund of the purchase-money. *K L* and others brought the present suit to recover by way of damages a refund of the purchase-money in proportion to the deficiency which they alleged had occurred and interest on the amount claimed from the date of their purchase to that of the institution of the suit. *Held* that the plaintiffs were entitled to have their claim decreed. *KISHEN LAL AND OTHERS v. KINLOCH.*

[I-164]

(14.) —————. Suit for damages by vendee—*Deficiency in area of land sold.*] A purchaser of certain immoveable property sued his vendors to recover compensation or damages on account of a deficiency in the actual area of land purchased by him as compared with area stated in his sale-deed. There was no covenant in the sale-deed to make compensation in case of misdescription. *Held* that the plaintiff in order to succeed must make out a fraudulent misrepresentation which he accepted as true and which induced him to enter into the contract and which caused him damage. *Derry v. Peek (L. R., 14 App., cas. 387)* referred to. *ABDULLAH KHAN AND ANOTHER v. ABDUR RAHMAN BEG.*

[XVI-81]

(15.) —————. Caused by imperfect title of vendor.] *R M* and another sold and conveyed certain land to *K R* and others and the latter obtained possession of such land. Subsequently *R M's* brothers sued *K R* and others for possession of a portion of such land alleging that it belonged to them. They obtained a decree for possession of such portion and the cancellation of the conveyance so far as it related to such portion. Thereupon *K R* and others instituted the present suit against *R M* claiming by way of damages the value of such portion and also by way of damages the costs incurred by them in defending the suit brought against them. It was found as a fact that *R M* had not been guilty of fraud or concealment in the matter. *Held* that the defendant was not liable for the costs incurred by the plaintiffs in defending the suit brought for the recovery

SUITS—(continued.)

of the property. *KESHO RAWAT AND OTHERS v. RAGHUNANDAN MISR.*

[I-160]

(16.) —————. Suit for declaration of right to land purchased—*Purchase-money.*] The vendees of certain land a portion of which only was in their possession by virtue of sale, the rest being in the possession of mortgagees, sued for a declaration of their right to such land and to have a sale of a portion of such land, made after it had been sold to them, set aside. *Held* that inasmuch as the sale to them had taken effect they were entitled, notwithstanding the whole of the purchase-money might not have been paid to, a decree as claimed, and the vendors, if they had any claim in respect of the purchase-money, should be left to seek their remedy. *KESRI AND ANOTHER v. GANGA PRASAD AND ANOTHER.*

[I-173]

(17.) —————. Suit to enforce contract of sale—*Purchase-money.*] *A* agreed to purchase and *B* agreed to sell a certain share of a certain village. A portion of the price was paid as earnest money and the balance was sent to *C* to be paid to *B*, but *C* misappropriated the money. *B* having sold the share to *D*, *A* brought this suit for specific performance of the contract of sale, making *B*, *C* and *D*, defendants. *Held* that the plaintiff having failed to fulfil the conditions of payment and having not proposed even in this suit to pay the balance the suit must fail. *TAFAZZUL HUSAIN v. ALI HUSAIN AND ANOTHER.*

[III-146]

(18.) —————. Suit for refund of purchase-money on sale being set aside.] Certain immoveable property was put up for sale in execution of a hypothecation decree held by *K L* against *H L* and was purchased by *G*. The sale was subsequently set aside at the suit of a prior auction-purchaser and *G* was obliged to surrender such property. He consequently brought the present suit against *K L* to recover the purchase-money, alleging that the bond given by *H L* to *K L* and the decree obtained thereon were of a "collusive nature." The lower appellate Court found that the decree was the result of collusive proceedings between *K L* and *H L*. *Held* that on that finding the plaintiff was entitled to recover the money from the decree-holder *K L*, as money had and received for his use. *KISHORI LAL v. GHAN SHAM.*

[I-125]

(19.) —————. Suit for money paid under legal compulsion.] *Held* that where money has been paid by the plaintiff to the defendant under the compulsion of legal process which is afterwards discovered not to have been due,

SUITS—(continued.)

the plaintiff cannot recover it back in an action for money had and received. *GAYA PRASAD v. SIKHAR PRASAD.*

[II-144]

(20).—*Suit for money paid for defendant.* *A* brought a suit for redemption of certain properties usufructually mortgaged by him to *B*, on the allegation that the mortgage-money had been paid off from the usufruct. *A* obtained a decree, the accounts were taken to the end of 1933 *Sambat*. During the pendency of the suit, and before *A* had obtained possession under his decree, *B* had to pay the Government revenue for 1884. The present suit has been brought by *B* against *A* to recover this amount which he was bound to pay under the terms of the mortgage. *Held* that the suit for money paid for the defendants (which it really was) was maintainable. But that the defendants were entitled to set off any sum collected by the plaintiff as rent subsequently to 1933 and also any sum found due to the mortgagor on taking of accounts. *CHAND MAL v. RAGHUNATH AND OTHERS.*

[III-4]

(21).—*Suit for accounts—Form of decree.* *A*, the owner of a zamindari estate, sued *B*, his *karinda*, for account. The lower appellate Court made a decree in the following terms:—"That *B* should, on or before a certain date, render to *A* proper accounts or should pay to *A* Rs. 100 as money compensation for his failure to do so. *A* appealed from the latter part of the decree. *Held* that the decree was open to the objection, and that the decree ought to have been framed as indicated in *Gaya Prasad v. Bihari*, (W. N. 1883, p. 149) and in *Sheoram v. Ganeshi Lal* (W. N. 1883, p. 176). *AJUDHIA BAKISH SINGH v. SHEOMANGAL SINGH.*

[III-218]

(22).—*Suit for dissolution of partnership Proceedings.* *Held* that the course to be followed by a Court entertaining an original suit for dissolution of partnership and for an account on the lines of form 113 of sch. IV of the Civil Procedure Code, has been pointed out in *Ram Chunder Shaha v. Manik Chunder Banikya* (I. L. R., 7 Calc., 428). *LEKHRAJ v. SAUDAGAR MAL AND ANOTHER.*

[III-220]

(23).—*Suit for rent—Form of suit.* *A*, the son of one *X*, by his second wife, sued *B*, his son by the first wife, for Rs. 96 odd as his share of the rents of certain houses which had belonged to *X*. He claimed as co-sharer in the houses by right of inheritance from *X*. *B* set up as a defence that *X* had transferred the houses by gift to his mother, and he was in possession on his mother's account. The suit was dismissed on the ground that *B* was admittedly in possession of the houses and that *A*

SUITS—(continued.)

had never received the rents either in the lifetime of *X* or on his decease; he therefore could not obtain a decree unless his right of inheritance and possession of the property were decreed by the Court in their favour, claims which they had not sued for. *Held* in revision that the decree made by the Court below was right. *ASHIK MUHAMMAD AND ANOTHER v. ALI MUHAMMAD AND ANOTHER.*

[II-208]

(24).—*Suit for physical possession—Formal possession.* When formal possession of immoveable property has been delivered according to law to a person holding a decree for the delivery of the same, the subsequent continuance in actual possession of the judgment-debtor does not give the decree-holder a right to a fresh order for delivery of possession in execution of the decree, but gives him a right to institute a fresh suit for possession of such property. *GOPAL DAS AND ANOTHER v. THAN SINGH.*

[II-4]

(25).—*Suit on contract superseding decree.* In the course of proceedings in execution of a decree, by which a simple mortgage of immoveable property was enforced, the judgment-debtor made an application to the Court executing the decree, dated in April, 1877, stating that the decree had been partially satisfied by the sale of a part of the mortgaged property; that the decree-holder had remitted a portion of the decree; that the balance should be paid by a certain date; and that a certain banker had given a note of hand for the payment of interest on the balance at a certain rate. The judgment-debtor then stated as follows:—"So long as the petitioner does not pay the money to the decree-holder, i.e. during the term fixed above, the banker shall pay interest to the decree-holder: the decree-holder shall not have power to take out execution within the said term, but after the expiry thereof he should be at liberty to realize his money together with interest from the petitioner and his property by executing the decree: excepting the property sold all the property mortgaged and attached under the decree shall continue so mortgaged and attached: the decree-holder's pleader has affixed his signature at the foot of this petition showing that he consents to it; the petitioner therefore prays that the case may be struck off as partially executed." The decree-holder subsequently sued the judgment-debtor to recover the balance of the decree, claiming under the arrangement set forth in the petition of April 1877, as a contract superseding the decree. *Held*, having regard to the terms of that petition, that no new contract superseding the decree was either intended or effected and the suit was consequently not maintainable. *Billings v. The Unconventured Service Bank* (I. L. R., 3 All., 781) distinguished; *Ganga v. Murlidhar* (I,

SUITS,—(continued.)

L. R., 4 *All.*, 240; *S. A. No. 25 of 1882* (*Weekly Notes*, 1883, p. 93) and *Champat Rai v. Piltambar Das* (*L. R.*, 6 *All.*, 16) followed. **MUKAND RAM AND OTHERS v. PURAN PRASAD AND OTHERS.**

[IV-41]

(26).—*Suit on compromise superseding decree.* One *X* had two decrees for money against *B*, dated June 1872. In 1874, the parties entered into a compromise that the decretal money should be paid by instalment and in case of default of any two instalments the whole amount should be recoverable at once. Default was made and the decree-holder and afterwards *A* (to whom the decree had been transferred "with all the rights" in June, 1875) sought to execute the decree in the terms of the compromise in the year 1880. The application was dismissed as time-barred. Thereupon *A* brought this suit against *B* to recover the amount of the decrees basing the suit on the compromise. The Court of first instance dismissed the suit on the ground that the right to sue under the compromise not having been transferred the suit was not maintainable. *Held* that the transfer of the decree with all the rights entitled the plaintiff to maintain the suit. **CHOTRAY LAL AND OTHERS v. UMED RAI AND ANOTHER.**

[III-127]

(27).—*Suit for partition—Parties having no estate in law.* *Held* that where the parties had set up a false claim to an estate and had no estate in law which they could divide, a suit for partition of the estate was not maintainable merely by reason of the fact that they were in possession. *Armory v. Delamirie Smiths* (1. *L. C.*, 6th edition, p. 313) and *Asher v. Whitlock* (*L. R.*, 1 *Q. B.* 1) referred to. **PARBATI v. SUNDAR.**

[V-315]

(28).—*Suit for restitution of conjugal rights—Form of decree.* *Held* that the form of a decree in a suit for restitution of conjugal rights should be as follows:—"That the defendant's wife do within.....from the receipt of this order, return to cohabitation with her husband and live with him as claimed." That the other defendants be ordered to abstain from further harbouring defendant's wife or otherwise interfering with the rights of the plaintiff as her husband. **PAKHANDU v. BISHESHAR AND OTHERS.**

[II-243]

(29).—*Suit—For malikana allowance.* Certain property was sold by *S C* to one *M S* absolutely, but with the condition that *M S* should pay Rs. 25 to *S C* annually, as *malikana*. *M S* afterwards mortgaged this property to *B*, the defendant in the suit; *B* refused to pay the *malikana* allowance alleging himself to be a transferee without notice. This suit was brought by the heirs of *S C* against *B* to recover 11 years

SUITS,—(continued.)

arrears of the *malikana* due. *Held*,—(i) That the suit was not of the nature cognizable in Court of Small Causes. (ii) That the word *malikana* cannot be rejected as a surplusage, but that they clearly indicated that the payment of the Rs. 25 annually was intended by the parties to be an annual charge upon the property and the profits arising from the property. (iii) That the sale-deed being registered *B* could not be said to be a transferee without notice. *Pestonji Bezoni v. Abdool Rahiman* (1. *L. R.*, 5 *Bom.*, 463); *Qutub Husain v. Abul Hasan* (1. *L. R.*, 4 *All.*, 134); *Ali Mazhar v. Gopi Nath* (1. *L. R.*, 4 *All.*, 152); *Alogirisami Naiker v. Innasi Udayan* (1. *L. R.*, 3 *Mad.*, 127) and *Kadaressur Mookerjee v. Gooroo Churn Mookerjee* (2 *Cal.*, 1. *L. R.*, 388); *Bhawan Singh v. Chatlar Kuar* (W. N., 1882, p. 114); *Mahomed Karamut-oollah v. Abdool Majeed* (N.-W. P. H. C. Rep., 1869, p. 205); *Gobind Chunder Roy Chowdhry v. Ram Chunder Chowdhry* (19 *W. R.*, p. 94); *Herranund Shoo v. Ozeerun* (9 *W. R.*, 102); *Bhoolee Singh v. Neemo Behoo* (12 *W. R.*, 498); *Hurmut Begum v. Hirday Narain* (1. *L. R.*, 5 *Cal.*, 921); *Abadi Begum v. Asa Ram* (1. *L. R.*, 2 *All.*, 162); *The Collector of Thanav. Krishna Nath Gobind* (1. *L. R.*, 5 *Bom.*, 322); *Gunga Din v. Lachman Parshad* (N.-W. P. R., 1869, p. 147); *Lakshmandas Sarup Chand v. Dasrat* (1. *L. R.*, 6 *Bom.*, 168) and *Vasudev Bhat v. Narayan Daji Damle* (1. *L. R.*, 7 *Bom.*, 131). **CHURAMAN v. BALLI.**

[VII-121]

(30).—*Suit for damages—Cause of action.* *A* held a decree of a competent Court of revenue for possession of certain land as against *B*, and obtained under that decree formal possession of the land. *B*, however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. *B* removed his crop, and thereafter sued in a Civil Court for a declaration that he was *A*'s tenant of the land in question, holding occupancy rights. *A* did not defend the suit, and the Civil Court passed a declaratory decree in favor of the plaintiff, and further proceeded to execute that declaratory decree by putting *B* in possession. Subsequently *B* sued *A* for damages in respect of the alleged removal by *A* of a second crop which he asserted that he (*B*) had sown upon the said land. *Held* that *B* had no cause of action, and that even if in fact he had sown the crop in respect of which damages were claimed he did so at his own peril and as a trespasser. **UDIT NARAIN SINGH AND OTHERS v. SAHIB RAI.**

[XVIII-21]

(31).—*Property sold in execution of decree.* A zamindar applied to a revenue officer to commute the rent hitherto paid in kind by certain of his tenants to a fixed money-rent to be paid in future

SUITS—(continued.)

The Assistant Collector made the order asked for and fixed the money-rent to be paid in future. After that order had been made the *zamindar* brought a suit for arrears of rent against the tenants in a Revenue Court and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. That decree was put into execution: property of the tenants was attached and sold, and the decree was partially satisfied out of the sale proceeds. Subsequently to the passing of the decree for rent the Board of Revenue set aside the order of the Assistant Collector commuting the rent in kind to a fixed money-rent. The tenants thereupon sued to recover compensation on account of the sale of their property under the decree for rent. *Held* that the suit would not lie inasmuch as the decree for rent under which the plaintiff's property was sold was unreversed and not superseded by any competent Court. *Marriot v. Hampton* (2 *Smith L. C.*, 409, 10th edition); *Shama Parshad Roy Chowdhery v. Hurro Parshad Roy Chowdhery* (10 *Moo., I. A.*, 203); *Jogesh Chunder Dutt v. Kali Churn Dutt* (1 *L. R.*, 3 *Calc.*, 30) and *Raja Nilmoney Singh Deo Bahadoor v. Sharoda Parshad Mookerjee* (18 *W. R. C. R.*, 434) referred to. *KISHEN SAHAI v. BAKHTAWAR SINGH AND OTHERS.*

[XVIII-24]

(32).—*Suit for mesne profits—Trespasser.* *Held* that a trespasser, who after having been for some time in possession of immoveable property, was ejected in execution of a decree obtained by the rightful owner, could not have allowed to him in reduction of mesne profits expenses incurred by him in obtaining decrees for rent against tenants on the property in suit. *SHARAF-UD-DIN KHAN v. FATEHYAB KHAN.*

[XVIII-23]

(33).—*Cause of action.* In the case of a suit for mesne profits a separate cause of action arises on each occasion of the receipt by the defendant of rent or profits of land belonging to the plaintiff. *Unnoda Gobind Chowdhry v. Rancee Surnomoye* (*W. R. Full Bench Ruling*, 1862—1864, p. 163) referred to. *JIWAN SINGH v. MISRI LAL.*

[XIV-48]

(34).—*Suit by mortgagee against mortgagor.* The plaintiff, who was a second mortgagee, brought the rights and interests of the mortgagors to sale and purchased them himself, but without making the defendant who was a prior mortgagee, a party to those proceedings. He then brought a suit for redemption against the defendant and obtained a decree conditioned on his paying into Court the sum of Rs. 12,000. That sum was paid in on the 22nd June, 1885. The defendant appealed, and under the circumstances

SUITS—(continued.)

of the case a conditional decree was given in his favour. The condition was not fulfilled, and the plaintiff's decree accordingly became final. The plaintiff obtained actual possession of the mortgaged property on the 15th June, 1887, and on the 22nd June, 1887, he sued the defendant for two years' mesne profits. *Held*, that the plaintiff's title to the property being good at any rate from the time of payment into Court under his decree for redemption, the defendant was liable for mesne profits just as much as if he were a trespasser being sued in ejectment, and his liability extended to the amount of the normal profits of the property, and not merely to the actual sums which had come into his hands. He was not, however, liable for interest on such profits. *SAMI-UD-DIN KHAN v. KUAR MAN SINGH.*

[XI-38]

(35).—*Suit for possession of immoveable property.* *Held* that where a decree for possession of immoveable property has been made but the decree-holder does not choose to execute it, the judgment-debtor would not be liable to damages in the way of mesne profits for the period, the decree-holder did not execute his decree. *SHIMBHU NARAIN SINGH v. HASINA BIBI AND OTHERS.*

[III-199]

(36).—*Suit on tampered bond.* The obligee of a bond for the payment of money, in which a certain share of a village had been hypothecated as collateral security, having fraudulently altered such bond so as to make it appear that a larger share of such village was hypothecated, sued the obligor to recover the money due on such bond, by the sale of such larger share. The obligor admitted the execution of the bond and that a certain sum was due thereon. *Held* on the question whether under these circumstances the obligee was entitled to relief as regards his claim for money, that he was not so entitled, inasmuch as the bond on which his suit was brought must be discarded, being a forgery, and therefore the suit as brought failed. (*S. A. No. 1037 of 1879, "unreported," decided the 11th March, 1880*) distinguished. *GANGA RAM v. CHANDAN SINGH.*

[I-118]

(37).—*Suit by co-sharer against lessee.* Where one co-sharer in a *thoke* sued the lessee of another co-sharer in the *thoke*, the said lessee being in actual physical possession of a portion of the land comprised in the *thoke* for joint possession and for mesne profits. *Held* that the only decree which could be given was a declaration that plaintiff was entitled to an undivided share in the *thoke* and for rents and profits of the share in proportion, and that the plaintiff was not entitled to get a decree for mesne profits against the lessee defendants. *Watson and*

SUITS—(continued.)

Co. v. Ram Chund Dutt (I. L. R., 18 Calc., 10) followed. BHOLA NATH v. M. BUSKIN.

[XIV-127

(38).—*Suit to set aside lease*. This was a suit by the lessee of one *KS lambardar*, for possession of two pieces of land. The defendant asserted that the land was situate in a 5 *biswa thoke* which was owned by the predecessors in title of the defendants and was the *sir-land* of the defendants. It was further contended by the defendants that *KS*, had no right as *lambardar* in this *thoke* of 5 *biswas*, and that even if he had, he had no legal right to deal with the land by giving a lease to the plaintiff. The following is the history of the transactions relating to the property given by the defendants. That the owners of the 5 *biswa thoke* mortgaged it, with 43 *bighas* as *sir* to *SL* in 1859. The mortgage was redeemed in 1870. In 1871 the same persons mortgaged 101 *bighas* including the 43 *bighas* *sir* to *M* and *DC* for nine years, by way of usufructuary mortgage. This last mortgage was redeemed in 1881; then one *JR* was allowed to cultivate the land as *shikmi*, in 1882. *KS*, the lessor, successfully took proceedings in the Revenue Court to eject *JR* and then gave a lease of the land to the plaintiff. The first Court dismissed the suit; and the lower appellate Court has decreed it. The Judge admits that the proceedings taken by *KS* in the Revenue Court are not conclusive as to the title now set up and he addresses himself to determine the question whether the land is *sir* of the defendants. On this point, however, he arrives at no definite conclusion. He seems to hold that any portion of the 101 *bighas* mortgaged in 1871, which was *sir*, lost its character of *sir* in the hands of the mortgagee. *Held* that the judgment of the Court below was defective. The case will therefore be remanded for trial of the following issues:—
(i). Was any portion of the land in suit, and if so what portion, the *sir* of the defendants when they mortgaged it in 1871? (ii). Is *KS* the *lambardar* of the *thoke* in which this land is situate, and has he as a *lambardar* a right to eject defendants and give a lease of the land or any portion of it to plaintiff? SHAM LAL AND OTHERS v. UMED SINGH.

[VI-124

(39).—*Suit for possession of sir land*. The appellant alleging that he had purchased a 4 *gunas* 1 *bat* 1 *sat* share at an execution-sale the share in a certain *zamindari* estate of one *SP*, and that the *sir* land appertaining to such share was 12 *bighas* 9 *biswas* and 10 *dhurs* of land, sued the respondent for possession of such *sir* land. He paid court-fees according to the value of each land. The defendant contended that *SP*'s share in such estate was only 2 *gunas* 2 *sats* and that the *sir* land appertaining to such share was 5 *bighas* 2½ *biswas* of land. Both the lower Courts refused to entertain the suit on the ground that the appellant should

SUITS—(continued.)

first sue to have the extent of his share determined and should pay court-fees accordingly. *Held* that the lower Courts must decide the claim on the merits and that the suit was properly valued with reference to the claim in the plaint. MANOG GIR v. BIRTA KUAR.

[I-161

(40).—*Suit for partition of court-yard*. In 1853 certain buildings used for habitation, in which *PD* owned a two-third share and *US* a one-third share were divided between them. A court-yard appertaining to the premises was not partitioned. *PD* brought the present suit against *US*, in which, alleging that his share in the court-yard was two-thirds, he prayed that a certain portion might be assigned for common use and a certain other portion might be partitioned and a portion thereof representing his two-thirds share, be assigned to his separate use. He did not indicate in what way the partition was to be made. Both the lower Courts dismissed the claim on the ground that the partition would inconvenience both the parties. *Held* that the lower Courts were right in refusing the relief in the very peculiar, inconvenient and unpractical shape in which the plaintiff sought to enforce it: PARAS DAS v. UMRAO SINGH.

[VII-249

(41).—*Suit for partition by mortgagees*. Two mortgagees held separate usufructuary mortgages, the one of a two-thirds share, the other of one-third share in an undivided area of *muafi* land granted by the owners of those shares respectively. *Held* that one mortgagee could not, in a suit to which neither of the mortgagors was a party, obtain partition of the share mortgaged to him. MANGLI PARSHAD v. ISHRI PRASAD.

[XVI-158

(42).—*Suit for exclusive use of ghat*. Certain Brahmins, on the allegation that a custom existed whereby they had an exclusive right to use a *ghat* for the purpose of collecting alms, the land of which did not belong to them, sued for a declaration of their exclusive right to the use of the *ghat* for that purpose. *Held* that, as the plaintiff had no right of any kind in the land of the *ghat*, the suit was not maintainable. HUSAIN ALI AND ANOTHER v. MATUKMAN AND OTHERS.

[III-185

(43).—*Suit to recover money deposited in Court and realized by the defendant*. A mortgagee after he had obtained a decree for foreclosure and possession, agreed with the mortgagor that if he (the mortgagor), deposited the mortgage-money before the 15th April, the mortgagee would surrender the property and accept the money. Thereupon the mortgagor

SUITS—(continued.)

raised Rs. 1,000 by mortgaging the same property to *A* but he failed to deposit the money within the time stipulated and the Court put the mortgagee in possession of the property. *B*, who had a money decree against the mortgagor out of the Rs. 1,000 deposited in Court, attached a portion. *A* then brought the present suit against *B* for the recovery of the money attached and realized by the latter on the allegation that it belonged to him and not to the mortgagor. *Held* that it belonged to the plaintiff. **CHUNNI LAL v. LACHMAN PRASAD.**

[III-258]

(44).—*Suit on a bond.* One *R S* died leaving a son called *M D* and *S*, the widow of a deceased son. *M D* died leaving a widow *M. R D* claimed to be the adopted son of *M D*. In 1874 one *SR* executed a bond in favor of *S* and in her name alone, for debts incurred by him in favour of *RS* and *M D*. In this bond he hypothecated his estate in a certain village. In 1876 *S* obtained a certificate under Act XXVII of 1860, the claim of *RD* as an adopted son of *M D* being overruled. *M* and *S* were recorded in the revenue registers as representatives and possessors of the estates of their deceased husbands and in and after 1877 *S*'s name was substituted for that of *M*. In 1880 *S* sued *SR* on the bond mentioned above. *RD* was also made a defendant on the ground that he had purchased from *SR* the property hypothecated in the bond. *SR*'s defence was that he had been deceived into giving *S* the bond and that on hearing *RD*'s superior claim had paid off the bond by selling him the hypothecated property. *RD* set up his adoption. *Held* that *SR* was not competent to withdraw from his contract under the bond with *S* or to sell the property to *RD* and that the question of the adoption could not be determined in the suit. **RAM DAS v. SUDDI.**

[II-32]

(45).—*Suit to set aside decree for fraud.* On the 18th July, 1883, a decree was passed against the plaintiff (a minor) on a compromise entered into by his guardian *ad.litem*, to which the consent of the Court had been duly obtained under s. 562, Civil Procedure Code. The present suit was instituted by the plaintiff to set aside that decree on the allegation that the guardian *ad.litem* had entered into the compromise *mala fide*, and by reason of collusion, fraud, and improper pecuniary inducement. *Held* that on the allegation made in the plaint the suit was maintainable. **Bibee Solomon v. Abdool Azeez (I. L. R., 6 Calc., 687)** cited. **BEHARI LAL v. MUMTAZ KHAN.**

[IV-316]

(46).—*Suit against one representative of a deceased debtor—Liability of others.* *D* was the creditor of one *S* on a simple money-bond. *S* died, leaving four representatives.

SUITS—(continued.)

S D, sued upon his bond, making one only of such representatives, *K*, defendant, and obtained a decree, which was a simple money-decree, against *K* only. In execution of that decree *S D* attached and brought to sale property which had been of *S* in his life-time and had since devolved on his four representatives jointly. On suit by the three representatives of *S* other than *K*, against the auction-purchaser to recover their shares of the property sold, it was *held* that *S D* was entitled under the decree which he had obtained to get execution only as against *K*'s share in the property sold. **PREM SUKH AND OTHERS v. KEDAR NATH.**

[XIV-20]

(47).—*Suit for rent against intermeddler—Liability for rent actually collected.* One *G*, the purchaser of the rights and interests of three co-sharers *P*, *L* and *B*, brought this suit against Balwant, the lessee of *P* and *L* (before the sale) for recovery of rent collected by him in respect of the share of *B*. The claim was not confined to the rents actually collected by him but extended to those which he might have collected, but neglected to collect. *Held* that as he must be regarded as a volunteer or intermeddler he is liable only for the rents actually collected. **BALWANT SINGH v. GOKARAN PRASAD.**

[VII-135]

(48).—*Suit for possession of burial ground.* This was a suit for joint possession of a certain plot of ground formerly used as a burial ground together with trees thereon. The Munsif decreed the claim. The lower appellate Court reversed the decree on the ground that by an order of the Municipality the plot had ceased to be a burial ground and the plaintiff therefore had no right or interest therein. *Held* that the Court was wrong in dismissing the suit as the land might be used for purposes other than those prohibited by the Municipality. **MEHR BAKHSH AND OTHERS v. MUHAMMAD BAKHSH AND OTHERS.**

[IV-3]

(49).—*Suit for a declaration of right and to have ground-rent assessed.* Certain land situate within the limits of a cantonment was granted free of rent for building purposes by the military authorities. Under the Military Regulations relating to such grant could not be resumed by the Government without a month's notice and without the payment of the value of such buildings which might have been authorized to be erected. The land was subsequently resumed by the civil authorities, and the land being within Municipal limits, the ground-rents on it were assigned to the Municipality. The Municipal Committee having demanded ground-rent in respect of the buildings erected on such land under such grant from the

SUITS—(continued.)

representative in title of the original grantee, and the latter having refused to pay the same or to vacate the land, the Secretary of State for India in Council sued him in the Civil Court for a declaration of proprietary right to the land, for its assessment to ground-rent, and, in the event of the refusal of the defendant to pay such rent, when fixed, for his ejectment therefrom, and for mesne profits of the land for six years. The cause of action was stated in the plaint to be the refusal of the defendant to pay ground-rent or to accept a lease or to surrender the land after a notice to that effect had been issued to him by the Municipal Committee as the plaintiff's agents. *Held* that the Municipal Committee were the plaintiff's duly authorized agents to lease and obtain rent for the land occupied by the defendant's buildings with their compounds; that such notice was properly issued in that character on behalf of the plaintiff; and that the defendant's subsequent refusal to pay rent or to accept a lease or evacuate the premises amounted to a sufficient denial of the plaintiff's title to afford him a good cause of action—that, assuming that no agreement to pay rent existed, the plaintiff was entitled to demand and recover reasonable compensation for the use and occupation of the land by the defendant—that the suit was maintainable in the Civil Court, and it had power to grant the plaintiff the reliefs sought—that by the conditions of the grant by the military authorities the plaintiff was not disqualified from demanding ground-rent for the land before he had paid the defendant the value of the buildings but that looking to those conditions it would not be fair or equitable to grant the plaintiff a decree, pure and simple, for the ejectment of the defendant, but he should be put under the condition that, if, in case of the defendant's refusal to pay the rent fixed, he desired to eject him, the value of the buildings as cantonment residences must first be determined, and when determined, must be tendered to the defendant, and if the latter refused to accept it, the plaintiff would then be entitled to eject him. **THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. JAGAN PRASAD.**

[IV-6]

(50.)—*Suit on a covenant—Cause of action.*] This was a suit by a mortgagor to recover Rs. 303 from a mortgagee, who, as mortgage consideration, had taken upon himself to pay two debts due from the mortgagor to third persons, on the ground that the mortgagee did not pay those debts till 6 years after the mortgage was entered into. *Held* that there was no cause of action as the whole debt, principal and interest, had been cleared off and no liability remained on the mortgagor. **HARNARAIN SINGH AND ANOTHER v. ZALIM SINGH AND ANOTHER.**

[III-213]

SUITS—(continued.)

(51.)—*Suit for declaration that certain purchase was benami.*] The holder of two decrees for money sold them, as the sale-deed indicated, to one R, who was at the time of the sale the servant of M G. In R's name was taken out the execution of the decrees. Subsequently R sold the decrees to PR and another. Thereupon MG brought the present suit for a declaration that he was the real purchaser of the decrees and that R was only *benami* for him and that the sale to PR and another may be set aside. The lower appellate Court dismissed the suit on the single ground that PR and another had bought the decrees in good faith, for consideration, and without notice or means of cognizance of the fact that R was only a nominal purchaser. *Held* that the case must be remanded for a finding on the following issues: (i) Who was the real purchaser? (ii) By whose funds were the decrees purchased? (iii) Did MG by any acts, declarations or omissions known to the last vendees intentionally cause, countenance, or favour the belief, before the date of the purchase by them, that not he, but his ex-servant R, was the real, as well as the ostensible, owner of the decrees? **MADAN GOPAL v. PARSHADI RAI AND ANOTHER.**

[I-126]

(52.)—*Suit against Government—Act done in exercise of sovereign power.*] The plaintiff in this suit, alleging that the Government had granted him a lease of certain land with the rights of a proprietor, promising to confer on him the proprietary rights in such land if he did certain thing; that he had done such things; that the Government had refused to perform such promise and had conferred the proprietary rights in such land on another person, claimed, by virtue of the contract between him and the Government and as against the Government and such person, proprietary possession of such land. *Held* (per Spankie, J.) that assuming that the Government had entered into such a contract with the plaintiff as alleged, the suit would not lie, inasmuch as such contract was entered into, and the refusal of the Government to confer the proprietary rights in such land on the plaintiff and the grant by it of such rights to such person were acts done in the exercise of sovereign powers. *Held* (per Stuart, C.J.) that the Government had entered into the contract alleged by the plaintiff that the suit would lie as the Government had not entered into such contract in the exercise of sovereign powers, but in the capacity of a private owner; but that the plaintiff's case failed as he had not performed his part of such contract. **KESHEN CHAND v. THE SECRETARY OF STATE FOR INDIA.**

[I-87]

(53.)—*Suit to enforce a contract against a minor.*] The uncle of a minor Muhammadan

SUITS—(continued.)

purporting, though without authority, to act as the minor's guardian, made a mortgage of certain property belonging to the minor, and subsequently took a lease in favour of the minor of the mortgaged property. The minor having made default in payment the mortgagee sued to recover rent. *Held* that the mortgagee was not entitled to recover, although had the minor sued the mortgagee to avoid the mortgage he might have not been able to succeed without paying compensation to the mortgagee to the extent to which he or his property had benefited by the moneys advanced on the security of the mortgagee. *Ruttun v. Dhoomee Khan* (N. W. P. H. C. Rep., 1868, p. 21); *Bhutnath Dey v. Ahmed Hosain* (I. L. R., 11 Calc., 417); *Anapurnabai v. Durgapa Mahalapa* (I. L. R., 20 Bom., 199); *Baba v. Shivappa* (I. L. R., 20 Bom., 199); *Mussamut Bukhsun v. Mussamut Doolhin* (12 W. R., 337) and *Girraj Bakhsh v. Qazi Hamid Ali* (I. L. R. 9 All., 340) referred to. NIZAM-UD-DIN SHAH V. ANANDI PRASAD.

[XVI-99]

(54).—*Suit for possession of land—Failure to prove recent dispossession alleged.* This suit by certain co-sharers of a village against other co-sharers for joint possession of a certain field, in proportion to the extent of their shares in the village, on the allegation that they had been wrongfully dispossessed by the defendant in 1881, was resisted by the defendants on the ground that the field had been in their cultivation for 30 years. Both the lower Courts dismissed the suit on the finding that the defendant had been in possession of the field for many years and that the plaintiff had failed to prove his recent dispossession. *Held* that those findings were conclusive and sufficient. The appeal must be dismissed. RAMMAN MAL AND OTHERS V. SHEORATAN MAL AND ANOTHER.

[IV-153]

(55).—*Suit by muafidars against the Zamindars on a contract.* The revenue of certain villages settled with the *Zamindars* was released by the Government in favor of certain *muafidars* for the support of a mosque, consenting that it should be paid to them by the *Zamindars*. In 1853 it was agreed between the *muafidars* and the managers of the mosque that the villages should remain in possession of the former who would pay to the managers for the support of the mosque half the amount of the revenue payable by the *Zamindars*, and that this should be the fixed sum payable until changes should be mutually agreed upon and sanctioned by the Government. At the recent settlement the amount fixed as revenue for the villages having been increased, the managers brought a suit against the *muafidars* for half the revenue fixed in the recent settlement. *Held* that the Government having

SUITS—(continued.)

no other object in increasing the revenue than to fix a standard by which certain cesses were to be paid by the *Zamindars* the plaintiff could not recover at the increased rate. MUHAMMAD SADIQ V. ZAHUR HUSAIN AND OTHERS.

[I-63]

(56).—*Suit for possession of property on default to pay interest.* A bond for money provided that on failure on the part of the obligor to pay interest as agreed in the bond, and within a certain period from the date of the bond, the obligee might sue for possession of the immoveable property mortgaged in the bond. Default was made in the payment of interest as agreed, but the obligee deferred bringing a suit for possession of the mortgaged property so long that the time mentioned in the bond expired before he could obtain a decree. *Held* that under these circumstances a decree for possession of the property should not be granted to him. BULWANT SINGH AND ANOTHER V. GUMANI RAM.

[III-142]

(57).—*Suit for declaration of proprietary title.* One X, who owned certain share in a village, mortgaged 2 *bighas* 2 *biswas* of his *sir* land to B's father and gave him possession. Subsequently a partition of the village took place and this *sir* land was transferred to the *patti* of A. The mortgagee however remained in possession. Some time after, the proprietary rights of X in the village were sold by auction and purchased by B's father and M and N. M and N then proceeded to dispossess the mortgagee B's father, to the extent of their purchased share of the *sir* land. Upon this B's father sued them for the mortgage money minus a portion equal to the proprietary interest he had purchased, got a decree; put it to sale and purchased the whole of it himself. In the course of this sale-proceeding by B's father, A made his appearance, objected to the attachment and sale and when defeated, brought a regular suit to save the land from sale in execution of B's decree which also failed. A then proceeded in the Revenue Court, obtained a decree for rent against B and also obtained an order of ejectment. Upon this B brought the present suit against A in the Civil Court for a declaration of their proprietary title to the land. *Held* that under all the circumstances of the case B had by virtue of the auction-sale and the decree arising out of the attachment proceedings become absolute owner of the *sir* land in question. RAMADHIN SINGH AND ANOTHER V. BAGESH SINGH AND OTHERS.

[II-104]

(58).—*Suit for mortgaged property—After expiry of term.* A mortgagor covenanted to give the mortgagee possession of the mortgaged property, but did not do so, and the mortgagee consequently sued him for possession, but

SUITS—(continued.)

not until the term of the mortgage had expired. The mortgagor set up as a defence to such suit that it was not maintainable after the expiration of the mortgage term. *Held* that the defence must be rejected inasmuch as the mortgagor had, by his breach of the mortgage-contract, put himself out of Court. **HARSAHAI v. CHUNNI KUAR AND ANOTHER.**

[I-105]

(59).—*Suit for possession of land.* A deceased Muhammadan left on his death a widow, a daughter and a sister. The widow took possession of the property in lieu of her dower. Subsequently the sister brought a suit against the widow for the recovery of her share and that of the daughter on payment of the dower and got a decree. But she failed to execute the decree and it became time-barred. Subsequently the widow sold her interest in the property to the daughter who brought a suit for possession of the property. The sister set up as a defence that the widow was not competent to alienate the property. *Held* that the decree passed in favour of the sister having become time-barred she was not competent to object to the alienation. **SAHIBZADI AND OTHERS v. AZIZ BIBI.**

[III-165]

(60).—*Suit on bond and account stated—Novation.* The plaintiff sued (i) for registration of a hypothecation bond executed by the defendant, (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts. *Held* that this decision was wrong, and that the plaintiff was entitled to sue upon the account stated. *Sirdar Kuar v. Chandrawati* (I. L. R., 4 All. 330) distinguished. Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration. **KIAMUDDIN AND ANOTHER v. RAJJO AND ANOTHER.**

[VIII-280]

TORT.

(1).—*Defamation—Privileged statement.* This was a suit for damages for defamation of character. The imputation complained of was made by the defendant while being cross-examined as a witness in a suit brought by the present plaintiff. *Held* that, as the statement was made by the defendant as a witness and was not so irrelevant to the matter in issue in the suit as to render that it was made

TORT—(continued.)

not in the character of a witness but with some sinister motive foreign to the purpose of his answer, it was privileged. **TULSHI RAM v. HARBANS.**

[V-301]

(2).—[The plaintiff was cited as a witness by one S in a suit instituted by him against defendant. After plaintiff's evidence had been concluded, in which he stated that there was no enmity between him and defendant; the defendant was examined by the Court, and stated that there was enmity between him and plaintiff, and on the Court inquiring to know what was the cause of enmity, defendant used words conveying the meaning that plaintiff's descent was illegitimate. *Held* by Brodhurst, J., that under the circumstances, the statement complained of was made by defendant while deposing in the witness-box, and therefore absolutely privileged.]

Per MAHMOOD, J., (contra):—That the question whether or not the statement complained of was made by defendant in course of his deposition or after it was finished and when he was no longer in the witness-box has not been tried, and the order remanding the case for trial on the merits was right. Further, that the English Law of slander as forming part of the law of defamation, and, as such, drawing somewhat arbitrary distinctions between words actionable *per se* and words requiring proof of special or actual damage, is not applicable to this country, either by reason of any statutory provision or by any uniform course of decision sufficient to establish such distinctions as part of the Common Law of British India. That whilst the English Law of defamation recognises no distinction between defamation as such and personal insult in civil liability the law of British India recognizes personal insult conveyed by abusive language as actionable *per se* without proof of special or actual damage. That such abusive and insulting language unless excused or protected by any other rule of law, is in itself a substantive cause of action and a civil injury apart from defamation and that malice is an element of liability for abusive and insulting language, and that such notice will be presumed or inferred unless the contrary is shown. That when the defendant is not absolutely privileged and protected by reason of the office or occasion on which he employed such language he renders himself subject to a civil liability for damage irrespective of any plea of justification based upon proving the truth of statements contained in the abusive and insulting language complained of. That the rule of English Law as to the privilege or protection of a witness in regard to defamatory statements made in the witness-box is based upon a public policy which is equally applicable to insulting and abusive

TORT—(continued.)

language used by such witness; and such statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the inquiry in the broadest sense of the phrase. That even where such statements have no reference to the inquiry, the defendant may prove the absence of malice and that they were made in good faith for the public good. The following cases were referred to the judgments:—*Scott v. Stansfield* (L. R., 3 Ex. 22); *Munster v. Lamb* (L. R., 11 Q. B. D., 588); *Mackay v. Ford* (29 L. J., Ex. 404); *Seaman v. Netherclift* (L. R., 2 C. P. D. 53); *Dawkins v. Rokeby* (L. R., 7 H. L. 744); *Henderson v. Broomhead* (28 L. J., Ex. 360); *Srikant Roy v. Satcori Shaha* (3 C. L. R., 181); *Ibn Husain v. Haidar* (I. L. R., 12 Cal., 109); *Parvati v. Mannar* (I. L. R., 8 Mad., 175); *Roberts v. Roberts* (33 L. J., Q. B., 248); *Lynch v. Knight* (9 H. L., Cas. 577); *Abdul Hakim v. Tej Chunder Mookharji* (I. L. R., 3 All., 815); *Sri Raja Sitarama Krishna Rajyadappa Ranga Baz Bahadur Garu v. Sri Raja Sanyasi Razu Pedda Ballyara Simbhula Bahadur Garu* (3 Mad., H. C. Rep., p. 4); *Oodai v. Bhowanee Pershad* (N.-W. P. H. C. Rep., 1866, p. 264); *Subbaiyar v. Kristnaiyar* (I. L. R., 1 Mad., 383); *Pitamber Dass v. Dwarka Pershad* (N.-W. P. H. C. Rep., 1870, p. 435); *Queen Empress v. Dhum Singh* (I. L. R., 6 All., 220). **DAWAN SINGH v. MAHIB SINGH.**

[VIII-157

(3).—[The law of defamation which should be applied in suits in India for defamation is that laid down in the Indian Penal Code, and not the English law of libel and slander. *Held*, therefore, that defamatory statements are not privileged merely because they are used in a petition preferred in a judicial proceeding. It is not essential that, before a person can be held entitled to the privilege of having made a statement in good faith for the protection of his interests, he should establish that every word he has spoken or written is literally true. If, having regard to facts and circumstances within his knowledge, he might, as an ordinarily reasonable and prudent man, have drawn the conclusions which he has expressed in defamatory language for the protection of his own interests, he may fairly be held to have made out his good faith. **ABDUL HAKIM v. TEJ CHANDAR.**

[I-81

(4).—[This was a suit for damages for defamation. The defamatory matter was published (i) by their being inserted in a written statement put in by the defendant in a suit brought against him by the plaintiff, (ii) by their being written in an application made by the defendant to the District Judge. *Held* that as the defamatory matters were not relevant to the suit they cannot be

TORT—(continued.)

held to be privileged. *Held* further that as they were not proved to be true, the defendant could on no account escape liability. **GOBINDHI v. JODHA BALI AND OTHERS.**

[V-204

(5).—[*Damages for defamation—Suit by father on behalf of daughter.*] A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then, under the provisions of the Civil Procedure Code by his guardian or next friend. *Daman Singh v. Mahib Singh* (W. N., 1888, p. 157) and *Parvathi v. Mannar* (I. L. R., 8 Mad., 175) distinguished. *Subbaiyar v. Kristnaiyar* (I. L. R., 1 Mad., 383) and *Luckumsey Rowji v. Hurbun Nurse* (I. L. R., 5 Bom., 580) referred to. **DAYA v. PARAM SINGH.**

[VIII-267

(6).—[*Damages for abduction—Suit by Hindu father.*] A Hindu sued for compensation for the loss of his daughter's services in consequence of her abduction by the defendant and for the costs incurred by him in prosecuting the defendant criminally for such abduction. The defendant was convicted on such prosecution. *Held* that the decision of the Criminal Court did not operate under s. 13 of Act X of 1877 to bar the determination in such suit of the question whether the defendant had or had not abducted the plaintiff's daughter. Also that the plaintiff was entitled to recover the costs of such criminal proceedings. The daughter in this case was a married woman, who had been deserted by her husband, and at the time of her abduction was living with the plaintiff her father. *Held* by Stuart, C. J., that the suit by the father for compensation for the loss of his daughter's services in consequence of her abduction was under the circumstances maintainable. *Held* by Oldfield, J., that a suit by a Hindu father for the loss of his daughter's services in consequence of her abduction is not maintainable. **RAM LAL v. TULA RAM.**

[I-143

(7).—[*Suit for damages for prosecuting defendant in Criminal Court.*] *Held* that a suit will not lie to recover as damages the expenses incurred by the plaintiff in prosecuting the defendant in a Criminal Court. **FAZAL IMAM AND OTHERS v. FAZAL RASUL.**

[X-19

CHANDAN v. SUMERA.

[VII-104

JODHI RAM AND ANOTHER v. ABDUL MIAN.

[XIII-62

TORT—(continued.)

(8).—*Contribution among tort-feasors.*] *Held* that the legal truism that no action for contribution is maintainable by one wrong doer against another is subject to this limitation that it is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. *Held* further that the defect of misjoinder is cured if the Court proceeds to the trial of the suit and does not reject the plaint or return it for amendment. *KISHNA RAM v. RAI RAKMINI SEWAK SINGH AND OTHERS.*

[VII-31]

(9).—*Joint decree.*] Where a joint decree was passed against two joint tort-feasors, and one of them paid up the whole amount of the decree, and afterwards sued the other for contribution; *held*, that, whatever the rights and liabilities of joint tort-feasors *inter se* may be before such a decree is passed, there is no right of contribution afterwards, the matter having passed *in rem judicatum*; and the Court is not entitled to go behind such a decree and consider the merits of the case. *RAM PRASAD v. ARJA NAND.*

[X-161]

(10).—*Joint decree.*] In a suit against one defendant for possession of certain property, which was claimed as his by the original defendant, certain third persons got themselves added to the array of parties as defendants and put in a defence in opposition to and exclusive of that of the first defendant. The plaintiff in that suit obtained decree, the claims of both sets of defendants being found to be unsupported, and the decree gave costs jointly against all the defendants. The decree having been executed for costs against the first defendant, he sued the other defendants for contribution. *Held* that the suit would not lie. *Kristo Chunder Chatterjee v. Wise* (14 W. R., 70); *Sreeputty Roy v. Loharam Roy* (7 W. R., 384); *Abdul Wahid Khan v. Shaluka Bibi* (I. L. R., 21 Calc., 503) and *Subut Singh v. Imrit Tewari* (I. L. R., 5 Calc., 720) referred to. *FAKIRE v. TASADDUK HUSAIN AND OTHERS.*

[XVII-107]

(11).—*Damages for assault—Measure of.*] *MR* sued *KN, G* and others for Rs. 50,000 compensation for an assault. He alleged that the defendants had instigated one *M* to beat him with a shoe and the defendant *No. 4* to threaten him with a knife in the public market of Sambhal, where he was an Honorary Magistrate and a person of position; that the defendants had been present at the time and had abetted it. The first Court found in plaintiff's favor, with Rs. 5,000 damages as against *KN, G* and one other. *K M* and *G* appealed to the High Court on the ground that the damages awarded were excessive. It appeared that the plaintiff

TORT—(continued.)

had prosecuted the defendant for the assault and that *K N* and *G* had suffered rigorous imprisonment for 12 months. *Held* that under the circumstances the damages awarded were excessive. If punishment in person is resorted to that must always be an important element in mitigation in subsequently estimating the amount of damages. The decree of the lower Court should be modified, the damages awarded being reduced to 1500. The parties should bear their own costs. *MISR RAMJI v. JIWAN RAM AND ANOTHER. KIDAR NATH AND ANOTHER v. MISR RAMJI.*

[I-131]

(12).—*Assault.*] There is nothing to prevent a person upon whom an assault had been committed from subsequently suing in a Civil Court to obtain damages in respect of such assault. *JODHI RAM AND ANOTHER v. ABDUL MIAN.*

[XIII-62]

CHANDAN v. SUMERA.

[VII-104]

(13).—*Damages for malicious prosecution.*] *Held*, that an unsuccessful application under s. 195 of the Criminal Procedure Code for sanction to prosecute for offences under the Penal Code, in which the only loss or injury entailed on the party against whom such application was directed, was the expense he incurred in employing counsel to appear in answer to such application, such appearance being due to the fact not that he had been summoned, but that he had applied through counsel for notice of the application, anticipating that it would be made, afforded no cause of action in a suit for recovery of damages on account of malicious prosecution. *EZID BAKHSR v. HARSUKH RAI.*

[VI-297]

(14).—*Reasonable and probable cause.*] *Held* that, where in a suit for compensation for malicious prosecution the plaintiff had neither alleged in the plaint nor proved that in prosecuting him the defendant had acted without reasonable or probable cause, his suit must be dismissed. *UMRAO v. JAISUKH.*

[II-83]

CHANDAN v. SUMERA.

[VII-104]

(15).—*Malice.*] This was a suit for compensation for malicious prosecution. *Held* that the question to be determined was, had the defendant at the time of instituting the criminal proceedings against the plaintiff such grounds for his action as might fairly lead him as an ordinarily cautious and

TORT,—(continued.)

discreet man, to believe that the plaintiff had committed the offence? And that though malice may be inferred from want of probable and reasonable cause, but absence of reasonable and probable cause can not be inferred from malice without which the action must necessarily fail. *DWARKA DAS v. HARI HAR DAT AND THE COLLECTOR OF BENARES.*

[IV-1

(16). —————.] This was a suit for damages for malicious prosecution. *Held* that in order to succeed, the plaintiff must prove either *malice* or that the suit was instituted without any reasonable grounds for doing so. It is not enough for the plaintiff to prove the failure of the prosecution. *GANESH PRASAD SINGH v. MAHIP RAI AND OTHERS AND MAHIP RAI v. GANESH PRASAD SINGH*

[V-175

(17). —————. *Malicious prosecution—Reasonable and probable cause.*] In a suit for malicious prosecution there can be no question of reasonable and probable cause where the charge was one which must have been true or false to the defendant's knowledge, and in which there could be no mistake on his part. The bringing of a charge false to the knowledge of the prosecutor imports in law malice sufficient to support a Civil action. In cases such as false imprisonment, malicious prosecution, libel, and others in which a man's reputation may be affected, a defendant pleads justification at his peril, and if he fails to prove such a plea, that fact may be taken into account by the Court in assessing damages. *HIRA LAL v. BANDHU BHAGAT.*

[IX-189

(18). —————.] Where in an action for malicious prosecution it appeared that the crime in respect of which the prosecution had been instituted had in fact never been committed, *held*, that the Court was justified in finding that there was no reasonable or probable cause, and that, this being so, malice might be inferred. *SUKHDEO SINGH AND ANOTHER v. BHOJAN SINGH.*

[X-243

(19). —————. *Suit for removal of obstruction from public thoroughfare—Special damage.*] *Held* that a suit to remove an unlawful obstruction from a public thoroughfare is not maintainable, where the plaintiff fails to show that he has suffered special damage. *NATHU v. JAGRAM DAS.*

[I-3

TAFAZZUL HUSAIN v. FAZAL IMAM.

[I-103

RAMPHAL RAI AND OTHERS v. RAGHUNANDAN PRASAD.

[VIII-205

TORT,—(continued.)

(20). —————.] The appellant sued the respondent for removal of a certain obstruction from a public thoroughfare, alleging that such obstruction had narrowed the way and such narrowing had resulted in cattle driven along it straying on his land. *Held* that, there being a sufficiency of road along which cattle could be driven, the damage which had resulted to the appellant from such obstruction was not a natural or necessary consequence of the respondent's act, of such special damage as could give the appellant a right to sue. *KANDHI v. KAMTA.*

[I-98

(21). —————.] The plaintiff who is the *zemindar* of the village brought an action claiming to have a *chabutra* or building erected by the defendant in one of the village roads removed. The road in question was a *hatcha* road used by the village over which the public have a right of way and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the *chabutra* and the defendant appealed. *Held* that the rule of English Law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a *zemindar* who or whose predecessor in title had dedicated to the public the road over his *zemindari* land. A *zemindar* in giving the public right of road or way over his land does not give the public or any one else a right to interfere with the soil of the road as by erecting a building upon it. In such a case the *zemindar* has in common with the public the right to use the road as a road and over and above it he has a right to the soil in the road, which he had never given to the public. In an action of this kind the *zemindar* does not sue as a guardian of the public but in respect of an interference with his own rights of property. *Baroda Prasad Mustafee v. Gorachand Mustafee* (12 W. R., Civ. R., 160) discussed. *Dovaston v. Payne* (2 Sm. L. C. 9th Ed., 154); *Rolls v. Vestry of St. George the Martyr, Southwark* (14 Ch. D., 785); *R v. Pratt* (1 E. and B. 860) and *Goodson v. Richardson* (L. R. 9 Ch. 221) referred to. *TOTA v. SARDUL SINGH.*

[VIII-213

(22). —————.] The plaintiff in this suit claimed an injunction to restrain the defendant from allowing dirty water to flow from his premises into the public street opposite his house and the defendant's. The lower Court dismissed the suit on the ground that as the dirty water passed through a public street and the defendant thereby committed a public nuisance there was no remedy in the Civil Courts and the plaintiff should apply to the Magistrate to have the nuisance abated. *Held*

TORT.—(continued.)

that the view taken by the lower Court is wrong; they should decide the suit on merits. **PABU LAL v. PARBATI.**

[IV-74]

(23).—*Suit for the removal of what might become a nuisance—Cause of action.* Held that a suit to have a drain newly constructed by the defendant on his own land, but close to the door of the plaintiff's house, closed because it might possibly in some season or another of the year incommode the plaintiff's sense of smell, was immature and must be dismissed, it having been found as a fact that it was not a nuisance when the suit was brought. **NAIK SINGH v. MADHO SINGH.**

[VI-158]

(24).—*Suit for removal of trees.* The plaintiff claimed the removal of certain trees, planted by the defendant on his own land, on the ground that the trees had been planted so near his land that when they grew up they would injure his crops. Held that until the plaintiff's enjoyment of his own land was directly and immediately interfered with by the growth of the defendant's trees, he had no right to ask for their removal, and he had therefore no cause of action. **RAM LAL v. DALGANJAN.**

[III-58]

(25).—*Suit for damages for wrongful conversion of indigo—Measure of.* In this case the defendant had wrongfully converted to their own use a box of indigo belonging to the plaintiff. The plaintiff sued for the recovery of the box and damages. Held that the measure of damages was the value of the indigo at the time of the wrongful conversion minus its value at the date it was to be returned to the plaintiff plus interest at 6 per cent for the intervening period. **AZMAT ALI AND ANOTHER v. MAULA BAKHSI.**

[V-200]

(26).—*Suit for damages for wrongful conversion of produce.* Held that a hypothecation of certain future indigo produce was a valid contract; that the hypothecation became complete when the crop was grown, and was enforceable against a transferee of such produce with notice of the hypothecation. In a suit against such a transferee with notice, who had sold the produce for damages, for wrongful conversion of the security, held that the measure of damages under ordinary circum-

TORT.—(continued.)

stances and where a fair price had been obtained would be the amount which the defendant had realized by the sale. **PANSIDHAR v. SANT LAL AND ANOTHER.**

[VIII-35]

(27).—*Suit for damages for collusive sale—Measure of.* One AB obtained a decree against U for Rs. 535 by sale of the moveable property hypothecated. One M who had also obtained a money decree against U caused the same property to be attached in execution of his decree. AB objected and the attachment was released by the Court. But owing to the collusion and the misconduct of the *amin* the attachment of such property in execution of M's decree was not removed and the property was eventually sold in execution of that decree, realizing Rs. 50. Thereupon AB brought the present suit against M and the *amin* for damages. It was found by the lower appellate Court that the sale was only a colourable transaction and that the purchasers to whom and the prices at which such property was knocked down were alike fictitious and that the defendants had improperly colluded to abuse the process of law. Held that the measure of damages in the case was the amount of AB's decree, the benefit of which had been lost to him and not the amount realized at the sale. **GURBAKHSI SINGH v. MALKA SAHIBA AND OTHERS.**

[I-107]

(28).—*Suit for damages for wrongful obstruction.* The Maharaja of Dumraon and his predecessors exercised from time immemorial a right to exclusively weigh the goods and produce sold at a bazaar held upon their land, and to claim all the weighment-fees in respect of such transactions as took place there, in lieu of charging rent to the traders for the use of the land. The Maharajah leased to the plaintiff the exclusive right to weigh and receive the weighment-fees in the bazaar. Held that a suit brought by the plaintiff for damages for wrongful obstruction of the right of weighing and making the collection, and to have the defendant restrained from offering such wrongful obstruction, was maintainable. **Ram Deehul v. Chukhoo (N. W. P. H. C. Rep., 1869, P. 208)** and **Chultan Mahton v. Tilukdari Singh (I. L. R., 11 Calc., 175)** distinguished. **BHIKHI OJHA v. HARAKH KANDU AND OTHERS.**

[IX-89]